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TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY
TRIBUNALS

FULL TEXT SEARCHING OF THE FINAL REPORT AND THE 42 VOLUME INTERNATIONAL MILITARY TRIBUNAL SET (GREY BOOKS) AND THE 11 VOLUME NAZI CONSPIRACY AND AGGRESSION SET (RED BOOKS) AND THE 16 VOLUME NUREMBERG MILITARY TRIBUNAL SET (GREEN BOOKS) IS AVAILABLE ON CD-ROM IN THE GOVERNMENT DOCUMENTS DEPARTMENT: "NUREMBERG WAR CRIMES TRIAL ONLINE", JX5437.N8/1995x.

VOLUME III

"THE JUSTICE CASE"

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TRIALS
OF
WAR CRIMINALS
BEFORE THE
NUERNBERG MILITARY TRIBUNALS
UNDER
CONTROL COUNCIL LAW No. 10

NUERNBERG
OCTOBER 1946–APRIL 1949

VOLUME III

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1951

For sale by the Superintendent of Documents, U. S. Government Printing Office
Washington 25, D. C. - Price $3.75 (Buckram)

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other important portions of the record of the 12 cases, and it is believed that these materials give a fair picture of the trials, and as full and illuminating a picture as is possible within the space available. Copies of the entire record of the trials are available in the Library of Congress, the National Archives, and elsewhere.

In some cases, due to time limitations, errors of one sort or another have crept into the translations which were available to the Tribunal. In other cases the same document appears in different trials, or even at different parts of the same trial, with variations in translation. For the most part these inconsistencies have been allowed to remain and only such errors as might cause misunderstanding have been corrected.

Volume III of this series is dedicated to the case United States of America *vs.* Josef Altstoetter, et al. (Case 3). This trial has become known as the Justice Case, because all of the defendants held positions in the Reich system of justice, as officials of the Reich Ministry of Justice or as judges or prosecutors of the Special Courts and the People's Courts.

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* Although the subject material in many of the cases overlaps, it was believed that this arrangement of the cases would be most helpful to the reader and the most feasible for publication purposes.

DECLARATION ON GERMAN ATROCITIES

[Moscow Declaration]

Released November 1, 1943

THE UNITED KINGDOM, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled. The brutalities of Hitlerite domination are no new thing and all the peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are now being redeemed by the advancing armies of the liberating Powers and that in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites, and on French and Italian territory.

Accordingly, the aforesaid three allied Powers, speaking in the interests of the thirty-two [thirty-three] United Nations, hereby solemnly declare and give full warning of their declaration as follows:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres, and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. Lists will be compiled in all possible detail from all these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxemburg, France and Italy.

Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian, or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies.

[Signed]

Roosevelt
Churchill
Stalin

EXECUTIVE ORDER 9547

PROVIDING FOR REPRESENTATION OF THE UNITED STATES IN PREPARING AND PROSECUTING CHARGES OF ATROCITIES AND WAR CRIMES AGAINST THE LEADERS OF THE EUROPEAN AXIS POWERS AND THEIR PRINCIPAL AGENTS AND ACCESSORIES

By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, it is ordered as follows:

1. Associate Justice Robert H. Jackson is hereby designated to act as the Representative of the United States and as its Chief of Counsel in preparing and prosecuting charges of atrocities and war crimes against such of the leaders of the European Axis powers and their principal agents and accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal. He shall serve without additional compensation but shall receive such allowance for expenses as may be authorized by the President.

2. The Representative named herein is authorized to select and recommend to the President or to the head of any executive department, independent establishment, or other federal agency necessary personnel to assist in the performance of his duties hereunder. The head of each executive department, independent establishment, and other federal agency is hereby authorized to assist the Representative named herein in the performance of his duties hereunder and to employ such personnel and make such expenditures, within the limits of appropriations now or hereafter available for the purpose, as the Representative named herein may deem necessary to accomplish the purposes of this order, and may make available, assign, or detail for duty with the Representative named herein such members of the armed forces and other personnel as may be requested for such purposes.

3. The Representative named herein is authorized to cooperate with, and receive the assistance of, any foreign Government to the extent deemed necessary by him to accomplish the purposes of this order.

HARRY S. TRUMAN

THE WHITE HOUSE,
May 2, 1945

(F. R. Doc. 45–7256; Filed, May 3, 1945; 10:57 a. m.)

LONDON AGREEMENT OF 8 AUGUST 1945

AGREEMENT by the Government of the UNITED STATES OF AMERICA, the Provisional Government of the FRENCH REPUBLIC, the Government of the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND and the Government of the UNION OF SOVIET SOCIALIST REPUBLICS for the Prosecution and Punishment of the MAJOR WAR CRIMINALS of the EUROPEAN AXIS

WHEREAS the United Nations have from time to time made declarations of their intention that War Criminals shall be brought to justice;

AND WHEREAS the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German Officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

AND WHEREAS this Declaration was stated to be without prejudice to the case of major criminals whose offenses have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies;

NOW THEREFORE the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics (hereinafter called "the Signatories") acting in the interests of all the United Nations and by their representatives duly authorized thereto have concluded this Agreement.

Article 1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.

Article 3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

Article 4. Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.

Article 5. Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.

Article 6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Article 7. This agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this Agreement.

IN WITNESS WHEREOF the Undersigned have signed the present Agreement.

DONE in quadruplicate in London this 8th day of August 1945 each in English, French and Russian, and each text to have equal authenticity.

For the Government of the United States of America
ROBERT H. JACKSON

For the Provisional Government of the French Republic
ROBERT FALCO

For the Government of the United Kingdom of Great Britain and Northern Ireland
JOWITT, C.

For the Government of the Union of Soviet Socialist Republics
I. NIKITCHENKO
A. TRAININ

CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL

I. CONSTITUTION OF THE INTERNATIONAL MILITARY TRIBUNAL

Article 1. In pursuance of the Agreement signed on the 8th day of August 1945 by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, there shall be established an International Military Tribunal (hereinafter called "the Tribunal") for the just and prompt trial and punishment of the major war criminals of the European Axis.

Article 2. The Tribunal shall consist of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place.

Article 3. Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.

Article 4.

(*a*) The presence of all four members of the Tribunal or the alternate for any absent member shall be necessary to constitute the quorum.

(*b*) The members of the Tribunal shall, before any trial begins, agree among themselves upon the selection from their number of a President, and the President shall hold office during that trial, or as may otherwise be agreed by a vote of not less than three members. The principle of rotation of presidency for successive trials is agreed. If, however, a session of the Tribunal takes place on the territory of one of the four Signatories, the representative of that Signatory on the Tribunal shall preside.

(*c*) Save as aforesaid the Tribunal shall take decisions by a majority vote and in case the votes are evenly divided, the vote of the President shall be decisive: provided always that convictions and sentences shall only be imposed by affirmative votes of at least three members of the Tribunal.

Article 5. In case of need and depending on the number of the matters to be tried, other Tribunals may be set up; and the establishment, functions, and procedure of each Tribunal shall be identical, and shall be governed by this Charter.

II. JURISDICTION AND GENERAL PRINCIPLES

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(*a*) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(*b*) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(*c*) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

Article 10. In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.

Article 11. Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

Article 12. The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

* See protocol p. XVIII for correction of this paragraph.

Article 13. The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter.

III. COMMITTEE FOR THE INVESTIGATION AND PROSECUTION OF MAJOR WAR CRIMINALS

Article 14. Each Signatory shall appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.

The Chief Prosecutors shall act as a committee for the following purposes:

(*a*) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,

(*b*) to settle the final designation of major war criminals to be tried by the Tribunal,

(*c*) to approve the Indictment and the documents to be submitted therewith,

(*d*) to lodge the Indictment and the accompanying documents with the Tribunal,

(*e*) to draw up and recommend to the Tribunal for its approval draft rules of procedure, contemplated by Article 13 of this Charter. The Tribunal shall have power to accept, with or without amendments, or to reject, the rules so recommended.

The Committee shall act in all the above matters by a majority vote and shall appoint a Chairman as may be convenient and in accordance with the principle of rotation: provided that if there is an equal division of vote concerning the designation of a Defendant to be tried by the Tribunal, or the crimes with which he shall be charged, that proposal will be adopted which was made by the party which proposed that the particular Defendant be tried, or the particular charges be preferred against him.

Article 15. The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

(*a*) investigation, collection, and production before or at the Trial of all necessary evidence,

(*b*) the preparation of the Indictment for approval by the Committee in accordance with paragraph (*c*) of Article 14 hereof,

(*c*) the preliminary examination of all necessary witnesses and of the Defendants,

(*d*) to act as prosecutor at the Trial,

(*e*) to appoint representatives to carry out such duties as may be assigned to them,

(*f*) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

It is understood that no witness or Defendant detained by any Signatory shall be taken out of the possession of that Signatory without its assent.

IV. FAIR TRIAL FOR DEFENDANTS

Article 16. In order to ensure fair trial for the Defendants, the following procedure shall be followed:

(*a*) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the Trial.

(*b*) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.

(*c*) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.

(*d*) A defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel.

(*e*) A defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

V. POWERS OF THE TRIBUNAL AND CONDUCT OF THE TRIAL

Article 17. The Tribunal shall have the power

(*a*) to summon witnesses to the Trial and to require their attendance and testimony and to put questions to them,

(*b*) to interrogate any Defendant,

(*c*) to require the production of documents and other evidentiary material,

(*d*) to administer oaths to witnesses,

(*e*) to appoint officers for the carrying out of any task designated by the Tribunal including the power to have evidence taken on commission.

Article 18. The Tribunal shall

(*a*) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(*b*) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(*c*) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article 19. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.

Article 20. The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

Article 21. The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. It shall also take judicial notice of official governmental documents and reports of the United Nations, including the acts and documents of the committees set up in the various allied countries for the investigation of war crimes, and the records and findings of military or other Tribunals of any of the United Nations.

Article 22. The permanent seat of the Tribunal shall be in Berlin. The first meetings of the members of the Tribunal and of the Chief Prosecutors shall be held at Berlin in a place to be designated by the Control Council for Germany. The first trial shall be held at Nuremberg, and any subsequent trials shall be held at such places as the Tribunal may decide.

Article 23. One or more of the Chief Prosecutors may take part in the prosecution at each Trial. The function of any Chief Prosecutor may be discharged by him personally, or by any person or persons authorized by him.

The function of Counsel for a Defendant may be discharged at the Defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.

Article 24. The proceedings at the Trial shall take the following course:

(*a*) The Indictment shall be read in court.

(*b*) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty".

(*c*) The Prosecution shall make an opening statement.

(*d*) The Tribunal shall ask the Prosecution and the Defense what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.

(*e*) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defense. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defense.

(*f*) The Tribunal may put any question to any witness and to any Defendant, at any time.

(*g*) The Prosecution and the Defense shall interrogate and may cross-examine any witnesses and any Defendant who gives testimony.

(*h*) The Defense shall address the court.

(*i*) The Prosecution shall address the court.

(*j*) Each Defendant may make a statement to the Tribunal.

(*k*) The Tribunal shall deliver judgment and pronounce sentence.

Article 25. All official documents shall be produced, and all court proceedings conducted, in English, French and Russian, and in the language of the Defendant. So much of the record and of the proceedings may also be translated into the language of any country in which the Tribunal is sitting, as the Tribunal considers desirable in the interests of justice and public opinion.

VI. JUDGMENT AND SENTENCE

Article 26. The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.

Article 27. The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.

Article 28. In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.

Article 29. In case of guilt, sentences shall be carried out in accordance with the orders of the Control Council for Germany, which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof. If the Control Council for Germany, after any Defendant has been convicted and sentenced, discovers fresh evidence which, in its opinion, would found a fresh charge against him, the Council shall report accordingly to the Committee established under Article 14 hereof, for such action as they may consider proper, having regard to the interests of justice.

VII. EXPENSES

Article 30. The expenses of the Tribunal and of the Trials, shall be charged by the Signatories against the funds allotted for maintenance of the Control Council for Germany.

907802—51——2

Whereas an Agreement and Charter regarding the Prosecution of War Criminals was signed in London on the 8th August 1945, in the English, French, and Russian languages.

And whereas a discrepancy has been found to exist between the originals of Article 6, paragraph (*c*), of the Charter in the Russian language, on the one hand, and the originals in the English and French languages, on the other, to wit, the semi-colon in Article 6, paragraph (*c*), of the Charter between the words "war" and "or", as carried in the English and French texts, is a comma in the Russian text,

And whereas it is desired to rectify this discrepancy:

NOW, THEREFORE, the undersigned, signatories of the said Agreement on behalf of their respective Governments, duly authorized thereto, have agreed that Article 6, paragraph (*c*), of the Charter in the Russian text is correct, and that the meaning and intention of the Agreement and Charter require that the said semi-colon in the English text should be changed to a comma, and that the French text should be amended to read as follows:

(*c*) LES CRIMES CONTRE L'HUMANITE: c'est à dire l'assassinat, l'extermination, la réduction en esclavage, la déportation, et tout autre acte inhumain commis contre toutes populations civiles, avant ou pendant la guerre, ou bien les persécutions pour des motifs politiques, raciaux, ou réligieux, lorsque ces actes ou persécutions, qu'ils aient constitué ou non une violation du droit interne du pays où ils ont été perpétrés, ont été commis à la suite de tout crime rentrant dans la compétence du Tribunal, ou en liaison avec ce crime.

IN WITNESS WHEREOF the Undersigned have signed the present Protocol.

DONE in quadruplicate in Berlin this 6th day of October, 1945, each in English, French, and Russian, and each text to have equal authenticity.

For the Government of the United States of America

ROBERT H. JACKSON

For the Provisional Government of the French Republic

FRANÇOIS DE MENTHON

For the Government of the United Kingdom of Great Britain and Northern Ireland

HARTLEY SHAWCROSS

For the Government of the Union of Soviet Socialist Republics

R. RUDENKO

CONTROL COUNCIL LAW NO. 10

PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

Article II

1. Each of the following acts is recognized as a crime:

(*a*) *Crimes against Peace.* Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(*b*) *War Crimes.* Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(*c*) *Crimes against Humanity.* Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime or (*f*) with reference to paragraph 1 (*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any person found guilty of any of the Crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

(*a*) Death.
(*b*) Imprisonment for life or a term of years, with or without hard labour.
(*c*) Fine, and imprisonment with or without hard labour, in lieu thereof.
(*d*) Forfeiture of property.
(*e*) Restitution of property wrongfully acquired.
(*f*) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (*a*) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(*b*) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

Article III

1. Each occupying authority, within its Zone of occupation,

(*a*) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.

(*b*) shall report to the Legal Directorate the names of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and locations of witnesses.

(*c*) shall take appropriate measures to see that witnesses and evidence will be available when required.

(*d*) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.

2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.

3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.

4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1 (*b*) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.

5. The execution of death sentences may be deferred by not to exceed one month after the sentence has become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence

would be of value in the investigation and trial of crimes within or without his Zone.

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant hereto, as he may deem proper in the interest of justice.

Article IV

1. When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the Zone in which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.

2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its determination to be communicated to the Zone Commander.

(*a*) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence outside Germany, as the case may be, except upon approval of the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.

(*b*) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:

(1) If wanted for trial in the Zone in which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere;

(2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere;

(3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;

(4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;

(5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV 2 (*b*) (3) above, that which has the most serious charges against him, which are moreover supported by evidence, should have priority.

Article V

The delivery, under Article IV of this Law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of defeating or unnecessarily delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by the Court of the zone or country to which he has been delivered, then such

person shall be returned upon demand of the Commander of the Zone where the person was located prior to delivery.

Done at Berlin, 20 December 1945.

JOSEPH T. MCNARNEY
General

B. L. MONTGOMERY
Field Marshal

L. KOELTZ
Général de Corps d'Armée
for P. KOENIG
Général d'Armée

G. ZHUKOV
Marshal of the Soviet Union

EXECUTIVE ORDER 9679

AMENDMENT OF EXECUTIVE ORDER NO. 9547 OF MAY 2, 1945, ENTITLED "PROVIDING FOR REPRESENTATION OF THE UNITED STATES IN PREPARING AND PROSECUTING CHARGES OF ATROCITIES AND WAR CRIMES AGAINST THE LEADERS OF THE EUROPEAN AXIS POWERS AND THEIR PRINCIPAL AGENTS AND ACCESSORIES"

By virtue of the authority vested in me as President and Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, it is ordered as follows:

1. In addition to the authority vested in the Representative of the United States and its Chief of Counsel by Paragraph 1 of Executive Order No. 9547 of May 2, 1945, to prepare and prosecute charges of atrocities and war crimes against such of the leaders of the European Axis powers and their accessories as the United States may agree with any of the United Nations to bring to trial before an international military tribunal, such Representative and Chief of Counsel shall have the authority to proceed before United States military or occupation tribunals, in proper cases, against other Axis adherents, including but not limited to cases against members of groups and organizations declared criminal by the said international military tribunal.

2. The present Representative and Chief of Counsel is authorized to designate a Deputy Chief of Counsel, to whom he may assign responsibility for organizing and planning the prosecution of charges of atrocities and war crimes, other than those now being prosecuted as Case No. 1 in the international military tribunal, and, as he may be directed by the Chief of Counsel, for conducting the prosecution of such charges of atrocities and war crimes.

3. Upon vacation of office by the present Representative and Chief of Counsel, the functions, duties, and powers of the Representative of the United States and its Chief of Counsel, as specified in the said Executive Order No. 9547 of May 2, 1945, as amended by this order, shall be vested in a Chief of Counsel for War Crimes to be appointed by the United States Military Governor for Germany or by his successor.

4. The said Executive Order No. 9547 of May 2, 1945, is amended accordingly.

HARRY S. TRUMAN

THE WHITE HOUSE,
January 16, 1946.

(F. R. Doc. 46-893; Filed, Jan. 17, 1946; 11:08 a. m.)

HEADQUARTERS
US FORCES, EUROPEAN THEATER

GENERAL ORDERS
No. 301

24 OCTOBER 1946

Office of Chief of Counsel for War Crimes I
Chief Prosecutor II
Announcement of Assignments III

I....OFFICE OF CHIEF OF COUNSEL FOR WAR CRIMES. Effective this date, the Office of Chief of Counsel for War Crimes is transferred to the Office of Military Government for Germany (US). The Chief of Counsel for War Crimes will report directly to the Deputy Military Governor and will work in close liaison with the Legal Adviser of the Office of Military Government for Germany and with the Theater Judge Advocate.

II....CHIEF PROSECUTOR. Effective this date, the Chief of Counsel for War Crimes will also serve as Chief Prosecutor under the Charter of the International Military Tribunal, established by the Agreement of 8 August 1945.

III....ANNOUNCEMENT OF ASSIGNMENTS. Effective this date, Brigadier General Telford Taylor, USA, is announced as Chief of Counsel for War Crimes, in which capacity he will also serve as Chief Prosecutor for the United States under the Charter of the International Military Tribunal, established by the Agreement of 8 August 1945.

BY COMMAND OF GENERAL MCNARNEY:

C. R. HUEBNER
Major General, GSC
Chief of Staff

OFFICIAL:

GEORGE F. HERBERT
Colonel, AGD
Adjutant General

DISTRIBUTION: D

MILITARY GOVERNMENT—GERMANY
UNITED STATES ZONE
ORDINANCE NO. 7

ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS

Article I

The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with

offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses.

Article II

(*a*) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.

(*b*) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (*c*) of this Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.

(*c*) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.

(*d*) The Military Governor shall designate one of the members of the tribunal to serve as the presiding judge.

(*e*) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel.

(*f*) In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial. Members may be replaced for reasons of health or for other good reasons, except that no replacement of a member may take place, during a trial, other than by the alternate. If no alternate has been designated, the trial shall be continued to conclusion by the remaining members.

(*g*) The presence of three members of the tribunal or of two members when authorized pursuant to subsection (*f*) *supra* shall be necessary to constitute a quorum. In the case of tribunals designated under (*c*) above the agreement shall determine the requirements for a quorum.

(*h*) Decisions and judgments, including convictions and sentences, shall be by majority vote of the members. If the votes of the members are equally divided, the presiding member shall declare a mistrial.

Article III

(*a*) Charges against persons to be tried in the tribunals established hereunder shall originate in the Office of the Chief of Counsel for War Crimes, appointed by the Military Governor pursuant to paragraph 3 of the Executive Order Numbered 9679 of the President of the United States dated 16 January 1946. The Chief of Counsel for War Crimes shall determine the persons to be tried by the tribunals and he or his designated representative shall file the

indictments with the Secretary General of the tribunals (see Article XIV, *infra*) and shall conduct the prosecution.

(*b*) The Chief of Counsel for War Crimes, when in his judgment it is advisable, may invite one or more United Nations to designate representatives to participate in the prosecution of any case.

Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

(*a*) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.

(*b*) The trial shall be conducted in, or translated into, a language which the defendant understands.

(*c*) A defendant shall have the right to be represented by counsel of his own selection, provided such counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country, or any other person who may be specially authorized by the tribunal. The tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.

(*d*) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI (*c*). The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.

(*e*) A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.

(*f*) A defendant may apply in writing to the tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located and shall also state the facts to be proved by the witness or the document and the relevancy of such facts to the defense. If the tribunal grants the application, the defendant shall be given such aid in obtaining production of evidence as the tribunal may order.

Article V

The tribunals shall have the power

(*a*) to summon witnesses to the trial, to require their attendance and testimony and to put questions to them;

(*b*) to interrogate any defendant who takes the stand to testify in his own behalf, or who is called to testify regarding any other defendant;

(*c*) to require the production of documents and other evidentiary material;

(*d*) to administer oaths;

(*e*) to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission;

(*f*) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunal or by the committee of presiding judges as provided in Article XIII.

Article VI

The tribunals shall

(*a*) confine the trial strictly to an expeditious hearing of the issues raised by the charges;

(*b*) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever;

(*c*) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

Article VII

The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

Article VIII

The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof.

Article IX

The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

Article X

The determinations of the International Military Tribunal in the judgment in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

Article XI

The proceedings at the trial shall take the following course:

(*a*) The tribunal shall inquire of each defendant whether he has received

and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty."

(*b*) The prosecution may make an opening statement.

(*c*) The prosecution shall produce its evidence subject to the cross examination of its witnesses.

(*d*) The defense may make an opening statement.

(*e*) The defense shall produce its evidence subject to the cross examination of its witnesses.

(*f*) Such rebutting evidence as may be held by the tribunal to be material may be produced by either the prosecution or the defense.

(*g*) The defense shall address the court.

(*h*) The prosecution shall address the court.

(*i*) Each defendant may make a statement to the tribunal.

(*j*) The tribunal shall deliver judgment and pronounce sentence.

Article XII

A Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable. The main office of the Secretariat shall be located in Nurnberg. The Secretariat shall consist of a Secretary General and such assistant secretaries, military officers, clerks, interpreters and other personnel as may be necessary.

Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

Article XIV

The Secretariat shall:

(*a*) Be responsible for the administrative and supply needs of the Secretariat and of the several tribunals.

(*b*) Receive all documents addressed to tribunals.

(*c*) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.

(*d*) Secure such information for the tribunals as may be needed for the approval or appointment of defense counsel.

(*e*) Serve as liaison between the prosecution and defense counsel.

(*f*) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the tribunals.

(*g*) Be responsible for the preparation of the records of the proceedings before the tribunals.

(*h*) Provide the necessary clerical, reporting and interpretative services to the tribunals and its members, and perform such other duties as may be required for the efficient conduct of the proceedings before the tribunals, or as may be requested by any of the tribunals.

Article XV

The judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Article XVII, *infra*.

Article XVI

The tribunal shall have the right to impose upon the defendant, upon conviction, such punishment as shall be determined by the tribunal to be just, which may consist of one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10.

Article XVII

(*a*) Except as provided in (*b*) *infra*, the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.

(*b*) In cases tried before tribunals authorized by Article II (*c*), the sentence shall be reviewed jointly by the zone commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders.

Article XVIII

No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Article III, Section 5 of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes.

Article XIX

Upon the pronouncement of a death sentence by a tribunal established thereunder and pending confirmation thereof, the condemned will be remanded to the prison or place where he was confined and there be segregated from the other inmates, or be transferred to a more appropriate place of confinement.

Article XX

Upon the confirmation of a sentence of death the Military Governor will issue the necessary orders for carrying out the execution.

Article XXI

Where sentence of confinement for a term of years has been imposed the condemned shall be confined in the manner directed by the tribunal imposing sentence. The place of confinement may be changed from time to time by the Military Governor.

Article XXII

Any property declared to be forfeited or the restitution of which is ordered by a tribunal shall be delivered to the Military Governor, for disposal in accordance with Control Council Law No. 10, Article II (3).

Article XXIII

Any of the duties and functions of the Military Governor provided for herein may be delegated to the Deputy Military Governor. Any of the duties and functions of the Zone Commander provided for herein may be exercised

by and in the name of the Military Governor and may be delegated to the Deputy Military Governor.

This Ordinance becomes effective 18 October 1946.

BY ORDER OF MILITARY GOVERNMENT:

MILITARY GOVERNMENT—GERMANY
ORDINANCE NO. 11

AMENDING MILITARY GOVERNMENT ORDINANCE NO. 7 OF 18 OCTOBER 1946, ENTITLED "ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS"

Article I

Article V of Ordinance No. 7 is amended by adding thereto a new subdivision to be designated "(*g*)", reading as follows:

"(*g*) The presiding judges, and, when established, the supervisory committee of presiding judges provided in Article XIII shall assign the cases brought by the Chief of Counsel for War Crimes to the various Military Tribunals for trial."

Article II

Ordinance No. 7 is amended by adding thereto a new article following Article V to be designated Article V–B, reading as follows:

"(*a*) A joint session of the Military Tribunals may be called by any of the presiding judges thereof or upon motion, addressed to each of the Tribunals, of the Chief of Counsel for War Crimes or of counsel for any defendant whose interests are affected, to hear argument upon and to review any interlocutory ruling by any of the Military Tribunals on a fundamental or important legal question either substantive or procedural, which ruling is in conflict with or is inconsistent with a prior ruling of another of the Military Tribunals.

"(*b*) A joint session of the Military Tribunals may be called in the same manner as provided in subsection (*a*) of this Article to hear argument upon and to review conflicting or inconsistent final rulings contained in the decisions or judgments of any of the Military Tribunals on a fundamental or important legal question, either substantive or procedural. Any motion with respect to such final ruling shall be filed within ten (10) days following the issuance of decision or judgment.

"(*c*) Decisions by joint sessions of the Military Tribunals, unless thereafter altered in another joint session, shall be binding upon all the Military Tribunals. In the case of the review of final rulings by joint sessions, the judgments reviewed may be confirmed or remanded for action consistent with the joint decision.

"(*d*) The presence of a majority of the members of each Military Tribunal then constituted is required to constitute a quorum.

"(*e*) The members of the Military Tribunals shall, before any joint session begins, agree among themselves upon the selection from their number of a member to preside over the joint session.

"(*f*) Decisions shall be by majority vote of the members. If the votes of the members are equally divided, the vote of the member presiding over the session shall be decisive."

Article III

Subdivisions (*g*) and (*h*) of Article XI of Ordinance No. 7 are deleted; subdivision (*i*) is relettered "(*h*)"; subdivision (*j*) is relettered "(*i*)"; and a new subdivision, to be designated "(*g*)", is added, reading as follows:

"(*g*) The prosecution and defense shall address the court in such order as the Tribunal may determine."

This Ordinance becomes effective 17 February 1947.

BY ORDER OF THE MILITARY GOVERNMENT:

OFFICIALS OF THE OFFICE OF THE SECRETARY GENERAL

Secretaries General

Mr. Charles E. Sands	From 25 October 1946 to 17 November 1946.
Mr. George M. Read	From 18 November 1946 to 19 January 1947.
Mr. Charles E. Sands	From 20 January 1947 to 18 April 1947.
Colonel John E. Ray	From 19 April 1947 to 9 May 1948.
Dr. Howard H. Russell	From 10 May 1948 to 2 October 1949.

Deputy and Executive Secretaries General

Mr. Charles E. Sands	Deputy from 18 November 1946 to 19 January 1947.
Judge Richard D. Dixon	Acting Deputy from 25 November 1946 to 5 March 1947.
Mr. Henry A. Hendry	Deputy from 6 March 1947 to 9 May 1947.
Mr. Homer B. Millard	Executive Secretary General from 3 March 1947 to 5 October 1947.
Lieutenant Colonel Herbert N. Holsten	Executive Secretary General from 6 October 1947 to 30 April 1949.

Assistant Secretaries General

[Since many trials were being held simultaneously, an Assistant Secretary General was designated by the Secretary General for each case. Assistant Secretaries General are listed with the members of each tribunal.]

Marshals of Military Tribunals

Colonel Charles W. Mays	From 4 November 1946 to 5 September 1947.
Colonel Samuel L. Metcalfe	From 7 September 1947 to 29 August 1948.
Captain Kenyon S. Jenckes	From 30 August 1948 to 30 April 1949.

Court Archives

Mrs. Barbara S. Mandellaub	Chief from 21 February 1947 to 15 November 1949.

Defense Information Center

Mr. Lambertus Wartena	Defense Administrator from 3 March 1947 to 16 September 1947.
Lieutenant Colonel Herbert N. Holsten	Defense Administrator from 17 September 1947 to 19 October 1947.
Major Robert G. Schaefer	Defense Administrator from 20 October 1947 to 30 April 1949.

"The Justice Case"

Military Tribunal III

Case 3

THE UNITED STATES OF AMERICA

—against—

JOSEF ALTSTOETTER, WILHELM VON AMMON, PAUL BARNICKEL, HERMANN CUHORST, KARL ENGERT, GUENTHER JOEL, HERBERT KLEMM, ERNST LAUTZ, WOLFGANG METTGENBERG, GUENTHER NEBELUNG, RUDOLF OESCHEY, HANS PETERSEN, OSWALD ROTHAUG, CURT ROTHENBERGER, FRANZ SCHLEGELBERGER, and CARL WESTPHAL, *Defendants*

907802—51——3

INTRODUCTION

The "Justice Case" was officially designated United States of America *vs.* Josef Altstoetter, et al. (Case 3). Of the sixteen defendants indicted, nine were officials in the Reich Ministry of Justice. The two persons who held the position of Reich Minister of Justice during the Hitler regime, Franz Guertner and Georg Thierack, were both dead before the indictment was filed. Between Guertner's death in January 1941 and Thierack's appointment in August 1942, the defendant Schlegelberger served as Acting Reich Minister of Justice. The defendants Schlegelberger, Rothenberger, and Klemm each had held the position of Under Secretary ("Staatssekretaer", also translated as State Secretary) in the Reich Ministry of Justice. Two other officials of this Ministry were indicted but not tried: the defendant Westphal committed suicide in Nuernberg jail after indictment and before the opening of the trial; a mistrial was declared as to the defendant Engert, whose physical condition prevented his presence in court for most of the trial. The defendants who were not officials of the Reich Ministry of Justice included the chief public prosecutor of the People's Court and several prosecutors and judges of both the Special Courts and the People's Courts. Both the Special and the People's Courts were established as important parts of the administration of justice during the Nazi regime.

All sixteen defendants named in the indictment were charged with criminal responsibility under the first three counts of the indictment. Count one charged participation in a conspiracy to commit war crimes and crimes against humanity; count two alleged the commission of war crimes against civilians of territories occupied by Germany and against members of the armed forces of nations at war with Germany after September 1939; count three charged the commission of crimes against humanity, including offenses against both German civilians and the nationals of occupied countries, after the outbreak of World War II. The specific offenses charged included murder, persecution on political, racial, and religious grounds, deportation and enslavement, plunder of private property, torture and other atrocities. Count four charged seven of the defendants with membership in the SS, the SD, or the Leadership Corps of the Nazi Party, all organizations declared to be criminal by the International Military Tribunal.

During the course of the trial the Tribunal ruled with respect to count one "that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense." However, the Tribunal ruled further that count one "also alleges unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We therefore cannot properly strike the whole of count one from the indictment, but, insofar as count one charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge." Judge Blair, in a separate opinion filed at the time of judgment, dissented from this ruling, declaring that the Tribunal should have declared that the military tribunals created under Ordinance No. 7 had jurisdiction over "conspiracy to commit" any and all crimes defined in Article II of Control Council Law No. 10.

Of the 14 defendants who stood trial to the end, ten were convicted on one or more counts, and four were acquitted on all counts.

The Justice Case was tried at the Palace of Justice in Nuernberg before Military Tribunal III. Early in June 1947, the presiding judge became ill, and for this reason the sessions of the Tribunal had to be temporarily suspended. Thereupon the Tribunal designated the other two members and the alternate member as commissioners of the Tribunal to hear the testimony of a number of available witnesses whose affidavits had been introduced in evidence by the prosecution and who had been requested for cross-examination by the defense. Accordingly, the commissioners held hearings to take the further testimony of 13 prosecution affiants on 3, 4, and 5 June 1947. The presiding judge still remained incapacitated due to severe illness. Consequently, on 19 June 1947, shortly before the beginning of the defense case, the Tribunal was reconstituted pursuant to Article II of Military Government Ordinance No. 7, and the alternate judge, who had been present throughout the sessions of the trial, replaced the incapacitated member. Hearings before the Tribunal or the commissioners of the Tribunal were held on 129 separate days. The trial, from indictment to judgment, lasted 11 months. The course of the trial and subsequent related proceedings is shown in the following table:

Indictment filed	4 January 1947
Arraignment	17 February 1947
Prosecution opening statement	5 March 1947
Defense opening statements	23 June 1947
Prosecution closing statement	13–14 October 1947
Defense closing statements	14–18 October 1947
Prosecution rebuttal closing	18 October 1947
Final statements of defendants	18 October 1947
Judgment	3–4 December 1947
Sentences	4 December 1947
Affirmation of sentences by the Military Governor of the United States Zone of Occupation	18 January 1949
Order of the Supreme Court of the United States denying Writs of Habeas Corpus.	2 May 1949

The English transcript of the Court proceedings, including the judgment, the separate opinion of Judge Blair, and the sentences, runs to 10,964 mimeographed pages. The prosecution introduced into evidence 641 written exhibits (some of which contained several documents), and the defense 1,452 written exhibits. The exhibits offered by the prosecution and the defense contained documents, photographs, affidavits, interrogatories, letters, charts, and other written evidence. Approximately 600 of these written exhibits were affidavits, more than 500 of which were introduced by the defense. The Tribunal and the members thereof sitting as commissioners heard the testimony of approximately 140 witnesses, including that of twelve of the defendants who elected to testify. Each of the defendants who testified was subject to examination on behalf of the other defendants. Many of the witnesses heard by the Tribunal itself, and all of the witnesses whose testimony was taken in the commission, were prosecution affiants who were called for cross-examination by the defense.

The case-in-chief of the prosecution began on 5 March 1947 and ended on 5 June 1947, subject to the understanding that several prosecution affiants requested for cross-examination by the defense and not immediately available for cross-examination, could be cross-examined by the defense during the defense case. The Tribunal was in recess between 28 May 1947 and 23 June 1947, during which period the commissioners of the Tribunals held hearings on three successive days. The defense case began on 23 June 1947 and ended on 26 September 1947. The Tribunal was in recess between 26 September 1947 and 13 October 1947, to give both the prosecution and the defense additional time to prepare the closing statements.

The members of the Tribunal and prosecution and defense counsel are listed on the ensuing pages. Prosecution counsel were assisted in preparing the case by Walter Rapp (Chief of the Evidence Division), Fred Niebergall (Chief of the Document Branch), Peter Beauvais, interrogator, and Arnold Buchtal and Henry Einstein, research and documentary analysts.

Selection and arrangement of the Justice Case material published herein was accomplished principally by Robert D. King, working under the general supervision of Drexel A. Sprecher, Deputy Chief Counsel and Director of Publications, Office U.S. Chief of Counsel for War Crimes. Arnold Buchtal, Paul H. Gantt, Gertrude Ferencz, Wolfgang Hildesheimer, Julia Kerr, and Walter Schonfeld assisted in selecting, compiling, editing, and indexing the numerous papers.

John H. E. Fried, Special Legal Consultant to the Tribunals, reviewed and approved the selection and arrangement of the material as the designated representative of the Nuernberg Tribunals.

Final compilation and editing of the manuscript for printing was administered by the War Crimes Division, Office of the Judge Advocate General, under the supervision of Richard A. Olbeter, Chief, Special Projects Branch, with Evelyn A. Goldblatt and Robert F. Phelps as editors and Harry Jacobs and John W. Mosenthal as research analysts.

ORDERS CONSTITUTING THE TRIBUNAL

OFFICE OF MILITARY GOVERNMENT FOR GERMANY (U.S.)
APO 472

GENERAL ORDERS
No. 11

14 February 1947

Pursuant to Military Government Ordinance No. 7

1. Effective as of 13 February 1947, pursuant to Military Government Ordinance No. 7, 24 October 1946, entitled "Organization and Powers of Certain Military Tribunals," there is hereby constituted, Military Tribunal III.

2. The following are designated as members of Military Tribunal III:

CARRINGTON T. MARSHALL	Presiding Judge
JAMES T. BRAND	Judge
MALLORY B. BLAIR	Judge
JUSTIN WILLIAM HARDING*	Alternate Judge

3. The Tribunal shall convene at Nurnberg, Germany, to hear such cases as may be filed by the Chief of Counsel for War Crimes or by his duly designated representative.

BY COMMAND OF LIEUTENANT GENERAL CLAY:

C. K. GAILEY
Brigadier General, GSC
Chief of Staff

OFFICIAL:

A. D. VAN ORSDEL
Lieutenant Colonel, AGD
Acting Adjutant General

SEAL:
Office of Military Government for Germany (US)
Official

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* Judge Harding's middle name was correctly used as "Woodward" in General Orders No. 52, OMGUS, 21 June 1947. See section VII, opinion and judgment.

HEADQUARTERS, EUROPEAN COMMAND

GENERAL ORDERS
No. 69

27 June 1947

Pursuant to Military Government Ordinance No. 7

1. Confirming verbal order Commander-in-Chief, European Command, 19 June 1947, and pursuant to Military Government Ordinance No. 7, 24 October 1946, entitled "Organization and Powers of Certain Military Tribunals", JAMES T. BRAND is appointed Presiding Judge of Military Tribunal III vice CARRINGTON T. MARSHALL, relieved because of illness.

2. Confirming verbal order Commander-in-Chief, European Command, 19 June 1947, JUSTIN WILLIAM HARDING,* Alternate Judge, is appointed Judge for Military Tribunal III.

BY COMMAND OF GENERAL CLAY:

C. R. HUEBNER
Lieutenant General, GSC
Chief of Staff

OFFICIAL:

GEORGE E. NORTON, JR.
Lieutenant Colonel, AGD
Asst. Adjutant General

Seal: Official Headquarters
European Command

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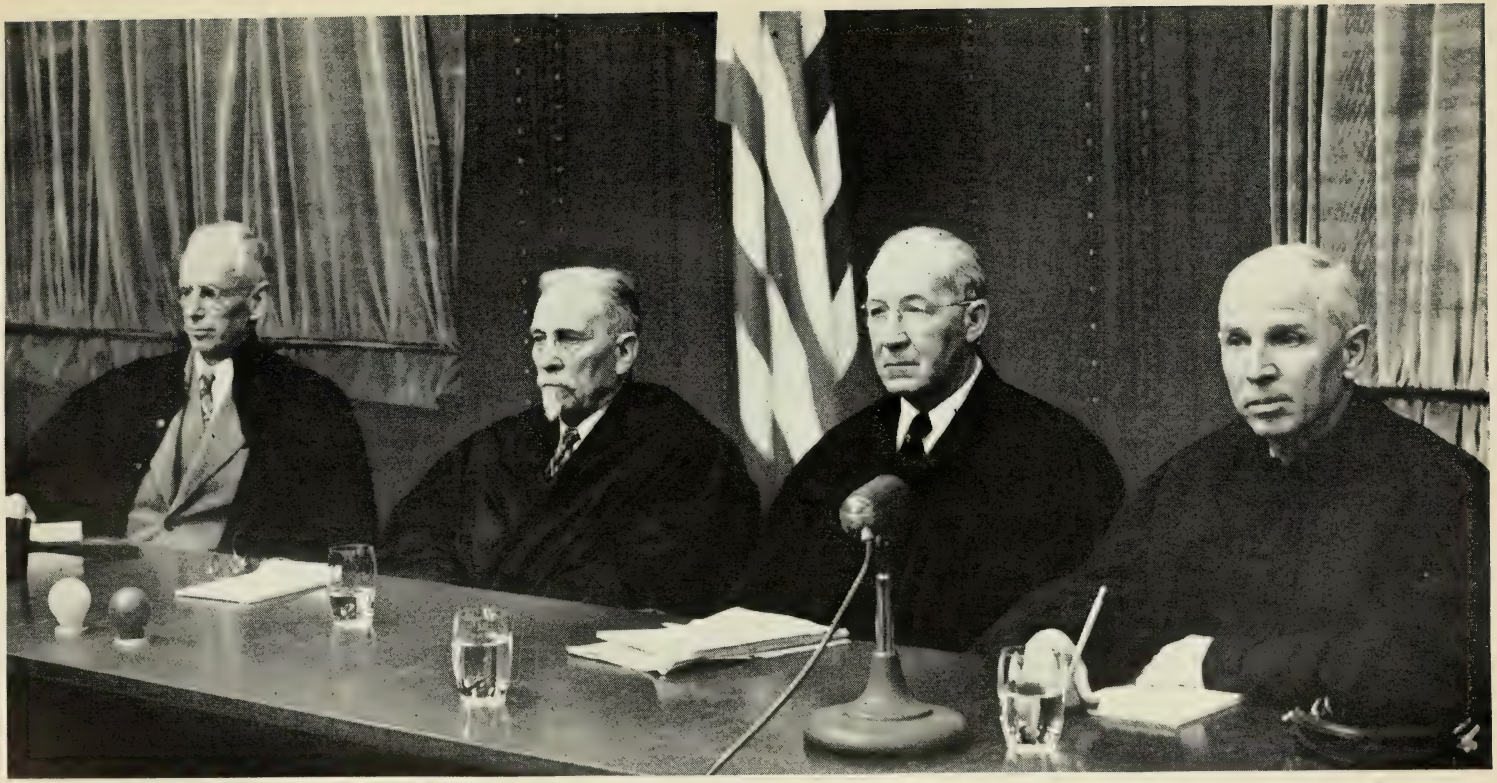
* Id.



TRIBUNAL III—CASE THREE

James T. Brand; Carrington T. Marshall, presiding; Mallory P. Blair; Justin W. Harding, alternate. [*Presiding Judge Marshall was obliged to retire because of illness at which time Judge Brand became presiding judge and Alternate Judge Harding became a member judge.*]

The defendants in the dock. Left to right: front row, Franz Schlegelberger, Herbert Klemm, Curt Rothenberger, Ernst Lantz, Wolfgang Mettgenberg, Wilhelm Von Ammon, Guenther Joel, Oswald Rothaug, Paul Barnickel, Hans Petersen, Guenther Nebelung. Back row, Hermann Cuhorst, Rudolf Oeschey, and Joseph Altstoetter. In front of defendants' dock are defense counsel. Interpreters are behind glass partition at upper right.

Charles M. LaFollette, Deputy Chief Counsel at the reading of the indictment.

Defendant Hermann Cuhorst, on the witness stand, conferring with defense counsel.

MEMBERS OF THE TRIBUNAL*

JUDGE CARRINGTON T. MARSHALL, Presiding Judge (to 19 June 1947).
Formerly Chief Justice of the Supreme Court of the State of Ohio.

JUDGE JAMES T. BRAND, Member (to 19 June 1947), and Presiding Judge (from 19 June 1947).
Justice of the Supreme Court of the State of Oregon.

JUDGE MALLORY B. BLAIR, Member.
Associate Justice of the Court of Civil Appeals for the Third District of the State of Texas.

JUDGE JUSTIN W. HARDING, Alternate Member (to 19 June 1947), and Member (from 19 June 1947).
Formerly Assistant Attorney General of the State of Ohio and District Judge of the First Division of the Territory of Alaska.

ASSISTANT SECRETARIES GENERAL

ARTHUR P. NESBIT..... From 6 March 1947 to 6 May 1947.

C. G. WILLSIE..... From 9 May 1947 to 4 December 1947.

* The order constituting the Tribunal and designating the judges, General Orders No. 11, 14 February 1947, is reproduced on page 7. Because of illness, Judge Marshall was obliged to retire from the case after the trial was under way. Thereupon, Judge Brand succeeded Judge Marshall as Presiding Judge and, pursuant to Article II, paragraphs (*b*) and (*f*) of Military Government Ordinance No. 7, Judge Harding became a full member of the Tribunal. The text of General Order No. 52, OMGUS, 21 June 1947, is quoted in the opinion and judgment, (sec. VII). The final order of the Military Governor providing for these changes in the constitution of the Tribunal is reproduced on page 8.

PROSECUTION COUNSEL

Chief of Counsel:
BRIGADIER GENERAL TELFORD TAYLOR

Deputy Chief Counsel:
CHARLES M. LAFOLLETTE

Associate Counsel:
ROBERT D. KING
ALFRED M. WOOLEYHAN

Assistant Counsel:
SADIE B. ARBUTHNOT

DEFENDANTS AND DEFENSE COUNSEL

Defendant	*Defense Counsel*	*Assistant Defense Counsel*
ALTSTOETTER, JOSEF	DR. HERMANN ORTH	DR. LUDWIG ALTSTOETTER
VON AMMON, WILHELM	DR. EGON KUBUSCHOK	DR. HUBERTUS JANICKI
BARNICKEL, PAUL	DR. EDMUND TIPP	RUDOLF SCHMIDT
CUHORST, HERMANN	DR. RICHARD BRIEGER	KARL HASSFUERTHER
ENGERT, KARL	DR. HANNS MARX (to 31 July 1947) DR. HEINRICH LINK (from 31 July 1947)	
JOEL, GUNTHER	DR. CARL HAENSEL	HERBERT THIELE-FREDERSDORF
KLEMM, HERBERT	DR. ALFRED SCHILF	DR. ERHARD HEINKE
LAUTZ, ERNST	DR. HEINRICH GRUBE	
METTGENBERG, WOLFGANG	DR. ALFRED SCHILF	DR. ERHARD HEINKE
NEBELUNG, GUENTHER	DR. KARL DOETZER	GERDA DOETZER
OESCHEY, RUDOLF	DR. WERNER SCHUBERT	DR. KARL PRIBILLA
PETERSEN, HANS	DR. RUDOLF ASCHENAUER	DR. OTFRIED SCHWARZ
ROTHAUG, OSWALD	DR. RUDOLF KOESSL	ADOLF HUETTL
ROTHENBERGER, CURT	DR. ERICH WANDSCHNEIDER	DR. HELMUT BOTHE
SCHLEGELBERGER, FRANZ	DR. EGON KUBUSCHOK	DR. HUBERTUS JANICKI

I. INDICTMENT

The United States of America, by the undersigned Telford Taylor, Chief of Counsel for War Crimes, duly appointed to represent said Government in the prosecution of war criminals, charges that the defendants herein participated in a common design or conspiracy to commit and did commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, duly enacted by the Allied Control Council on 20 December 1945. These crimes included murders, brutalities, cruelties, tortures, atrocities, plunder of private property, and other inhumane acts, as set forth in counts one, two, and three of this indictment. Certain defendants are further charged with membership in criminal organizations, as set forth in count four of this indictment.

The persons accused as guilty of these crimes and accordingly named as defendants in this case are:

JOSEF ALTSTOETTER—Chief (Ministerialdirektor) of the Civil Law and Procedure Division (Abteilung VI) of the Reich Ministry of Justice; and Oberfuehrer in the SS.

WILHELM VON AMMON—Ministerial Counsellor (Ministerialrat) of the Criminal Legislation and Administration Division (Abteilung IV) of the Reich Ministry of Justice and coordinator of proceedings against foreigners for offenses against Reich occupational forces abroad.

PAUL BARNICKEL—Senior Public Prosecutor (Reichsanwalt) of the People's Court (Volksgerichtshof) ; Sturmfuehrer in the SA.

HERMANN CUHORST—Chief Justice (Senatspraesident) of the Special Court (Sondergericht) in Stuttgart; Chief Justice of the First Criminal Senate of the District Court (Landgericht) in Stuttgart; member of the Leadership Corps of the Nazi Party at Gau executive level; sponsoring member (Foerderndes Mitglied) of the SS.

KARL ENGERT—Chief (Ministerialdirektor) of the Penal Administration Division (Abteilung V) and of the secret Prison Inmate Transfer Division (Abteilung XV) of the Reich Ministry of Justice; Oberfuehrer in the SS; Vice President of the People's Court (Volksgerichtshof) ; Ortsgruppenleiter in the NSDAP Leadership Corps.

GUENTHER JOEL—Legal Adviser (Referent) to the Reich Minister of Justice concerning criminal prosecutions; Chief Public

Prosecutor (Generalstaatsanwalt) of Westphalia at Hamm; Obersturmbannfuehrer in the SS; Untersturmbannfeuhrer [sic] in the SD.

HERBERT KLEMM—State Secretary (Staatssekretaer)* of the Reich Ministry of Justice; Director (Ministerialdirektor) of the Legal Education and Training Division (Abteilung II) in the Ministry of Justice; Deputy Director of the National Socialist Lawyers League (NS Rechtswahrerbund); Obergruppenfuehrer in the SA.

ERNST LAUTZ—Chief Public Prosecutor (Oberreichsanwalt) of the People's Court.

WOLFGANG METTGENBERG—Representative of the Chief (Ministerialdirigent) of the Criminal Legislation and Administration Division (Abteilung IV) of the Reich Ministry of Justice, particularly supervising criminal offenses against German occupational forces in occupied territories.

GUENTHER NEBELUNG—Chief Justice of the Fourth Senate of the People's Court; Sturmfuehrer in the SA; Ortsgruppenleiter in the NSDAP Leadership Corps.

RUDOLF OESCHEY—Judge (Landgerichtsrat) of the Special Court in Nuernberg and successor to the defendant Rothaug as Chief Justice (Landgerichtsdirektor) of the same court; member of the Leadership Corps of the Nazi Party at Gau executive level (Gauhauptstellenleiter); an executive (Kommissarischer Leiter) of the National Socialist Lawyers League.

HANS PETERSEN—Lay Judge of the First Senate of the People's Court; Lay Judge of the Special Senate (Besonderer Senat) of the People's Court; Obergruppenfuehrer in the SA.

OSWALD ROTHAUG—Senior Public Prosecutor (Reichsanwalt) of the People's Court; formerly Chief Justice of the Special Court in Nuernberg; member of the Leadership Corps of the Nazi Party at Gau executive level.

CURT ROTHENBERGER—State Secretary (Staatssekretaer) of the Reich Ministry of Justice; deputy president of the Academy of German Law (Akademie fuer deutsches Recht); Gaufuehrer of the National Socialist Lawyers League.

FRANZ SCHLEGELBERGER—State Secretary; Acting Reich Minister of Justice.

CARL WESTPHAL—Ministerial Counsellor (Ministerialrat) of the Criminal Legislation and Administration Division (Abteilung

* A "Staatssekretaer" is approximately the equivalent of an under secretary in one of the executive departments of the United States Government. During the trial "Staatssekretaer" was translated synonymously as State Secretary or Under Secretary.

IV) of the Reich Ministry of Justice, and officially responsible for questions of criminal procedure and penal execution within the Reich; Ministry coordinator for nullity pleas against adjudicated sentences.

COUNT ONE—THE COMMON DESIGN AND CONSPIRACY

1. Between January 1933 and April 1945 all of the defendants herein, acting pursuant to a common design, unlawfully, willfully, and knowingly did conspire and agree together and with each other and with divers other persons, to commit war crimes and crimes against humanity, as defined in Control Council Law No. 10, Article II.

2. Throughout the period covered by this indictment all of the defendants herein, acting in concert with each other and with others, unlawfully, willfully, and knowingly were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving, the commission of war crimes and crimes against humanity.

3. All of the defendants herein, acting in concert with each other and with others, unlawfully, willfully, and knowingly participated as leaders, organizers, instigators, and accomplices in the formulation and execution of the said common design, conspiracy, plans, and enterprises to commit, and which involved the commission of, war crimes and crimes against humanity, and accordingly are individually responsible for their own acts and for all acts performed by any person or persons in execution of the said common design, conspiracy, plans, and enterprises.

4. The said common design, conspiracy, plans, and enterprises embraced the commission of war crimes and crimes against humanity, as set forth in counts two and three of this indictment, in that the defendants unlawfully, willfully, and knowingly encouraged, aided, abetted, and participated in the commission of atrocities and offenses against persons and property, including plunder of private property, murder, extermination, enslavement, deportation, unlawful imprisonment, torture, persecutions on political, racial, and religious grounds, and ill-treatment of, and other inhumane acts against, thousands of persons, including German civilians, nationals of other countries, and prisoners of war.

5. It was a part of the said common design, conspiracy, plans, and enterprises to enact, issue, enforce, and give effect to certain purported statutes, decrees, and orders, which were criminal both in inception and execution, and to work with the Gestapo, SS, SD, SIPO, and RSHA for criminal purposes, in the course of which

the defendants, by distortion and denial of judicial and penal process, committed the murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts, more fully described in counts two and three of this indictment.

6. The said common design, conspiracy, plans, and enterprises embraced the assumption by the Reich Ministry of Justice of total control of the administration of justice, including preparation of legislation concerning all branches of law, and control of the courts and prisons. The supreme administration of justice in all German states was transferred to the Reich Ministry of Justice in 1934. Thereupon, certain extraordinary courts of a predominantly political nature, with wide and arbitrary criminal jurisdiction, were superimposed upon the existing ordinary court system. The People's Court (Volksgerichtshof) became the court of original and final jurisdiction in cases of "high treason" and "treason." This court itself had jurisdiction over the investigation and prosecution of all cases before it, and there was no appeal from its decision. The court's territorial jurisdiction was extended not only to all annexed countries of the Reich but also to the "Protectorate" (Bohemia and Moravia) in 1939. Beginning in 1933, Special Courts (Sondergerichte) also were superimposed upon the ordinary court system under the Reich Ministry of Justice. These Special Courts were of a character which had been outlawed until the NSDAP seizure of power. Jurisdiction of these Special Courts extended to all "political" cases, as well as to all acts deemed inimical to either the Party, the government, or continued prosecution of the war. At least one Special Court was attached to every court of appeal (Oberlandesgericht); public prosecutors could arbitrarily refer thereto any case from the local courts (Amtsgerichte) or from the criminal division of the district courts (Landgerichte). Despite guaranties in the Weimar Constitution and the German Judicature Act, that no one may be deprived of his competent judge, and prohibitions against irregular tribunals, these courts were imposed upon Germany, as well as upon the "Protectorate" and the occupied countries.

7. The said common design, conspiracy, plans, and enterprises embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi regime regardless of nationality and for the persecution and extermination of "races." The special political tribunals mentioned above visited cruel punishment and death upon political opponents and members of certain "racial" and national groups. The People's Court was presided over by a minority of trusted Nazi lawyers, and a majority of equally trusted laymen appointed by Hitler from the Elite Guard and Party hierarchy. The People's Court in col-

laboration with the Gestapo became a terror court, notorious for the severity of punishment, secrecy of proceedings, and denial to the accused of all semblance of judicial process. Punishment was meted out by Special Courts to victims under a law which condemned all who offended the "healthy sentiment of the people." Independence of the judiciary was destroyed. Judges were removed from the bench for political and "racial" reasons. Periodic "letters" were sent by the Ministry of Justice to all Reich judges and public prosecutors, instructing them as to the results they must accomplish. Both the bench and bar were continually spied upon by the Gestapo and SD, and were directed to keep disposition of their cases politically acceptable. Judges, prosecutors and, in many cases, defense counsel were reduced in effect to an administrative arm of the Nazi Party.

COUNT TWO—WAR CRIMES

8. Between September 1939 and April 1945 all of the defendants herein unlawfully, willfully, and knowingly committed war crimes, as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offenses against persons and property, including, but not limited to, plunder of private property, murder, torture, and illegal imprisonment of, and brutalities, atrocities, and other inhumane acts against thousands of persons. These crimes included, but were not limited to, the facts set out in paragraphs 9 to 19, inclusive, of this indictment, and were committed against civilians of occupied territories and members of the armed forces of nations then at war with the German Reich and who were in the custody of the German Reich in the exercise of belligerent control.

9. Extraordinary irregular courts, superimposed upon the regular court system, were used by all of the defendants for the purpose of and in fact creating a reign of terror to suppress political opposition to the Nazi regime. This was accomplished principally through the People's Court (Volksgerichtshof) and various Special Courts (Sondergerichte), which subjected civilians of the occupied countries to criminal abuse of judicial and penal process including repeated trials on the same charges, criminal abuse of discretion, unwarranted imposition of the death penalty, prearrangement of sentences between judges and prosecutors, discriminatory trial processes, and other criminal practices, all of which resulted in murders, cruelties, tortures, atrocities, plunder of private property, and other inhumane acts.

10. Special Courts subjected Jews of all nationalities, Poles, Ukrainians, Russians, and other nationals of the Occupied Eastern Territories, indiscriminately classed as "gypsies", to discriminatory and special penal laws and trials, and denied them all semblance of judicial process. These persons who had been arbitrarily designated "asocial" by conspiracy and agreement between the Ministry of Justice and the SS were turned over by the Ministry of Justice, both during and after service of prison sentences, to the SS to be worked to death. Many such persons were given a summary travesty of trial before extraordinary courts, and after serving the sentences imposed upon them, were turned over to the Gestapo for "protective custody" in concentration camps. Jews discharged from prison were turned over to the Gestapo for final detention in Auschwitz, Lublin, and other concentration camps. The above-described proceedings resulted in the murder, torture, and ill-treatment of thousands of such persons. The defendants von Ammon, Engert, Klemm, Schlegelberger, Mettgenberg, Rothenberger, and Westphal are charged with special responsibility for and participation in these crimes.

11. The German criminal laws, through a series of expansions and perversions by the Ministry of Justice, finally embraced passive defeatism, petty misdemeanors and trivial private utterances as treasonable for the purpose of exterminating Jews or other nationals of the occupied countries. Indictments, trials and convictions were transparent devices for a system of murderous extermination, and death became the routine penalty. Jurisdiction of the German criminal code was extended to the entire world, to cover acts of non-Germans as well as Germans living outside the Reich. Non-German nationals were convicted of and executed for "high treason" allegedly committed against the Reich. The above-described proceedings resulted in the murder, torture, unlawful imprisonment, and ill-treatment of thousands of persons. The defendants Barnickel, Cuhorst, Klemm, Lautz, Mettgenberg, Nebelung, Oeschey, Petersen, Rothaug, Rothenberger, Schlegelberger, and Westphal are charged with special responsibility for and participation in these crimes.

12. The Justice Ministry aided and implemented the unlawful annexation and occupation of Czechoslovakia, Poland, and France. Special Courts were created to facilitate the extermination of Poles and Jews and the suppression of political opposition generally by the employment of summary procedures and the enforcement of Draconic penal laws. Sentences were limited to death or transfer to the SS for extermination. The People's Court and Special Courts were projected into these countries, irregular prejudicial regulations and procedures were invoked without no-

tice (even in violation of the Reich Criminal Code as unlawfully extended to other occupied territories), sentences were prearranged, and trial and execution followed service of the indictment within a few hours. The above-described proceedings resulted in the murder, ill-treatment, and unlawful imprisonment of thousands of persons. The defendants Klemm, Lautz, Mettgenberg, Schlegelberger, and Westphal are charged with special responsibility for and participation in these crimes.

13. The Ministry of Justice participated with the OKW and the Gestapo in the execution of Hitler's decree of "Night and Fog" (Nacht und Nebel) whereby civilians of occupied territories who had been accused of crimes of resistance against occupying forces were spirited away for secret trial by certain Special Courts of the Justice Ministry within the Reich, in the course of which the victims' whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victims' relatives and associates and barring recourse to any evidence, witnesses, or counsel for defense. The accused was not informed of the disposition of his case, and in almost every instance those who were acquitted or who had served their sentences were handed over by the Justice Ministry to the Gestapo for "protective custody" for the duration of the war. In the course of the above-described proceedings, thousands of persons were murdered, tortured, ill-treated, and illegally imprisoned. The defendants Altstoetter, von Ammon, Engert, Joel, Klemm, Mettgenberg, and Schlegelberger are charged with special responsibility for and participation in these crimes.

14. Hundreds of non-German nationals imprisoned in penal institutions operated by the Reich Ministry of Justice were unlawfully executed and murdered. Death sentences were executed in the absence of the necessary official orders, and while clemency pleas were pending. Many who were not sentenced to death were executed. In the face of Allied military advances so-called "inferior" or "asocial" prison inmates were, by Ministry order, executed regardless of sentences under which they served. In many instances these penal institutions were operated in a manner indistinguishable from concentration camps. The defendants Engert, Joel, Klemm, Lautz, Mettgenberg, Rothenberger, and Westphal are charged with special responsibility for and participation in these crimes.

15. The Ministry of Justice participated in the Nazi program of racial purity pursuant to which sterilization and castration laws were perverted for the extermination of Jews, "asocials", and certain nationals of the occupied territories. In the course

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of the program thousands of Jews were sterilized. Insane, aged, and sick nationals of occupied territories, the so-called "useless eaters," were systematically murdered. In the course of the above-described proceedings thousands of persons were murdered and ill-treated. The defendants Lautz, Schlegelberger, and Westphal are charged with special responsibility for and participation in these crimes.

16. The Ministry of Justice granted immunity to and amnesty following prosecutions and convictions of Nazi Party members for major crimes committed against civilians of occupied territories. Pardons were granted to members of the Party who had been sentenced for proved offenses. On the other hand, discriminatory measures against Jews, Poles, "gypsies," and other designated "asocials" resulted in harsh penal measures and death sentences, deprivation of rights to file private suits and rights of appeal, denial of right to receive amnesty and to file clemency pleas, denial of right of counsel, imposition of special criminal laws permitting the death penalty for all crimes and misdemeanors, and finally, in the transfer to the Gestapo for "special treatment" of all cases in which Jews were involved. The defendants von Ammon, Joel, Klemm, Rothenberger, and Schlegelberger are charged with special responsibility for and participation in these crimes.

17. By decrees signed by the Reich Minister of Justice and others, the citizenship of all Jews in Bohemia and Moravia was forfeited upon their change of residence by deportation or otherwise; and upon their loss of citizenship their properties were automatically confiscated by the Reich. There were discriminatory changes in the family and inheritance laws by which Jewish property was forfeited at death to the Reich with no compensation to the Jewish heirs. The defendants Altstoetter and Schlegelberger are charged with special responsibility for and participation in these crimes.

18. The Ministry of Justice through suspension and quashing of criminal process, participated in Hitler's program of inciting the German civilian population to murder Allied airmen forced down within the Reich. The defendants Klemm and Lautz are charged with special responsibility for and participation in these crimes.

19. The said war crimes constitute violations of international conventions, particularly of Articles 4–7, 23, 43, 45, 46, and 50 of the Hague Regulations, 1907, and of articles 2, 3, and 4 of the Prisoner of War Convention (Geneva, 1929), the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal

laws of the countries in which such crimes were committed, and of Article II of Control Council Law No. 10.

COUNT THREE—CRIMES AGAINST HUMANITY

20. Between September 1939 and April 1945 all of the defendants herein unlawfully, willfully, and knowingly committed crimes against humanity as defined by Control Council Law No. 10, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, illegal imprisonment, torture, persecution on political, racial and religious grounds, and ill-treatment of and other inhumane acts against German civilians and nationals of occupied countries.

21. Extraordinary irregular courts were used by all of the defendants in creating a reign of terror to suppress political opposition to the German Reich, in the course of which German civilians and nationals of occupied countries were subjected to criminal abuses of judicial and penal process, resulting in murders, brutalities, cruelties, tortures, atrocities, plunder of private property, and other inhumane acts. These crimes are further particularized in paragraph 9 of this indictment, which is incorporated herein by reference.

22. Special Courts subjected certain German civilians, and nationals of occupied countries to discriminatory and special penal laws and trials, and denied them all semblance of judicial process. Convicted German civilians and nationals of other countries who were deemed to be political prisoners and criminals designated as "asocial," were turned over to the Reich Security Main Office (RSHA) for extermination in concentration camps. These crimes are further particularized in paragraph 10 of this indictment, which is incorporated herein by reference. The defendants von Ammon, Engert, Joel, Klemm, Lautz, Mettgenberg, and Rothenberger are charged with special responsibility for and participation in these crimes.

23. The German criminal laws, through a series of additions, expansions, and perversions by the defendants became a powerful weapon for the subjugation of the German people and for the extermination of certain nationals of the occupied countries. This program resulted in the murder, torture, illegal imprisonment, and ill-treatment of thousands of Germans and nationals of occu-

pied countries. These crimes are further particularized in paragraph 11 of this indictment, which is incorporated herein by reference. The defendants Barnickel, Cuhorst, Klemm, Lautz, Mettgenberg, Nebelung, Oeschey, Petersen, Rothaug, Rothenberger, Schlegelberger, and Westphal are charged with special responsibility for and participation in these crimes.

24. The Ministry of Justice, through the People's Court and certain Special Courts, aided and implemented the unlawful annexation and occupation of Czechoslovakia, Poland, and France. These crimes are further particularized in paragraph 12 of this indictment, which is incorporated herein by reference. The defendants Klemm, Lautz, Mettgenberg, Schlegelberger, and Westphal are charged with special responsibility for and participation in these crimes.

25. The Ministry of Justice participated in the decree of "Night and Fog" whereby certain persons who committed offenses against the Reich or the German forces in occupied territories were taken secretly by the Gestapo to Germany and handed over to the Special Courts for trial and punishment. This program resulted in the murder, torture, illegal imprisonment, and ill-treatment of thousands of persons. These crimes are further particularized in paragraph 13 of this indictment, which is incorporated herein by reference. The defendants Altstoetter, von Ammon, Engert, Joel, Klemm, Mettgenberg, and Schlegelberger are charged with special responsibility for and participation in these crimes.

26. In penal institutions operated by the Reich Ministry of Justice, hundreds of German civilians and nationals of other countries were subjected to murders, brutalities, cruelties, tortures, atrocities, and other inhumane acts. The particulars concerning these crimes are set forth in paragraph 14 of this indictment. The defendants Engert, Joel, Klemm, Lautz, Mettgenberg, Rothenberger, and Westphal are charged with special responsibility for and participation in these crimes.

27. Special health courts (Erbgesundheitgerichte) perverted eugenic and sterilization laws or policies regarding German civilians and nationals of other countries which resulted in the systematic murder and ill-treatment of thousands of persons. Thousands of German civilians and nationals of other countries committed to institutions for the insane, were systematically murdered. These crimes are further particularized in paragraph 15 of count two of this indictment, which is incorporated herein by reference. The defendants Lautz, Schlegelberger, and Westphal are charged with special responsibility for and participation in these crimes.

28. The Ministry of Justice granted immunity to and amnesty following prosecutions and convictions of Party members for major crimes committed against civilians of occupied territories. Pardons were granted to members of the Party who had been sentenced for proved offenses. On the other hand, discriminatory judicial proceedings were imposed against so-called "asocial" German nationals and civilians of the occupied countries. These crimes are further particularized in paragraph 16 of count two of this indictment and are incorporated herein by reference. The defendants von Ammon, Joel, Klemm, Mettgenberg, Rothenberger, and Schlegelberger are charged with special responsibility for and participation in these crimes.

29. Discriminatory changes made in the German family and inheritance laws for the sole purpose of confiscating Jewish properties, were enforced by the Justice Ministry. All Jewish properties were forfeited at death to the Reich. Jews and Poles, both in Germany and in the occupied countries, were deprived of their citizenship, their property was seized and confiscated, and they were deprived of means of earning a livelihood, by the State, by Party organizations, and by individual members of the Party. These crimes are further particularized in paragraph 17 of this indictment, which is incorporated herein by reference. The defendants Altstoetter and Schlegelberger are charged with special responsibility for and participation in these crimes.

30. The Ministry of Justice through suspension and quashing of criminal process, participated in Hitler's program of inciting the German civilian population to murder Allied airmen forced down within the Reich. This program resulted in the murder, torture, and ill-treatment of many persons. These crimes are further particularized in paragraph 18 of this indictment, which is incorporated herein by reference. The defendants Klemm and Lautz are charged with special responsibility for and participation in these crimes.

31. The said crimes against humanity constitute violations of international conventions, including article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and of article II of Control Council Law No. 10.

COUNT FOUR
MEMBERSHIP IN CRIMINAL ORGANIZATIONS

32. The defendants Altstoetter, Cuhorst, Engert, and Joel are guilty of membership in an organization declared to be criminal

by the International Military Tribunal in Case 1, in that each of the said defendants was a member of DIE SCHUTZSTAFFELN DER NATIONAL SOZIALISTISCHEN DEUTSCHEN ARBEITERPARTEI (commonly known as the "SS") after 1 September 1939.

33. The defendants Cuhorst, Oeschey, Nebelung, and Rothaug are guilty of membership in an organization declared to be criminal by the International Military Tribunal in Case 1, in that Cuhorst, Oeschey, and Rothaug were members of the Leadership Corps of the Nazi Party at Gau level after 1 September 1939, and in that Nebelung was an Ortsgruppenleiter of the Leadership Corps of the Nazi Party after 1 September 1939.

34. The defendant Joel is guilty of membership in an organization declared to be criminal by the International Military Tribunal in Case 1, in that the said defendant was a member of DER SICHERHEITSDIENST DES REICHSFUEHRER SS (commonly known as the "SD") after 1 September 1939.

Such memberships are in violation of paragraph 1 (*d*), article II of Control Council Law No. 10.

Wherefore, this indictment is filed with the Secretary General of the Military Tribunals and the charges herein made against the above-named defendants are hereby presented to the Military Tribunals.

Acting on Behalf of the United States of America

TELFORD TAYLOR
Brigadier General, U. S. Army
Chief of Counsel for War Crimes

Nuernberg, 4 January 1947

II. ARRAIGNMENT

Extracts from the official transcript of Military Tribunal III in the matter of the United States of America *vs.* Josef Altstoetter, et al., defendants, sitting at Nuernberg, Germany, on 17 February 1947, 0930, Justice Carrington T. Marshall, presiding.[1]

THE MARSHAL: Persons in the courtroom will please find their seats.

The Honorable, the Judges of Military Tribunal III.

Military Tribunal III is now in session. God save the United States of America and this Honorable Tribunal.

There will be order in the courtroom.

PRESIDING JUDGE MARSHALL: The Tribunal will now proceed with the arraignment of the defendants in Case 3 pending before this Tribunal.

The Secretary General will call the names of the defendants.

THE SECRETARY GENERAL: Josef Altstoetter, Wilhelm von Ammon, Paul Barnickel, Hermann Cuhorst, Karl Engert, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg, Guenther Nebelung, Rudolf Oeschey, Hans Petersen, Oswald Rothaug, Curt Rothenberger, Franz Schlegelberger.

MR. LAFOLLETTE: May it please your Honor, all the defendants are present. I wish to advise the members of this Tribunal that subsequent to the filing of the indictment in this case the defendant therein named Carl Westphal died, and he died while in the custody of the Marshal which may be confirmed by the Tribunal.[2]

PRESIDING JUDGE MARSHALL: It will be so entered in the record.

Counsel for the prosecution will proceed with the arraignments of the defendants.

[Here Mr. LaFollette read the indictment. See pp. 15–26.]

* * * * * * *

PRESIDING JUDGE MARSHALL: The microphone will now be placed in front of the defendant Josef Altstoetter.

I shall now call upon all defendants to plead guilty or not guilty to the charges against them. Each defendant, as his name is called, will stand and speak clearly into the microphone.

[1] This caption, with the necessary factual changes, appeared at the top of the first page of the transcript for each day of the proceedings. Hereinafter it will be omitted from all extracts from the transcript.

[2] The defendant Westphal committed suicide in the Nuernberg prison adjacent to the Palace of Justice where the trials were held.

At this time there will be no arguments, speeches, or discussions of any kind. Each defendant will simply plead guilty or not guilty to the offenses with which he is charged by this indictment.

Josef Altstoetter, are you represented by counsel before this Tribunal?

DEFENDANT ALTSTOETTER: I do not consider myself guilty.

PRESIDING JUDGE MARSHALL: The question is, are you represented by counsel before this Tribunal?

DEFENDANT ALTSTOETTER: Yes, I am represented by counsel.

PRESIDING JUDGE MARSHALL: How do you plead to the charges and specifications and each thereof set forth in the indictment against you, guilty or not guilty?

DEFENDANT ALTSTOETTER: I consider myself not guilty.

PRESIDING JUDGE MARSHALL: You may be seated.

[At this point the other defendants were asked similar questions. Each defendant indicated that he was represented by counsel, and each pleaded "Not guilty" to the charges of the indictment against him.]

* * * * * * *

PRESIDING JUDGE MARSHALL: The pleas of the defendants will be entered by the Secretary General in the records of the Tribunal.

Military Tribunal will be at recess until Wednesday, 5 March 1947, at 9:30 o'clock a.m., at which time the trial of Case 3 will begin.

THE MARSHAL: Military Tribunal III will be at recess until Wednesday, 5 March 1947, at 9:30 o'clock.

DR. SCHILF: I wish to make a request. I wish to ask the prosecution, in due time before the opening of the trial, to make their document books available to the defendants and to their counsel.

We make the following objections against the indictment: Ordinance No. 7, by the Military Government, says, in article IV under paragraph (*a*), that the indictment is to set forth the counts simply, distinctly, and in sufficient detail, and that the defendants should be instructed on the details of the charges made against them.

The defendants, or rather the two clients I represent, failed to find certain details in the indictment. With the exception of possibly the charge in regard to the Night and Fog Decree, no legal decree is referred to which could possibly be considered illegal.

In that manner the preparation by the defendants is frustrated because the indictment, according to our opinion, is conceived

much too generally, and the requirements of article IV of Ordinance No. 7 just referred to by me are not fulfilled. This could be remedied in that the prosecution, in due time, before the opening of the trial, makes the document books available to the defense counsel.

That is what I should like to ask for on behalf of my two clients.

PRESIDING JUDGE MARSHALL: Does the prosecution desire to make any comment at this time upon the point raised?

MR. LAFOLLETTE: Unfortunately, and it is no fault of the defendants' counsel, I didn't hear what was coming through the phones. As I understand two points were raised—the fact that no documents were filed with defendants' counsel in their room. Those will be furnished. Secondly, with reference to the objection raised to the indictment, I believe the rules require the objections should be reduced to writing. In any event I think it would serve the purpose if the objection to the indictment was reduced to writing, and then Your Honors would pick such time as you see fit to dispose of the motion, and we can argue it at that time more intelligently than we could at this moment. I do not desire to take advantage of technicalities, but I hope the record will note that defense counsel have duly raised the objection, and at such time as it is to be disposed of it will be reduced to writing before it is disposed of. I think it only reasonable that it be reduced to writing.

PRESIDING JUDGE MARSHALL: The defendants' counsel will be required to reduce certain matters to writing, as requested by the prosecution, and it is possible that we will want to dispose of that matter between now and 5 March if it is agreeable to counsel on both sides.

DR. KOESSL: I have already submitted the same request in writing.

MR. LAFOLLETTE: If that has been submitted in writing I think Your Honors have indicated we may, within a reasonable time after you have seen it, wish to dispose of that prior to 5 March, or on 5 March, whichever Your Honors shall see fit. That will be satisfactory to us.

PRESIDING JUDGE MARSHALL: I suggest, in that connection, after you have seen the written matter that you advise the Tribunal when we are not in session as to your wishes.

MR. LAFOLLETTE: I shall be glad to do that, Judge. I assume we will wait and take not only the objections on behalf of the defendant Rothaug, but also any objections which have been filed by counsel on behalf of any other defendants. After they have been submitted and I have had an opportunity to see them, I will confer

with defense counsel, and perhaps after that we will have time to confer with the Court as to the time of disposition.

PRESIDING JUDGE MARSHALL: Are there any other counsel representing defendants who desire to present any matters at this time? If not, the order for recess will stand.

(The Tribunal adjourned until 0930 hours, 5 March 1947.)

III. OPENING STATEMENTS

A. Opening Statement for the Prosecution*

BRIGADIER GENERAL TAYLOR: This case is unusual in that the defendants are charged with crimes committed in the name of the law. These men, together with their deceased or fugitive colleagues, were the embodiment of what passed for justice in the Third Reich.

Most of the defendants have served, at various times, as judges, as state prosecutors, and as officials of the Reich Ministry of Justice. All but one are professional jurists; they are well accustomed to courts and courtrooms, though their present role may be new to them.

But a court is far more than a courtroom; it is a process and a spirit. It is the house of law. This the defendants know, or must have known in times past. I doubt that they ever forgot it. Indeed, the root of the accusation here is that those men, leaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system to an engine of despotism, conquest, pillage, and slaughter.

The methods by which these crimes were committed may be novel in some respects, but the crimes themselves are not. They are as old as mankind, and their names are murder, torture, plunder, and others equally familiar. The victims of these crimes are countless, and include nationals of practically every country in Europe.

But because these crimes were committed in the guise of legal process, it is important at the outset to set forth certain things that are not, here and now, charged as crimes.

The defendants and their colleagues distorted, perverted, and finally accomplished the complete overthrow of justice and law in Germany. They made the system of courts an integral part of dictatorship. They established and operated special tribunals obedient only to the political dictates of the Hitler regime. They abolished all semblance of judicial independence. They brow-beat, bullied, and denied fundamental rights to those who came before the courts. The "trials" they conducted became horrible farces, with vestigial remnants of legal procedure which only served to mock the hapless victims.

* Tr. pp. 34–137, 5 March 1947.

This conduct was dishonor to their profession. Many of these misdeeds may well be crimes. But, in and of themselves, they are not charged as crimes in this indictment. The evidence which proves this course of conduct will, indeed, be laid before the Court, as it constitutes an important part of the proof of the crimes which are charged. But the defendants are not now called to account for violating constitutional guaranties or withholding due process of law.

On the contrary, the defendants are accused of participation in and responsibility for the killings, tortures, and other atrocities which resulted from, and which the defendants know were an inevitable consequence of, the conduct of their offices as judges, prosecutors, and ministry officials. These men share with all the leaders of the Third Reich—diplomats, generals, party officials, industrialists, and others—responsibility for the holocaust of death and misery which the Third Reich visited on the world and on Germany herself. In this responsibility, the share of the German men of law is not the least. They can no more escape that responsibility by virtue of their judicial robes than the general by his uniform.

One other word of clarification. Some of the evidence in this case will relate to acts which occurred before the outbreak of war in 1939. These acts will be proved in order to show that the defendants were part of a conspiracy and plan to commit the crimes charged to have been committed after the outbreak of war, and to show that the defendants fully understood and intended the criminal consequences of their acts during the war. But none of these acts is charged as an independent offense in this particular indictment.

The charges in the indictment have been so limited for purposes of clarity and simplicity. There is no need to test in this case delicate questions concerning the criminality *per se* of judicial misconduct since the accusation and the evidence cut much deeper. The defendants are charged with using their offices and exercising their powers with the knowledge and intent that their official acts would result in the killing, torture, and imprisonment of thousands of persons in violation of international law as declared in Control Council Law No. 10. Nor is there any need to inquire here into what acts committed before the war are cognizable as crimes against humanity under Law No. 10, since the bulk of the proof relates to acts which occurred during the war.

In summary, the defendants are charged with judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then utilizing the emptied forms of legal process for persecution, enslavement, and extermination on

a vast scale. It is the purpose of this proceeding to hear these charges and to render judgment according to the evidence under law.

The true purposes of this proceeding, therefore, are broader than the mere visiting of retribution on a few men for the death and suffering of many thousands. I have said that the defendants know, or should know, that a court is the house of law. But it is, I fear, many years since any of the defendants have dwelt therein. Great as was their crime against those who died or suffered at their hands, their crime against Germany was even more shameful. They defiled the German temple of justice, and delivered Germany into the dictatorship of the Third Reich, "with all its methods of terror, and its cynical and open denial of the rule of law." [1]

The temple must be reconsecrated. This cannot be done in the twinkling of an eye or by any mere ritual. It cannot be done in any single proceeding or at any one place. It certainly cannot be done at Nuernberg alone. But we have here, I think, a special opportunity and grave responsibility to help achieve this goal. We have here the men who played a leading part in the destruction of law in Germany. They are about to be judged in accordance with the law. It is more than fitting that these men be judged under that which they, as jurists, denied to others. Judgment under law is the only just fate for the defendants; the prosecution asks no other.

THE GERMAN JUDICIAL SYSTEM

There are fifteen defendants in the box, all of whom held high judicial office, and all but one of whom are trained lawyers. To understand this case, it is necessary to understand the general structure of the German judicial system and the places occupied by the several defendants within that system.

To assist the Court in this regard, the prosecution has prepared a short expository brief which is already in the hands of the Court and which has been made available to defense counsel in German and English. The brief includes a glossary of the more frequent German words or expressions which will occur during the trial—most of them from the vocabulary of governmental and judicial affairs. It includes a table of equivalent ranks between the American Army and the German Army and SS, and a table of the civilian ranks used in the German judicial system. It also includes two charts, showing respectively the structure of the Reich Ministry of Justice, and the hierarchy of German courts.[2] Finally, it

[1] Trial of the Major War Criminals, Nuremberg, 1947, volume I, page 181.

[2] These two charts are reproduced below in section IV C 2.

includes a copy of the composite chart now displayed on the wall of the courtroom, which shows the positions occupied by the defendants in the general scheme of things. This chart has been certified by the defendant Schlegelberger, and will be introduced as an exhibit in this case when Mr. LaFollette commences the presentation of evidence. It is being displayed at this time as a convenient guide to the Court and to defense counsel, to enable them more easily to follow the opening statement.

JUDICIAL ORGANIZATION PRIOR TO 1933

Because Germany was divided into a multitude of states and provinces until modern times, German law is not the product of a continuous or uniform development. However, while some elements of old Germanic law have survived, German law has for many centuries been based primarily on the principles of Roman law. As is the case in most continental nations, German law today is enacted to a substantial degree in the form of codes.

Even at the present time, the principal source of German criminal law is the Criminal Code of 1871. Amendments have been frequent, but it has never been completely overhauled. For our present purpose, it is sufficient to note the code's threefold division of criminal offenses. Serious crimes, punishable with death or imprisonment for more than 5 years, are called "crimes" (Verbrechen) ; lesser offenses, punishable with imprisonment or substantial fines, are called "delicts" (Vergehen) ; and minor offenses are called "contraventions" (Uebertretungen).

Questions of criminal procedure are regulated by the Code of Criminal Procedure of February, 1877; matters of jurisdiction and of court organization are prescribed in the General Judicature Act of January, 1877.

Under both the German Empire and the Weimar Republic, the authority to appoint judges and prosecutors and the power to execute sentences were jealously guarded prerogatives of the individual German states. The Reich Ministry of Justice, therefore, remained predominantly a ministry of federal legislation. The anomaly of a highly unified federal law, as contrasted with a court system administered by the individual states, endured until after the advent of Hitler.

In spite of the fact that the authority for supervision and appointment of judges rested with the numerous states, the German court system was well organized and highly unified before Hitler came to power. The basis of the court system was the local courts (Amtsgerichte), of which there were over 2,000, which had original jurisdiction over minor civil suits and over the less serious criminal offenses ("delicts" and "contraventions"). Original juris-

diction in the more important civil and criminal cases was exercised by the district courts (Landgerichte), of which there were some 180.

The principal appellate courts in Germany were called the district courts of appeal (Oberlandesgerichte). Of those there were 26, or generally one to each state and province.* The district courts of appeal entertained civil appeals from all decisions of the local and district courts, and second criminal appeals from cases originally heard in the local courts. The president of the district court of appeals (Oberlandesgerichtspraesident) was also the administrative head of all the courts in his district.

The Supreme Court of the Reich (Reichsgericht) in Leipzig formed the apex of the judicial pyramid. It determined important legal questions involving the interpretation of Reich laws, and entertained appeals from the decisions of the district courts of appeal and from criminal cases originally heard in the district courts. It was also the court of first and last instance for important treason cases.

The judges of the Reich Supreme Court were appointed by the President of the Reich. The judges of the lower courts were appointed by the respective state governments. Before the advent of national socialism, a judge could not be removed by the government, but only by formal action before a disciplinary court composed of his peers. This security of tenure was guaranteed by articles 102 and 104 of the Weimar constitution.

JUDICIAL ORGANIZATION OF THE THIRD REICH

The impact of Hitler's seizure of power on the German judicial system was swift and drastic. The Enabling Law of 24 March 1933 authorized the executive to issue decrees with the force of law and provided that these "decree laws" could deviate from the Weimar constitution, the civil rights provision of which had already been suspended by a decree of 28 February 1933. For practical purposes, therefore, legislative and executive powers were merged in Hitler's cabinet, and the constitution was robbed of all practical effect.

In 1934, the administration of justice was taken entirely out of the hands of the German states and was concentrated exclusively in the government of the Reich. The first law for the transfer of the administration of justice to the Reich was proclaimed 16 February 1934; it provided that thereafter all courts should pronounce judgment in the name of the German people, vested in the President of the Reich all clemency powers formerly held by the states,

* Later nine more were formed in Austria, Danzig, Poland, Sudetenland, and Bohemia, making 35 in all.

and authorized the Reich Minister of Justice to issue regulations for the transfer of the administration of justice to the Reich. This general directive was put into execution by the second and third laws for the transfer of the administration of justice to the Reich, promulgated in December 1934 and January 1935, respectively. The Justice Ministries of the several states were thereby abolished, and all their functions and powers were concentrated in the Reich Ministry of Justice, which became the supreme judicial authority, under Hitler, in the Reich. Hitler had already proclaimed himself the "Supreme Law Lord of the German people" in his speech to the Reichstag defending the killings which occurred during the suppression of the Roehm putsch.*

1. *The Reich Ministry of Justice (Reichsjustizministerium)*— The centralization of the German administration of justice brought about, of course, a great increase in the scope and functions of the Reich Ministry of Justice. Its more important divisions are shown in the composite chart on the wall of the courtroom; a more detailed chart of the Ministry alone is included in the expository brief.

For the first 8 years of the Hitler regime, the Minister of Justice was Franz Guertner, who had taken this office under the von Papen cabinet and retained it until his death in January 1941. Under Guertner, the two principal officials were the defendant Schlegelberger and Roland Freisler, each with the title of under secretary. Schlegelberger took charge of the Ministry from Guertner's death until August 1942, but throughout that period he was "Acting Minister" and was never officially given cabinet rank. In August 1942, Dr. Georg Thierack, then president of the People's Court, was appointed Reich Minister and Schlegelberger was retired. Freisler succeeded Thierack as president of the People's Court.

Under Thierack, there was only one under secretary. Thierack first appointed the defendant Rothenberger, but in January 1944 Rothenberger was put on the retired list and replaced by the defendant Klemm.

Besides the defendants Schlegelberger, Rothenberger, and Klemm, four of the other defendants held high office in the Ministry of Justice, and still others served in the Ministry at various times during their careers. The defendant Klemm, as well as being the under secretary, headed Division II of the Ministry, which concerned itself with legal education and training. The defendants von Ammon and Mettgenberg, as well as the deceased Westphal, were officials of Divisions III and IV, which were ultimately merged, and which governed virtually all questions of

* Hitler's speech to the Reichstag 13 July 1934, Voelkischer Beobachter, 15 July 1934.

criminal legislation and procedure, and prosecutions. The defendant Altstoetter headed Division VI, which dealt with civil law and procedure. The defendant Engert, after having served on the People's Court, became the head of Division V, Penal Institutions, and of Division XV, first created in 1942 and dissolved in 1944. Division XV concerned itself with the secret transfer of certain classes of persons from ordinary prisons to the Gestapo. The Ministry of Justice controlled a variety of other judicial institutions, including various Special Courts and the examining office for candidates for admission and qualification of judges and lawyers. It controlled the Academy for German Law and various other associations of attorneys, as well as a special training camp for the Nazi indoctrination of young attorneys. Most important of all, it supervised and administered the entire court system from the Reich Supreme Court clear down to the local courts. This function included the assignment, transfer, and promotion of all judges.

2. *The Hierarchy of regular courts*—The centralization of judicial administration in the Reich Ministry of Justice did not at first have any pronounced effect upon the structure of the regular court system. The established hierarchy of courts—local courts, district courts, district courts of appeal, and the Reich Supreme Court—continued in effect. The most important development in the early years of the Third Reich was the creation of extraordinary and special courts, which increasingly cut into the jurisdiction of the regular courts.

Under the impact of war, however, the system of regular courts was substantially altered, although its general outlines remained the same. These alterations were intended for economy and expedition, and to reduce the number of judicial personnel. This was accomplished chiefly in two ways: by reduction in the number of judges required to hear particular kinds of cases, and by drastic curtailment of the right of appeal.

Many of these changes were made at the outbreak of war in 1939. Thereafter, all cases in the local courts and all civil cases in the district courts were heard by one judge only; criminal cases in the district courts were heard by three judges, but the president of the court could hear such cases alone if the issues were simple. Criminal cases heard by the local courts could be appealed only as far as the district courts; civil cases heard in the local courts could be appealed directly to the district court of appeals, bypassing the district court.

Further drastic curtailments of the right of appeal occurred in 1944 and 1945. In general, appeals could only be taken by permission of the court which heard the case, and permission was

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granted only to settle legal questions of fundamental importance. The judicial functions of the district courts of appeal were almost, if not entirely, eliminated, although their supervisory administrative functions continued.

3. *Extraordinary courts*—The most crucial and radical change in the judicial system under the Third Reich, however, was the establishment of various extraordinary courts. These irregular tribunals permeated the entire judicial structure, and eventually took over all judicial business which touched political issues or related to the war.

Within a matter of weeks after the seizure of power, by a decree of 21 March 1933, "Special Courts" (Sondergerichte) were established. One Special Court was set up within the district of each district court of appeal. Each court was composed of three judges drawn from the judges of the particular district. They were given jurisdiction over offenses described in the emergency decree of 28 February 1933, which included inciting to disobedience of government orders, crimes in the nature of sabotage, and acts "contrary to the public welfare." There were drastic provisions for the expedition of proceedings before the special courts, and no appeal whatsoever lay from their decisions.

A few weeks later, special military courts, which had been abolished by the Weimar constitution, were reestablished and given jurisdiction over all offenses committed by members of the armed forces. In July 1933, special "Hereditary Health Courts" more generally known as "Sterilization Courts" were established at the seats of the local courts, with special appellate "Hereditary Health Courts" above them.

But the most notorious Nazi judicial innovation was the so-called "People's Court" (Volksgerichtshof), established by the decree of 24 April 1934, after the Reich Supreme Court's acquittal of the defendants in the Reichstag fire trial. The People's Court replaced the Supreme Court as the court of first and last instance for most treason cases.

The People's Court sat in divisions, or "senates," of five members each. Two of the five had to be qualified judges; the other three were trusted Nazi laymen selected from high ranking officers of the Wehrmacht (armed forces) and SS, or from the Party hierarchy. They were appointed for 5-year terms by Hitler, on the recommendation of the Minister of Justice. Six "senates" were established, each of which heard cases from a particular geographical section of Germany. In 1940 a "special senate" was established to retry cases where, in the judgment of the chief public prosecutor of the Reich, an inadequate punishment had been imposed.

As time went on, the concept of "treason" was much enlarged by a variety of Nazi decrees, and both the Special Courts and the People's Court were given jurisdiction to try a great variety of offenses. In 1936, for example, the smuggling of property out of Germany was proclaimed an offense against the national economy, and the People's Court was given jurisdiction over such cases. In 1940, a new decree defined the jurisdiction of the Special Courts and People's Court, and all sorts of offenses, such as evasion of conscription and listening to foreign broadcasting stations, were brought within their purview.

Toward the end of the war, by a decree of February 1945, emergency civil courts martial (Standgerichte) were set up in areas "menaced by the approaching enemy." Each consisted of three members appointed by the Reich Defense Commissar, usually the Gauleiter (regional leader) of the district; the president was a professional judge, who sat with one associate judge from the Nazi Party, and one from the Wehrmacht or SS. These courts martial could only condemn the accused to death, acquit him, or transfer the case to a regular tribunal.

Thierack was president of the People's Court prior to his appointment as Reich Minister of Justice. He was then succeeded by Freisler, the former under secretary of the Ministry of Justice, who remained as president until nearly the end of the war, when he was killed in an air raid. The defendant Engert was vice president of the People's Court prior to his transfer to the Ministry of Justice in 1942. The defendant Nebelung was president of the Fourth Senate of the People's Court. The defendant Petersen, the only nonlawyer in the dock, was an SA Obergruppenfuehrer (lieutenant general) who sat as a lay judge on many occasions in the First and Special Senates of the People's Court.

Three of the defendants were judges of the Special Courts. The defendant Cuhorst was president of the Special Court in Stuttgart, and the defendant Rothaug was president of the Special Court in Nuernberg. The defendant Oeschey also sat on the Special Court in Nuernberg and succeeded Rothaug as its president when the latter became a public prosecutor. Oeschey was also president of the emergency civil court martial at Nuernberg.

4. *Public prosecutors*—The prosecution of criminal offenses, under the Third Reich, was handled by a special group of state attorneys (Staatsanwaltschaft) directed by the Ministry of Justice. Increasingly under the Third Reich there was interchange of personnel among judges and prosecutors.

The defendant Rothaug, for example, left the bench of the Special Court at Nuernberg to become a senior public prosecutor of the Reich (Reichsanwalt). The defendant Barnickel also held

this title. The defendant Joel, in 1943, left the Ministry of Justice and became the public prosecutor of the district court of appeals for Westphalia, at Hamm.

The most important prosecutor among these defendants, however, was Ernst Lautz, Chief Public Prosecutor of the Reich (Oberreichsanwalt). In this capacity, Lautz prosecuted many important cases before the People's Court.

COUNT ONE

THE DESTRUCTION OF LAW AND JUSTICE IN GERMANY

I turn now to an examination of the means by which the defendants and their colleagues seized control of Germany's judicial machinery and turned it into a fearsome weapon for the commission of the crimes charged in the indictment.

The destruction of law in Germany was, of course, part and parcel of the establishment of the Third Reich dictatorship. Initially, the dictatorship arose out of the decrees in the early part of 1933 which suspended the constitutional guaranties of freedom and vested Hitler's cabinet with legislative power, unrestrained by constitutional limitations. These early decrees put an end to law as we know it in a democracy.

But much more had to be accomplished in order to achieve a dictatorship of the proportions envisaged by the authors of the Third Reich. Freedom of the ballot had to be suppressed so that a false veneer of electoral approval could be spread over the Nazi edifice. The civil service had to be purged of dissident officials. An ubiquitous and ruthless police system had to be created. A multitude of other measures were necessary. But, above all, law and justice had to be utterly stamped out.

At first blush, the reason for this may not appear. The Nazi cabinet could decree any law it wanted to with the flourish of a pen. The courts, unless they were bold enough to deny the very basis of Hitler's authority, which they did not do, were bound to punish violations of these laws. Was this not enough for even Hitler's purposes?

The answer is twofold. Particularly in the early years of the Third Reich, Hitler's government pursued aims and employed methods which it did not, at that time, see fit to authorize by formal, public legislation. The regime was not yet strong enough, externally or internally, to face the storm of disapproval which such legislation would have encountered. The Nazi government thought it wise to pursue these aims and employ these methods outside of, and often in violation of, the letter and spirit of the law. And it did not wish to be embarrassed or obstructed by an

independent judiciary respectful only to the law. The outcome of the Reichstag fire trial, for example, was highly embarrassing and promptly bore sinister fruit in the creation of the People's Court.

But there was another and much more fundamental reason. The ideology of the Third Reich was totally incompatible with the spirit of the law. It could not live under law, and the law could not live under it. To take but one example: even under stringent anti-Jewish legislation, there were bound to be situations where an overgreedy German in a civil suit or an overzealous police official in a criminal case had erroneously haled a Jew into court. In other words, even under Nazi legislation, there were bound to be cases when the Jew was legally right. Yet, it was unthinkable that a German court should exalt the Jew and discredit the German with a decision in favor of the Jew. Such perplexing problems could be dealt with only by courts which were not true courts at all, and which could be trusted to suppress the law and to render an ideological judgment or, as was done later, to declare the Jew to be an animal beyond the judicial pale entirely, who could not, any more than a wrongfully beaten dog, ask judicial intervention or protection.

This sort of problem was far more delicate in the case of the Poles, whom the Nazis chose to regard as less than human but more than Jewish. Later on in this case, we will, I think, derive some macabre humor from the documentary spectacle which some of these defendants made of themselves in vainly wrestling with the insoluble problem of how to achieve a certain amount of legal order and stability in occupied Poland, without at the same time giving the Poles any true law on which they could rely.

In short, the very idea of "law" was inimical to the ideology of the Third Reich, and it is not surprising that its principal authors recognized this fact at a very early date. In 1930, Hitler himself declared with reference to a court decision against certain Nazis—

> "We can assure the judges that, if national socialism assumes power, they will be fired without any pension." [1]

Joseph Goebbels expressed the same thought even more bluntly in 1934 after the Nazis were in power—

> "We were not legal in order to be legal, but in order to rise to power. We rose to power legally in order to gain the possibility of acting illegally." [2]

Later on in this case, the Tribunal will have offered to it documents which speak at length about the creation of a new, National

[1] Voelkischer Beobachter, 27 August 1930.
[2] Deutsche Allgemaine Zeitung, 28 November 1934.

Socialist system of law. By then, it will be apparent, I believe, that a "National Socialist system of law" is a preposterous contradiction in terms. It never was an objective of the Third Reich to create any system of law. On the contrary, it was its fundamental purpose to tear down every vestige of law in Germany, and to replace it with a mere bureaucracy which would mete out reward and punishment in accordance with the tyrannical ideology and tactical necessities of the dictatorship. The one-time sage of Nazi jurisprudence, the late Dr. Hans Frank, summed this up aptly in 1935 (*NG–777, Pros. Ex. 19*)—

> "National socialism is the point of departure, the content, and the goal of the legal policies of the Third Reich." [1]

And the defendant Schlegelberger expressed the same thought in 1936 (*NG–538, Pros. Ex. 21*)—

> "Accordingly there can be no doubt that now the moral order and ideology [Weltanschauung], as recognized in the Party program, has to be taken into consideration in the interpretation and application of every norm of the existing law." [2]

We may now retrace some of the steps which the law lords of the Third Reich took to turn the judicial system into a subservient but effective agent of the regime. Some of these we have already noted. The centralization of the administration of justice in the Reich government, the vesting of over-all authority in the Reich Ministry of Justice, and the creation of extraordinary courts were essential steps in the process. Standing alone, these acts might have been unobjectionable, though the creation of special courts was expressly prohibited by article 105 of the Weimar constitution. But these first moves were but the prelude to a series of deadly thrusts at the vitals of the judicial system. The early history of this organized attack on the fundamentals of law is summarized in the decision of the International Military Tribunal—

> "Similarly, the judiciary was subjected to control. Judges were removed from the bench for political or racial reasons. They were spied upon and made subject to the strongest pressure to join the Nazi Party as an alternative to being dismissed. When the Supreme Court acquitted three of the four defendants charged with complicity in the Reichstag fire, its jurisdiction in cases of treason was thereafter taken over and given to a newly established 'People's Court' consisting of two judges and five officials of the Party. Special Courts were set up to try political crimes and only Party members were appointed as judges. Persons were arrested by the SS for political reasons, and detained in prisons and concentration camps; and the

[1] Speech before the NSDAP congress, 14 September 1935; Dokumente der Deutschen Politik, volume 3, page 315.

[2] *A Nation Beholds Its Rightful Law*, lecture at the University of Rostock, 13 February 1936.

judges were without power to intervene in any way. Pardons were granted to members of the Party who had been sentenced by the judges for proved offenses. In 1935, several officials of the Hohenstein concentration camp were convicted of inflicting brutal treatment upon the inmates. High Nazi officials tried to influence the court, and after the officials had been convicted, Hitler pardoned them all. In 1942, 'judges' letters' were sent out to all German judges by the government, instructing them as to the 'general lines' that they must follow." [1]

The destruction of the judicial process continued throughout the era of the Third Reich. The period from the beginning of the new regime in 1933 until the outbreak of the war was characterized by the rise of special tribunals, and the steady decrease of procedural guaranties. After 1939, the war accelerated the conversion of criminal justice into dictatorial administrative procedure until, at the end of the war, all resemblance to legal process had vanished. We turn now to an examination of the particular steps in the process.

a. 1933—1939

Immediately after the seizure of power, the Nazis struck hard at the independence and integrity of the judiciary by dismissing or demoting politically unreliable judges and officials of the Ministry of Justice. The temporary decree of 7 April 1933, under which this was done, provided that—

"Officials, whose former political activity does not offer a guarantee that they, at all times without reservation, act in the interest of the national state, can be dismissed from service. For a period of 3 months after dismissal, they are accorded their former salary. From this time on, they receive three-fourths of their pension and corresponding survivor's benefits." [2]

In 1937 similar language was embodied in permanent legislation in the Civil Service Act.[3] The result of these measures was the elimination of all Jews and part-Jews, Social Democrats, and other opponents of the Nazi regime, from the bench and from the staff of the Ministry of Justice.

Substantive criminal law during this period was radically affected by the introduction of the authoritarian ideology of the Third Reich, and the concept of the criminal as the enemy of the nation. The prime purpose of the new criminal provisions was to make the new holders of power secure against all competition or

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[1] Trial of the Major War Criminals, *op. cit.*, page 179.

[2] 1933 Reichsgesetzblatt I, 175. This decree is one of over 40 laws and decrees collected by the prosecution and introduced as Document NG–715, Prosecution Exhibit 112. Most of these are reproduced chronologically in section IV B below. See footnote 1, page 160.

[3] 26 January 1937, Reichsgesetzblatt I, 39, 71.

attack. The decree for the protection of the German people[1] initiated a never-ending stream of legislation intended to protect the persons, institutions, and symbols of the Third Reich against all attacks of political enemies. The field for the application of treason and high treason was vastly enlarged by investing the most preparatory and auxiliary acts with the character of treason. The range of application of the death penalty, in the past restricted to murder and some cases of homicide, was greatly widened. Hand in hand with the sharpening of penalties and the extension of the scope of punishable atrocities went the attempt to widen the scope of German criminal jurisdiction beyond its territorial limits. The new "race defilement" prohibitions for example were made applicable to offenses committed abroad.[2]

Examples of such draconic and tyrannical decrees are legion. The decree of 24 April 1934 provided that the death penalty, or hard labor for life, or hard labor for 2 years or more, should be inflicted—

"1. If the act aimed at establishing or maintaining an organized combination for the preparation of high treason; or

"2. If the act was directed toward making the armed forces or police unfit for the execution of their duty to protect the stability of the German Reich from internal or external attacks; or

"3. If the act was directed toward influencing the masses by making or distributing writings, recordings, and pictures, or by the installation of wireless, telegraph, or telephone; or

"4. If the act was committed abroad or was committed in such a manner that the perpetrator undertook to import writings, recordings, or pictures from abroad for the purpose of distribution within the country."

By August 1938, this tendency had progressed to a point where the following acts were all made punishable by death:

"1. Whoever openly solicits or incites others to evade the fulfillment of compulsory military service in the German or an allied armed force, or otherwise openly seeks to paralyze or undermine the will of the German people or an allied nation to self-assertion by bearing arms;

"2. Whoever undertakes to induce a soldier or conscriptee in the reserves to disobedience, opposition, or violence against a superior, or to desertion or illegal absence or otherwise to undermine the discipline of the German or an allied military force; and

[1] Decree of the Reich President for Protection against Insidious Attacks on the Government of the Nationalist Movement of 21 March 1933, Reichsgesetzblatt I, page 135.

[2] 15 September 1935; Reichsgesetzblatt I, page 1146.

"3. Whoever undertakes to cause himself or another to avoid the fulfillment of military service entirely, or to a limited extent, or temporarily, by means of self-mutilation, or by means designed to deceive or by other methods." [1]

But the Nazi jurists were not content to sharpen the letter of the penal laws; they subverted the spirit and method of interpretation of the criminal law in order to enable the courts to impose punishment, outside the law, in accordance with the political ideology of the regime. Thus, in June 1935, article 2 of the penal code was amended to read as follows:

"Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of a penal law or the sound sentiment of the people, shall be punished. If no specific penal law can be directly applied to this act, then it shall be punished according to the law whose underlying spirit can be most readily applied to the act." [2]

At the same time, the following articles were added to the code of criminal procedure:

"Article 170a—If an act deserves punishment according to the sound sentiment of the people, but is not declared punishable in the code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of this penal law.

"Article 267a—If the main proceedings show that the defendant committed an act which deserves punishment according to the sound sentiment of the people, but which is not declared punishable by the law, then the court must investigate whether the underlying principle of a penal law applies to this act and whether justice can be helped to triumph by the proper application of this penal law." [3]

And, simultaneously, the Reich Supreme Court was ordered to set aside its prior decisions in order to bring the law into conformance with the ideology of the Third Reich. The decree is as follows:

"The Reich Supreme Court, as the highest German tribunal, must consider it its duty to effect an interpretation of the law which takes into account the change of ideology and of legal concepts which the new State has brought about. In order to be able to accomplish this task without having to show consideration for the decisions of the past brought about by other ideology and other legal concepts, it is ruled as follows:

[1] 17 August 1938; 1939 Reichsgesetzblatt I, page 1455.
[2] 28 June 1935; 1935 Reichsgesetzblatt I, page 839.
[3] 28 June 1935; 1935 Reichsgesetzblatt I, page 844.

"When a decision is made about a legal question, the Reich Supreme Court can deviate from a decision laid down before this law went into effect."

This tyrannical doctrine of "punishment by analogy" was given a sugar coating by Dr. Hans Frank (*NG–777, Pros. Ex. 19*):

"In the future, criminal behavior, even if it does not fall under formal penal precepts, will receive the deserved punishment if such behavior is considered punishable according to the sound sentiment of the people." [1]

But once again, Josef Goebbels was shameless enough to state the doctrine with complete frankness (*NG–417, Pros. Ex. 23*):

"While making his decisions the judge is to proceed less from the law than from the basic idea that the offender is to be eliminated from the community. During a war it is not so much a matter of whether a judgment is just or unjust, but only the decision is expedient. The State must protect itself in the most efficient way and wipe them out entirely * * *. One must not proceed from the law, but from the resolution that the man must be wiped out." [2]

On the administrative side, the prewar years were characterized by ever closer collaboration between Himmler's Gestapo and the Reich Ministry of Justice. In February 1937, Himmler directed that all Gestapo matters be made available to the district public prosecutors. The next month, the Reich Minister of Justice (Guertner) addressed a letter to all the district public prosecutors, calling attention to Himmler's directive and stating (*NG–323. Pros. Ex. 32*):

"In order to have this decree fulfill its purpose and in the interest of the closest possible collaboration between the office of the public prosecutor and the authorities of the Gestapo, I hereby issue this supplementary order that in future, public prosecutors routinely address all requests for investigations to be conducted on the basis of reports of political nature received by them directly, to the local and district police authorities *via the competent state police offices.* When in cases based on such reports, the necessary interrogations of the accused or the witnesses are procured by the court itself or by the expert of the prosecution, and the police authorities are not at all involved in the proceedings, I request that the state police offices be informed of the proceedings as soon as possible." [3]

The German jurists, who collaborated so closely with Himmler's minions, were equally willing to protect "overzealous Nazis" against the penal consequences of their worst excesses. Late in

[1] Speech before the NSDAP Congress, *op. cit.*, page 315.

[2] Speech before members of People's Court, 22 July 1942; reproduced below in section V C 2a.

[3] Reproduced below in section V C 1a.

1933 a group of "Storm Troopers" (SA) committed vicious assaults and tortures on some political prisoners who had been confined in the concentration camp of Kemna, near Wuppertal in the Ruhr. The description of this outrage by the Reich Minister of Justice reads as follows:

"In the camp, some of the prisoners were exposed to the severest mishandling.

"In most cases, shortly after their shipment had come in, and when they were being interrogated, they would be beaten, partly upon their bare bodies, with rubber cudgels, horsewhips, sticks, ox lashes, and other objects. In many cases they had to lie down over a special caning bench, or were forced down onto it by guards, and their mouths were kept shut or they were gagged with balls of paper, pieces of cloth, bags, or similar things, in order to prevent them from screaming. Other members of the guard in the meantime would begin to beat them up. Prisoners who fainted were kicked back to consciousness or had water thrown over them to wake them up and make them stand up again. After this, prisoners who were mistreated were frequently locked up in a small space under the stairway or in an elevator without being given any medical attention or food and drink. In some cases, the injuries the prisoners received from their beatings made it necessary to transfer them to hospitals.

"Several prisoners also were forced to eat unwashed herrings from the barrel, which had also been sprinkled with salt * * *. When they had finished the herrings, the prisoners, who were naturally suffering from tormenting thirst, were not allowed to have water brought them."

Proceedings against the storm troop leaders in a disciplinary tribunal of the Nazi Party ended in a mere reprimand and deprivation of the right to hold public office for 1 year. The files of the Ministry of Justice concerning this atrocious episode contain the recommendations of various officials, including the defendant Joel, that criminal proceedings against the perpetrators should be cancelled. This recommendation was adopted and forwarded to Hitler by Minister Guertner, who, for justification, pointed to the circumstances that the culprits were not experienced concentration camp guards, that the majority of the victims were Communists, that, in some cases, the victims had been obstinate and insubordinate, and that communism had an especially strong hold in the Wuppertal area.

b. 1939—1945

Before the outbreak of war, the main objective of Nazi penal innovations was to suppress internal opposition to the new regime, and to render life intolerable for the Jews. During the early years

of the war, the Nazi jurists were largely concerned with legal problems incident to the occupation of Poland, France, and the other nations overrun by the Wehrmacht. The extension of German law to the occupied areas, and the outrages committed thereunder, constituted war crimes and crimes against humanity on a grand scale, which will be described in due course. German criminal law was also applied extensively to acts committed outside the Reich, even when committed by foreigners.[1] Acts committed by a foreigner outside the Reich could even constitute treason against the Reich.

But the war also brought a mass of new criminal legislation within Germany. This new legislation was influenced by the necessities of war, but also contained matured concepts of National Socialist criminal policy. The principal aim was to guarantee the security of the Nazi regime, and bolster the economic and military strength of Germany, through extremely harsh criminal punishments. The chief weapon was the unsparing and almost indiscriminate use of capital punishment.

Later on, as Germany's military situation worsened, the death penalty became an ordinary sentence for a great variety of offenses. The increased severity of air raids resulted in capital punishment or long prison sentences for crimes committed during black-outs, even very minor looting. Economic hardship and shortages of materials were accompanied by laws prescribing penal servitude, or even death, for anyone who destroyed or removed food or other supplies. Toward the end of the war, a desperate attempt was made to cope with the growing defeatism by imposing the death penalty for spreading rumors, listening to foreign broadcasts and even for the most minor derogatory remarks about the Hitler regime or pessimism concerning Germany's chances of military success.

The war brought new and extraordinary procedures, as well as new crimes. Despite all that had been done in prewar years, the courts were still handing down some sentences which, in the eyes of Berlin, were too mild, and once such a final judgment had been given, nothing could be done about it. The whole idea of the finality of judgments had long been a thorn in the flesh of the Nazi jurists. Accordingly, 2 weeks after the outbreak of war, a decree[2] was promulgated which provided that, if the Chief Reich Prosecutor had "serious misgivings" concerning the justice of a sentence, he could, within 1 year thereafter, file an extraordinary appeal and secure a second trial of the case. The officials of the Reich Ministry of Justice, who controlled the public prosecutors,

[1] 6 May 1940, Reichsgesetzblatt I, page 754.
[2] 16 September 1939, Reichsgesetzblatt I, page 1841.

reviewed the criminal decisions and directed the chief prosecutor to file appeals in cases where they deemed the punishment insufficient. If the first decision had been rendered by the regular courts, the second trial was held by the Special Penal Senate of the Reich Supreme Court. If the first decision had been made by the People's Court, on the other hand, the second trial was held by the Special Senate of the People's Court.

In 1940, an analogous procedure was authorized[1] under which the Chief Public Prosecutor of the Reich could lodge with the Supreme Court a petition for "nullification" against final judgments of the regular criminal courts or the Special Courts "if the judgment is not justified because of an erroneous application of law on the established facts." The Supreme Court was authorized either to render a new judgment or to send the case back to a lower court for a new trial under binding instructions as to the legal principles which should govern. Not content with this elaborate system for punitive double jeopardy, the right of the Chief Public Prosecutor to attack final judgments by means of the nullification procedure was again enlarged in 1942, by extension to questions of law and to the adequacy of the punishment.[2] This new regulation provided the prosecution, but not the defense, with an unlimited right to ask for a new trial within one year after the decision had been rendered.

On the day of the attack on Poland, a new assault on the tenure and independence of the judiciary was made.[3] By this new decree, judges were obliged to take any assignment whatsoever, as judge, prosecutor, or administrative official, and on any regular or Special Court, according to the orders of the Reich Minister of Justice. Similar powers were given to the presidents of the district courts of appeal within their respective districts.

It might have been thought that, after the purge of Jewish and politically dissident judges in 1933, the permanent subjection of the judiciary to dismissal for political reasons in 1937, and their complete subordination to the Reich Ministry of Justice in 1939, Hitler would have at last obtained a suitable judiciary for his most extreme purposes. Apparently, however, pre-Hitler legal training sometimes had the unfortunate effect that even trusted Nazi judges failed in their decisions to measure up to the ideology and expectations of the Third Reich. At all events, something like a crisis in the German judicial system occurred in 1942.

On 26 April 1942 Hitler made a speech before the Reichstag in which he reviewed the effects of the hard winter of 1941–1942 and exhorted the German people to even greater sacrifices in order

[1] Decree of 21 February 1940, Reichsgesetzblatt I, page 407.
[2] Decree of 13 August 1942, Reichsgesetzblatt I, page 508.
[3] Decree of 1 September 1939, Reichsgesetzblatt, page 1658.

to achieve victory. In the course of this speech, Hitler made certain remarks about the German legal profession and the administration of justice which had an immediate and pronounced effect. Hitler said (*NG–752, Pros. Ex. 24*):

"I do expect one thing: that the nation gives me the right to intervene immediately and to take action myself wherever a person has failed to render unqualified obedience and service in the performance of the greater task which is a matter of to be or not to be. The front and the homeland, the transport system, administration, and justice must obey only one idea, that of achieving victory. In times like the present, no one can insist on his established rights, but everyone must know that today there are only duties.

"I therefore ask the German Reichstag to confirm expressly that I have the legal right to keep everybody to his duty and to cashier or remove from office or position, without regard for his person or his established rights, whoever, in my view and according to my considered opinion, has failed to do his duty.

* * * * * * *

"Furthermore, I expect the German legal profession to understand that the nation is not here for them, but that they are here for the nation; that is, the world, which includes Germany, must not decline in order that formal law may live, but that Germany must live, irrespective of the contradictions of formal justice. To quote one example, I fail to understand why a criminal who married in 1937, ill-treated his wife until she became insane and finally died as a result of the last act of ill-treatment, should be sentenced to 5 years in a penitentiary at a moment when tens of thousands of honorable German men must die to save the homeland from annihilation at the hands of bolshevism.

"From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour." *

Immediately after Hitler's speech, the Reichstag adopted the following resolutions:

"There can be no doubt in this present state of war, when the German nation wages its fight for its very existence, that the Fuehrer must exercise the right, which he claims, to do everything which serves or helps to achieve victory. Therefore, the Fuehrer, by his authority as the leader of the nation, supreme commander of the armed forces, head of the government, and in supreme possession of all executive power, as supreme

* Extracted from Voelkischer Beobachter, 27 April 1942; reproduced below in section V C 2a.

law lord, and as leader of the Party, has to be in a position to enforce, with all means which he may consider suitable, every German's duties, whether he might be a common soldier or an officer, a subordinate or high civil servant or a judge, a leading or subordinate functionary of the Party, a worker or an employee. In case of violations of duties, he has the right to impose the proper penance, after a conscientious examination of the case. This can be done without consideration for the so-called civil service rights. In particular, he may remove anyone from his office, rank and his position, without resort to the established procedures." [1]

This menacing blast from the Fuehrer, and the resolution of the Reichstag, wiped away the last remains of judicial independence in Germany. Furthermore, within a few months a complete reorganization of the upper levels of the Ministry of Justice took place. Schlegelberger, who had seen the storm coming and made desperate efforts to meet Hitler's wishes, was nevertheless retired and replaced by Thierack. A special Hitler decree in August 1942 gave the new Reich Minister sweeping powers to bring the administration of justice into conformity with the needs of the regime; it read:

"A strong administration of justice is necessary for the fulfillment of the tasks of the Greater German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice, and to take all necessary measures in accordance with the Reich Minister and Chief of the Reich Chancellery and the Leader of the Party Chancellery. He can hereby deviate from any existing law." [2]

At the same time, Roland Freisler left the Justice Ministry to become president of the People's Court, and the defendant Rothenberger took Freisler's old job as under secretary. Earlier in the year, Rothenberger, previously president of the district court of appeals at Hamburg, had attracted the Fuehrer's attention by submitting to him a long thesis on "judicial reform." This thesis is a curious document; it speaks at length of the honor and dignity of the judges' function and of the need for justice as the foundation of the Third Reich, but the reason it won the Fuehrer's approval can perhaps be more clearly inferred from the two following quotations (*NG–075, Pros. Ex. 27*):

"The present crisis in the administration of justice today is close to such a climax. A totally new conception of the administration of justice must be created, particularly a National

[1] Resolution of the Greater German Reichstag, 26 April 1942, "Deutsche Justiz," 1942, page 283.
[2] 20 August 1942, 1942 Reichsgesetzblatt, page 535.

Socialist judiciary, and for this the druggist's salve is not sufficient; only the knife of the surgeon, as will later be shown, can bring about the solution.

"The criterion, however, for the functions of justice, and particularly of the judge in the National Socialist Reich, must be a justice which meets the demands of national socialism.

"He who is striding gigantically toward a new world order cannot move in the limitation of an orderly administration of justice. To accomplish such a far-reaching revolution in domestic and foreign policy is only possible if, on the one hand, all outmoded institutions, concepts, and habits have been done away with—if need be, in a brutal manner—and if, on the other hand, institutions that are in themselves necessary but are not directly instrumental in the achievement of a great goal and which, in fact, impede it, are temporarily thrust to the background. All clamor about lawlessness, despotism, injustice, etc., is at present nothing but a lack of insight into the political situation * * *."

At the time he was appointed Minister, Thierack also became the president of the German Academy of Law, and of the National Socialist Association of Jurists. The temper of the new administration of justice was reflected in Thierack's announcement to the German Academy of Law as follows:

"The formulation of law is not a matter of science and a goal in itself, but rather a matter of political leadership and organization. Therefore, the activities of the Academy relating to the formulation of law must be coordinated with the aims of political leadership." *

At the time of their appointments, Thierack and Rothenberger envisaged an ambitious program for simplifying the hierarchy of German courts, drastically reducing the number of judges, and "modernizing" the education and training of judges in accordance with prevailing political thought. Much of this program was never realized, but Thierack and Rothenberger did succeed in developing new devices for direct control of judicial decisions by the government. This has been also foreshadowed in Rothenberger's thesis submitted to Hitler:

"* * * a judge who is in direct relation of fealty to the Fuehrer must judge 'like the Fuehrer.' In order to guarantee this, a direct liaison officer without any intermediate agency must be established between the Fuehrer and the German judge, that is, also in the form of a judge, the supreme judge in Germany, the 'Judge of the Fuehrer.' He is to convey to the German judge the will of the Fuehrer by authentic explanation of the

* Periodical of Academy for German Law, 1 September 1942, page 44.

laws and regulations. At the same time he must, upon the request of the judge, give binding information in current trials concerning fundamental political, economic, or legal problems which cannot be surveyed by the individual judge."

In part, this executive control was accomplished by conferences between the prosecutors and the judges, in which the prosecutor advised the judge what measure of sentence the Ministry of Justice thought fitting in a particular case. But an even more effective device was a series of confidential circulars to the judges known as Judges' Letters (Richterbriefe) which Thierack dispatched, under his own signature as Minister of Justice, to the judges and prosecutors throughout the German judicial system. Thierack announced this forthcoming series in September 1942 in the following letter:

"To aid the judge in fulfilling his high duty in the life of our people, I decided to publish the Judges' Letters. They shall be distributed to all German judges and prosecutors. These Judges' Letters will contain decisions that seem to be especially worthwhile mentioning, on account of result or argumentation. On these decisions, I will show how a better decision might or should have been found; on the other hand, good, and for the national community, important decisions shall be cited as examples.

"The Judges' Letters are not meant to create a new casuistry, which would lead to a further ossification of the administration of justice and to a guardianship over the judges. They will rather tell how judicial authorities think National Socialist justice should be applied and thereby give the judge the inner security and freedom to come to the right decision.

"The contents of these letters are confidential; the chief of an office shall keep them, and let every judge and prosecutor take notice of them against receipt.

"For the publication of the Judges' Letters, the collaboration of all the judges and prosecutors is needed. I expect that suitable decisions from all branches of justice will be presented to me. On publication, neither the judge nor the deciding court will be named.

"I am convinced that the Judges' Letters will help to influence the administration of justice uniformly according to National Socialist doctrines."

The first letter was published on 1 October 1942. In a sort of hortatory prelude, many thoughts and ideas from the Rothenberger thesis were embodied. Thereafter, a number of criminal cases and the sentences therein imposed were set forth and commented upon.

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Four cases dealing with crimes committed during black-outs were described; those decisions in which the death penalty had been imposed were approved, the others were all criticized for being too mild. Six cases dealing with sex offenses followed; the sentences in five of them were condemned as utterly inadequate. No case was cited where the sentence was thought too severe.

At the end of the letter, three cases dealing with Jews were discussed in great detail. One of these dealt with the racial law which required all Jews to adopt the surname "Sarah" or "Israel" according to their sex. A Jewish woman had neglected to apply to the telephone company to change her listing by the addition of the name "Sarah." The district court sentenced her to a fine of thirty reichsmarks, or 19 days in prison. The court set forth in its opinion that certain other courts had construed the law as not requiring an application to change a telephone listing, and that the Jewess might have relied on these decisions. Thierack's letter described the Jewess' action as "typical Jewish camouflage in her business dealings" and stated that the lack of uniformity in the decisions in no way justified leniency in the punishment.

In the second case, a special coffee ration had been distributed in a certain town, in the autumn of 1940. A large number of Jews had applied to receive the ration. However, since Jews were automatically excluded from the distribution, they did not receive any coffee. The following year, the food authorities imposed a fine on the Jews for the offense of having applied for the coffee; thereupon several hundred Jews sought relief against the fine in the district court. The judge rescinded the fine on the basis of the statute of limitations and for other legal reasons, and expressed the opinion that the Jews had not committed any punishable act in merely applying for the coffee. On this decision, the Reich Minister's letter commented as follows (*NG–298, Pros. Ex. 81*) :

> "The ruling of the local court, in form and content, borders on embarrassing a German administrative authority to the advantage of Jewry. The judge should have asked himself the question: What is the reaction of the Jew to this 20-page-long ruling, which certifies that he and the 500 other Jews are right and that he won over a German authority, and does not devote one word to the reaction of our own people to this insolent and arrogant conduct of the Jews. Even if the judge was convinced that the food office had arrived at a wrong judgment of the legal position, and if he could not make up his mind to wait with his decision until the question, if necessary, was clarified by the higher authorities, he should have chosen a form for his ruling which, under any circumstances, avoided harming the prestige

of the food office and thus putting the Jew expressly in the right toward it."

In the third case, a wealthy young Jew had committed certain violations of the German foreign currency regulations. The district court, although it found certain extenuating circumstances, imposed a heavy fine on the Jew and sentenced him to 2 years' imprisonment. This decision particularly provoked the Reich Minister of Justice, who said (*NG–298, Pros. Ex. 81*):

"The court applies the same criteria for the award of punishment as it would if it were dealing with a German fellow citizen as defendant. This cannot be sanctioned. The Jew is the enemy of the German people, who has plotted, stirred up, and prolonged this war. In doing so, he has brought unspeakable misery upon our people. Not only is he of a different, but he is also of an inferior race. Justice, which must not measure different matters by the same standard, demands that just this racial aspect must be considered in the award of punishment. Here, where a profiteering transaction typical of the defendant as a Jew, and to the disadvantage of the German people, had to be judged, the verdict, in awarding punishment, must take into consideration in the first place that the defendant for years had deprived the German people of considerable assets. * * * This typical Jewish parasitical attitude required the most severe judgment and heaviest punishment."

Beginning with this issue in October 1942, the Judges' Letters were issued regularly and continued to be filled with exhortations to the utmost ruthlessness in the imposition of sentences. Later on, they were supplemented by Lawyers' Letters (Rechtsanwaltbriefe). As time went on, German criminal law and procedure scarcely retained any other elements than that of threatening wavering elements of the population into submission. The wholesale destruction of legal process culminated at the very end of the war in the creation of the emergency civilian courts martial, which have already been mentioned. These courts martial were given jurisdiction "for all kinds of crimes endangering the German fighting power or undermining the people's defensive strength"* and, if they found the defendant guilty, could impose only the death sentence. The end of the war cut short the life of these tribunals, after ten weeks of judicial terrorism.

Throughout the war, the administrative and penal branches of the Ministry of Justice continued to cooperate in protecting loyal followers of the Third Reich from criminal prosecution for their innumerable atrocities against Poles, Jews, and other "undesirable elements." At the successful conclusion of the Polish campaign,

* Decree on Courts Martial Procedure, 15 February 1945, Reichsgesetzblatt I, page 30.

an unpublished decree suspended all prosecutions against racial Germans in Poland for any punishable offenses which they might have committed against Poles during the Polish war "due to anger aroused by the cruelties committed by the Poles." In 1941, the defendant Schlegelberger assured Rudolf Hess that he would consider "benevolently" an amnesty in any particular case of atrocities committed after the conclusion of the Polish campaign. An example of this "benevolent consideration" may be worth noting. Two Germans, one of whom was a sergeant of police, shot two Polish priests in Poland in the spring of 1940 "for no reason other than hatred for the Catholic clergy." A Special Court imposed 15 years' penal servitude for manslaughter. After 2 years of the sentence had been served, Himmler asked that the Germans be pardoned, and that it be made possible for them to "win their reprieve" through service at the front. At Himmler's request, the Ministry of Justice reduced the sentence to 5 years, and both men were released from confinement and assigned to duty in a Waffen SS [armed SS] unit.

After the advent of Thierack and Rothenberger, cooperation between the Ministry of Justice and Himmler's police became even closer. On 18 September 1942 Thierack and Rothenberger held a long conference with Himmler and other high ranking SS leaders at Hitler's headquarters. Thierack's notes of the meeting included the following (*654–PS, Pros. Ex. 39*):

"1. Correction by special treatment at the hands of the police in cases where judicial sentences are not severe enough. On the suggestion of Reichsleiter Bormann, the following agreement was reached between the Reich Leader SS, and myself:

a. In principle, the Fuehrer's time is no longer to be burdened with these matters.

b. The Reich Minister of Justice will decide whether and when special treatment at the hands of the police is to be applied.

c. The Reich Leader SS will send the reports, which he sent hitherto to Reichsleiter Bormann, to the Reich Minister of Justice.

d. If the views of the Reich Leader SS and those of the Reich Minister of Justice agree, the final decision on the case will rest with them.

e. If their views are not in agreement, Reichsleiter Bormann will be asked for his opinion, and he will possibly inform the Fuehrer.

f. In cases where the Fuehrer's decision on a mild sentence is sought through other channels (such as by a letter from a

Gauleiter) Reichsleiter Bormann will forward the report to the Reich Minister of Justice. The case will then be decided as already described by the Reich Leader SS and the Reich Minister of Justice.

"2. Delivery of antisocial elements from the execution of their sentences to the Reich Leader SS to be worked to death. Persons under security detention—Jews, gypsies, Russians, and Ukrainians, Poles with more than 3-year sentences; Czechs and Germans with more than 8-year sentences—will be turned over without exception according to the decision of the Reich Minister of Justice. First of all, the worst antisocial elements among those just mentioned are to be handed over. I shall inform the Fuehrer of this through Reichsleiter Bormann.

* * * * * * *

"14. It is agreed that, in consideration of the intended aims of the government for the clearing up of the eastern problems, in future Jews, Poles, gypsies, Russians, and Ukrainians are no longer to be tried by the ordinary courts, so far as punishable offenses are concerned, but are to be dealt with by the Reich Leader SS. This does not apply to civil lawsuits, nor to Poles whose names are registered for, or entered in the German Racial Lists." *

We said at the outset that the defendants and their colleagues accomplished the complete overthrow of justice and law in Germany. The foregoing recital of the steps in this process and the proof to be introduced will, we think, make this abundantly clear. The Third Reich became a realm of despotism, death, and finally, of despair.

But the very perversion and brutality of the Nazi penal system may lead us to think of it as aimless cruelty, which it is not. Fanatical, ruthless, and even unbalanced as the German leaders might have been, they were never purposeless. Law and justice were destroyed for a reason. They were destroyed because by their very nature they stood athwart the path of conquest, destruction, and extermination which the lords of the Third Reich were determined to follow. The Nazi Special Courts, double jeopardy, the flouting of the letter and the spirit of the law—those things were not ends in themselves. They were methods deliberately adopted for the purpose of causing death, torture, and enslavement. Now that we have traced the steps in the conspiracy, it is timely that we examine the murders and other atrocities which were its intended and actual outcome.

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* Reproduced below in section V C 3 a.

COUNTS TWO AND THREE

WAR CRIMES AND CRIMES AGAINST HUMANITY

Two facts stand out when we study the crimes charged in this indictment. First, the diabolical novelty presented by the designed use of a nation's system of justice and its machinery by the governing power of that nation, as a weapon of destruction—an instrumentality of murder, kidnapping, slavery, torture, brutality, and larceny. Second, the mass character, and therefore the enormity of the crimes committed by these defendants with this new weapon—this headman's axe fashioned from the scales of justice in a forge, stoked with national greed and racial bigotry and hatred, fanned by blasts of directed propaganda and shaped by the calculated blows of designedly infamous legislation, controlled and dominated courts, and a studied effort to make ineffective or to eliminate completely, the defensive aids customarily enjoyed by defendants in the courts of civilized nations.

These facts in turn have the definite effect of confusing and dulling the minds of lawyers and laymen alike, so that they do not clearly understand either the right and the power of this Tribunal to try these defendants under international law or the simple standards by which their crimes can be measured and judged.

It follows, therefore, that we should now pause at the threshold of this trial to make clear the authority under and by which we act, and the time honored standards under which we shall assert and prove the guilt of these defendants.

A concise review of recent history will be helpful and therefore proper.

On 30 October 1943 Prime Minister Churchill, Premier Stalin, and President Roosevelt issued their Moscow Declaration. That part which is pertinent to an understanding of what we do here reads as follows:

> "The above Declaration is without prejudice to the case of the major criminals whose offenses have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies."*

It is clear that those criminals whose offenses have no particular geographical localization, are to be "punished," not necessarily tried, by the "joint decision," not necessarily a joint or international tribunal, of the Allies. The basic policy to punish is thus clearly laid down.

Thereafter, the same three powers met at Potsdam after the

* Complete text of the Moscow Declaration is reproduced in the preface pages of this volume. See table of contents.

unconditional surrender of Germany. At this meeting representatives of the French nation also participated. There agreements and understandings relative to the future policies to be pursued by those governments toward Germany and war criminals were reached. Two of them should be recalled, because they throw light upon the stature and the international character of this Tribunal and also of the purpose behind the definition of the crimes for the commission of which these defendants have been indicted and are being tried.

In the statement released at Potsdam on 2 August 1945, they said:

> "The three governments have taken note of the discussions which have been proceeding in recent weeks in London * * * with the view to reaching agreement on the methods of trial of those major war criminals whose crimes under the Moscow Declaration of October 1943 have no particular geographical localization, * * * they regard it as a matter of great importance that the trial of those major criminals shall begin at the earliest possible date."

We thus see that the three powers have now advanced from their thinking at Moscow, in that they have determined the method by which these criminals are to be "punished." But the method of trial is still to be the result of the "joint decision" of the powers who signed the Moscow Declaration, concurred in by the representatives of the French nation. The decision to try by judicial proceeding came six days later at London.

But another significant decision was reached at Potsdam. The powers concerned reached agreement on "The Political and Economic Principles to Govern the Treatment of Germany in the Initial Control Period." Among these we find the following which are pertinent to an understanding of what we do here.

> "A. Political Principles
>
> "1. In accordance with the agreement, * * * supreme authority in Germany is exercised, on instructions from their respective governments, by the commanders-in-chief of the armed forces (of the governments concerned) each in his own zone of occupation and also jointly, in matters affecting Germany as a whole, in their capacity as member of the Control Council.
>
> "2. So far as practicable, there shall be uniformity of treatment of the German population throughout Germany.
>
> "3. The purposes of the occupation of Germany by which the Control Council shall be guided are:
>
> * * * * * * *

"(III) To destroy the National Socialist Party and its affiliated and supervised organizations, to dissolve all Nazi institutions, to insure they are not revived in any form, * * *.

"(IV) To prepare for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life in Germany."

On 8 August 1945 the powers which were represented at Potsdam, through their equally accredited representatives, brought forth at London an agreement which in its preamble refers to "major war criminals," and in article I, to "war criminals." The agreement also contemplated an International Military Tribunal for the trial of such criminals and for a charter to define the constitution, jurisdiction, and functions of that Tribunal, which charter was in fact made a part of said agreement on the same day. Two things deserve our attention at this point. The charter defined crimes and thus fixed an objective standard by which "war criminals" were to be identified. The adjective "major" was thereupon immediately relegated to the role of superficial invective or at most to that of fixing a comparative standard of criminal importance, measured solely by the judgment of the committee of chief prosecutors or the practical and mechanical necessities of the actual trial. The crimes of most of these defendants are so great that if they choose, they may consider themselves slighted by the committee of chief prosecutors. The prosecution in this case shall do its ethical best to see that they were not fortunate.

On 20 December 1945, the same three Allied Powers which had issued the Moscow Declaration, and the same four Powers which had reached the Potsdam Agreements and entered into the London Agreement and created the Charter of the International Military Tribunal, also enacted Law No. 10 of the Control Council for Germany.

Law No. 10 provided for this Tribunal and the method by which it was thereafter to be brought into existence; defined the crimes over which it exercises jurisdiction, and adequately described the persons it had jurisdiction to try and punish and the punishment it was authorized to impose. The preamble clearly discloses that Law No. 10 was enacted and therefore this Court was created to accomplish two purposes, first—

"In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945 and the Charter issued pursuant thereto,"

and second,

"In order to establish a *uniform legal basis* in Germany for the prosecution of war criminals and other similar offenders,

other than those dealt with by the International Military Tribunal."

Although this preamble does not expressly say so, it is clear that the second purpose is to implement the Potsdam Agreement, which required "uniform treatment of the German population throughout Germany" as an inter-allied multipowered policy. The policy was thus made inter-allied. The method of implementing it was all that was delegated as a matter of right, not power, to the several contracting nations acting within their zones of occupation through their zonal commander. This Tribunal therefore is international in its source as well as in its jurisdiction over subject matter and persons.

On 30 September and 1 October 1946, approximately 13 months after the London Agreement and Charter were created and more than 9 months after Law No. 10 was promulgated, the International Military Tribunal rendered its decision and judgment upon the individual defendants whom it found guilty.

After the judgment of the International Military Tribunal on 18 October 1946, the Zone Commander of the American Zone, for the purpose of implementing Law No. 10 of the Inter-Allied Control Council for Germany, and to carry out the purposes therein stated and previously agreed upon by the four signatory powers at London and Potsdam, promulgated Ordinance No. 7, concerning the organization and powers of certain military tribunals. That ordinance brought this Tribunal into existence and laid down many of the procedures under which it operates, but it did not restrict nor limit its jurisdiction over persons or subject matter set out in Law No. 10 nor did it define new crimes.

Nothing that has been done since the four Powers adopted the London Agreement and Charter has operated to materially limit the jurisdiction over persons and subject matter of this Tribunal from that conferred upon the International Military Tribunal by those international instruments.

A study of the charter, Law No. 10 and Ordinance No. 7 discloses that Law No. 10, article II, paragraph 5 tolls any and all statutes of limitations for the period from 30 January 1933 to 1 July 1945. It also contains provisions which have the effect of depriving this Tribunal of recognizing as a valid defense in this trial any immunity, pardon or amnesty granted to any of these defendants by the Nazi government. This is a limitation not imposed by the charter upon the International Military Tribunal.

Likewise, Ordinance No. 7, article X is in no wise a limitation upon the powers of this Court to determine the guilt or innocence of these defendants.* It reads as follows:

* Complete text of Ordinance No. 7 is reproduced in the preface pages of this volume. See table of contents.

"The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

This provision is couched in language calculated to adequately safeguard the rights of defendants, so that, by the same reasoning, it cannot be said to operate as an oppressive rule, which in any material manner unduly restricts this Court in making its own ultimate determination as to the guilt or innocence of these defendants. It is a reasonable rule designed to avoid undue repetitious production of acknowledged facts in the trial of this cause. As such it does not detract from the dignity of this Court nor affect the concurrent nature of the jurisdiction which this Court enjoys in relation to the International Military Tribunal.

In conclusion, therefore, we take the position that this Tribunal, like the International Military Tribunal, derives from the "joint decision" of the signers of the Moscow Declaration and of the French nation; that the subject matter over which it has jurisdiction, the crimes which it has jurisdiction to try, are codified by the same powers, and that it has jurisdiction over the same persons, those persons who are charged by indictment with having committed these crimes. These are the basic elements upon which concurrent jurisdiction as a matter of law has always been determined to exist by all courts which have had occasion to decide this question.

We have belabored this question of the equal dignity and concurrent jurisdiction of this Tribunal with that of the International Military Tribunal for reasons which are legal and also arise from the standpoint of policy. To us they seem important and because they do, a due regard for the candor owed to this Tribunal and to the world obligates us to state them.

MR. LAFOLLETTE: First, we believe that this Tribunal has the right and power to decide all questions of law, other than the "criminal nature" of those groups or organizations which the International Military Tribunal found to be criminal, and as distinguished from the ultimate facts set out in Ordinance No. 7, article X, as original questions of law which it has the right to decide, contrary to the decisions reached by the International Military Tribunal, if it is convinced that a proper interpretation

of the Charter and Law No. 10, or of the ultimate facts to be inferred from the evidence in this case, require it logically, and therefore, by the exercise of intellectual integrity, to reach a contrary decision. We do not deny the persuasive authority of the decision and judgment of the International Military Tribunal, but we point out that between the International Military Tribunal and this Tribunal the relationship of a court of superior jurisdiction to that of one of inferior jurisdiction does not exist in fact or in law. Therefore the decision and judgment of the International Military Tribunal is not binding upon this Court; except to the extent fixed by said article X and the other provisions which are referred to.

Second, from the standpoint of policy the prosecution believes it owes it not only to this Tribunal but to the world to establish the concurrent jurisdiction and therefore the equal dignity of this Tribunal and of the proceedings before it, with those before the International Military Tribunal, which preceded it. We try here war criminals charged with the commission of international crimes, codified as such, by the same nations which codified the crimes for which the International Military Tribunal tried the defendants indicted and arraigned before it. This is not an American side show, national in character. On the contrary, it is the avowed program of the Government of the United States to carry on the obligation assumed at Moscow in 1943 by living up to the inter-Allied agreements made at Potsdam in 1945. Finally, we assert the high character of this Tribunal and therefore of the proceeding before it, in order that we ourselves may understand the high judicial character of our actions and the obligations of candor and ethical conduct which these proceedings of necessity impose upon counsel appearing before this bar.

We try these defendants, therefore, in a Court whose authoritative source and whose jurisdiction over subject matter and persons is equal to, and concurrent with, the International Military Tribunal (IMT). We try them for crimes, war crimes, and crimes against humanity, which were unlawful, as alleged in the indictment, when committed because they were in violation of the "universal moral judgment of mankind" as attested by the judicial decision of the International Military Tribunal.

We try them in an international court for crimes under international law which finds its authority not in power or force, but in the universal moral judgment of mankind.

We shall now present our general theory of the prosecution's case. In doing so, we shall outline the broad legal principles which establish the relevancy of our evidence to the crimes charged. We shall not, at this time, except perhaps for the purpose of illustra-

tion, relate it to each of these defendants. That will be done adequately enough to satisfy the Court and disconcert the defendants when we sum up.

In count two of this indictment, we charge these defendants with the commission of war crimes as defined in article II, paragraph 1(*b*) of Law No. 10, and in count three we charge them with the commission of crimes against humanity as defined in Law No. 10, article II, paragraph 1(*c*). We have demonstrated that as we have charged these crimes in this indictment, we only ask for convictions for the same crimes for which the defendants before the IMT were tried; therefore, we adopt basically the following statements from the decision of the IMT:

> "With respect to war crimes, however, as has already been pointed out, the crimes defined by article 6, section (*b*) of the Charter [which are the same crimes defined by Law No. 10, article II, paragraph 1(*b*)] were already recognized as war crimes under international law."*

There's a parenthetical statement in there, Your Honors will note.

> "But it is argued that the Hague Convention does not apply in this case, because of the 'general participation' clause of article 2 of the Hague Convention of 1907. * * *.
>
> "In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt 'to revise the general laws and customs of war', which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (*b*) of the Charter.
>
> "A further submission was made that Germany was no longer bound by the Rules of Land Warfare in many of the territories occupied during the war, because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were a part of Germany. * * *. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1 September 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these

* Trial of the Major War Criminals, *op. cit.*, page 253.

territories were never added to the Reich, but a mere protectorate was established over them.

"* * * but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity." [1]

It is proper to point out also, that in order to establish the guilt of any of these defendants for crimes against humanity, it is not necessary that they themselves shall be indicted for or convicted of a crime against peace; that is, the waging of aggressive war, which the IMT held began on 1 September 1939.

In the trial before the IMT the record discloses that seven defendants were convicted of crimes against humanity, who either were not indicted for, or were found not guilty of, participation in a conspiracy to commit crimes against peace or of the commission of a crime against peace.

We want to discuss briefly the substantive law under which we try this case.

Law No. 10, article II, paragraph 2 is part of the substantive law under which this indictment is brought. An effective presentation of the meaning and effect of this paragraph is aided by presenting those parts of it which are relevant to this case verbatim at this time:

"Any person without regard to nationality or the capacity in which he acted is deemed to have committed a crime as defined in paragraph 1 of this article, if he was (*a*) a principal, or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime or * * *." [2]

Clause (*f*) of the above paragraph applies only to crimes against peace, for which none of these defendants is indicted.

We are not concerned in this opening statement with discussing niceties of legal draftsmanship nor shall we now use American legal terminology to describe the ultimate relationship of defendants, whose guilt is fixed by paragraph 2 of article II to the overt act; namely, any crime as defined in paragraph 1 of article

[1] Ibid., pages 253–255.

[2] Complete text of Control Council Law No. 10 is reproduced in the preface pages of this volume. See table of contents.

II. But we are concerned with offering to this Court our observation upon its legal effect.

We do not concern ourselves now with principals or accessories. We do discuss the relationships arising out of the words "abetted" and the relationships set out in clauses (*c*), (*d*), and (*e*), paragraph 2 to the overt act. At the threshold, we point out that the crime, which defendants who occupy any of the relationships last referred to are guilty of committing, is *any crime as defined in paragraph 1 of article II.* The proof must show that a crime as defined in Law No. 10, article II, paragraph (1), that is, a crime within the jurisdiction of this Tribunal, was committed, but if it was committed by any of the defendants or a person other than the defendants in the dock or any of them, and any of these defendants abetted the doing of that act, was connected with a plan or enterprise to commit it, consented to its commission, or was a member of any organization or group connected with the commission of any crime within the jurisdiction of the Tribunal, he is guilty of committing that crime.

The IMT has given two persuasive interpretations of the meaning of the words "being connected with" which we cite.

In the case of the defendant Streicher who was found guilty of committing crimes against humanity, the IMT said:

> "Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined in the charter, and constitutes a crime against humanity." [1]

The case of von Schirach is also most enlightening. Anschluss with Austria took place on 12 March 1938. Von Schirach was appointed Gauleiter of Vienna in July 1940. Von Schirach was found guilty of committing crimes against humanity.

The IMT said:[2]

> "As has already been seen, Austria was occupied pursuant to a common plan of aggression. Its occupation is, therefore, a 'crime within the jurisdiction of the Tribunal', as that term is used in article 6 (*c*) of the Charter. As a result, 'murder, extermination, enslavement, deportation and other inhumane acts,' and 'persecutions on political, racial or religious grounds' in connection with this occupation constitute a crime against humanity under that article."
>
> * * * * * * *
>
> "The Tribunal finds that von Schirach, while he did not originate the policy of deporting Jews from Vienna, participated in

[1] Trial of the Major War Criminals, *op. cit.*, page 304.
[2] Ibid., p. 318.

this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the ghettos of the East. Bulletins describing the Jewish extermination were in his office." [1]

It seems clear from these cases that there need be no prearrangement with, or subsequent request by, the person or persons who actually commit the crime and a defendant, to make him guilty as the IMT interpreted the words "being connected with." It would appear to be sufficient that the defendant knew that a crime was being committed, and with that knowledge acted in relation to it in any of the relationships set out in paragraph 2 of article II which we have heretofore been discussing.

We think it is also helpful to call to the attention of the Court one rule of evidence by which the existence of a conspiracy, that is, the relationship of individuals to the doing of the overt act, is held to be established.

The case from which we quote arose out of the activities of the Ku Klux Klan during the height of its power in Indiana. The people of the United States, on that occasion, at least, had enough courage and foresight not to let that organization acquire the control of all of its judicial system, the way the people of Germany let these defendants and their fellow Nazis acquire control of and pervert theirs. Consequently, our incipient Nazis were tried. The court in the cited case held that the proof of the doing of the overt act was in itself evidence of the intent of the conspirators to commit the act so as to establish their intent to conspire. I quote from the decision:

"True it is, that if the evidence is as consistent with the innocence of the appellant as with his guilt, no conviction can be had. It is equally true that overt acts of the parties may be considered with other evidence and attending circumstances in determining whether a conspiracy exists, *and where the overt acts are of the character which are usually, if not necessarily, done pursuant to a previous scheme and plan, proof of the acts has a tendency to show such preexisting conspiracy, so that when proved they may be considered as evidence of the conspiracy charged.*" [2]

We point out that proof of murders, enslavement, kidnapping, and mayhem, which are a few of the crimes committed through the device of a so-called legal and judicial process, are competent evidence that the preceding acts which perverted a judicial system into a means for committing such crimes were part of a plan and enterprise to make the commission of those crimes possible.

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[1] Ibid, pages 318–319.

[2] United States *vs.* Holt, 108 F. 2d 365 (C.C.A., 7th, 1939).

PRESIDING JUDGE MARSHALL: You are not giving the citation of the Indiana case?

MR. LAFOLLETTE: I beg your pardon, Your Honor. It's a C.C.A. case.

PRESIDING JUDGE MARSHALL: What was the page of the Federal second?

MR. LAFOLLETTE: 365. This mimeograph may not be completely correct. I am sure that's right. Otherwise, if that should not be correct I will advise the Court.

The overt acts are evidence under counts two and three of this indictment not only of the intent with which the preceding acts were done, but also of the fact that each of those defendants who knew that the preceding acts were being performed—and it is legally inconceivable to believe that they did not know—had knowledge of the fact that there was probable danger that the preceding acts would result in the overt crimes or that the preceding acts, being unlawful *eo ipso* and therefore felonious, would result in the overt acts as the natural consequence of preceding felonious acts. This is murder—whenever a homicide resulted from the foregoing act. And the murder being "an act usually done pursuant to" the "previous scheme and plans" establishes the guilty intent of each and all of the defendants to commit that murder who stood in any of the relationships to the murder defined in paragraph 2, article II of Law No. 10.

We have also said that it is an inevitable result of the murder of hundreds of thousands and millions of humans that such mass murder dulls our realization that the basic simple principles of the law which define the crime of murder of a single human furnish the standard by which was determined the guilt of those who have murdered those humans.

A review of these basic rules is therefore proper.

In 1877 Mr. Justice Stephen undertook to restate the English common law of homicide as he then found it. He states that an unlawful homicide, without adequate provocation, was murder, if it followed from an act accompanied by one of the following states of mind: (1) an intention to cause the death of or grievous bodily harm to any person; (2) knowledge that the act will probably cause either of the results, even though the actor hopes that they might not occur or is indifferent about them; or (3) an intention to commit a felony or to resist a peace officer in the execution of his duty.

As to the first category, no one can quarrel and there is evidence to support the commission of such murders by individual defendants.

As to the second category, Mr. Justice Holmes thought that the actor's awareness of the danger was immaterial, that the standard was completely objective. In Comm. *vs.* Pierce (1884) 138 Mass. 165, page 178, he stated his view succinctly—

> "When the jury are asked whether a stick of a certain size was a deadly weapon they are not further asked whether the defendant knew it was so."

In any event, in this case before this Tribunal, we shall ask the Court to bear in mind that lawyers, by the very nature of their legal training and experience, knew that the enactment of *ex post facto* laws, specially designed racial legislation and other legislation directly designed to restrict and destroy the right to make an adequate defense to a criminal charge; the handpicking of judges and their control by state and party; the submergence of the courts and prosecutors to the superior authority of the police; pretrial agreement of judges and prosecutor on judgment and penalty; unlawful extraterritorial extension of German law and the issuance of the Nacht und Nebel [Night and Fog] decree contrary to the laws of war, would probably cause death of human beings, subjected to such a perverted judicial system. These defendants are not farmers or factory workers.

As to the third category, that of homicide resulting from the intention to commit a felony or while resisting arrest, it is not amiss to point out that those who are connected with a plan to extend, or who consent to, or abet the unlawful extension of German law and German courts into overrun countries contrary to the laws of war, are doing acts which amount to larceny while armed or robbery; and that those individuals who commit acts which abet or are connected with the waging of an aggressive war or a plan to do so, or who consent thereto, are resisting the efforts of the peace enforcing nations of the world to arrest the criminal. The evidence in this case will establish the unprovocated homicide of countless numbers as the result of the doing of such acts by these defendants which are clearly felony murders.

These are but the most apparent applications of the three categories of murder to the evidence in this case. Time will not permit our further exemplifying them now. They will be presented adequately when we summarize the evidence. We do not wish to be understood by furnishing these few examples as having exhausted the cases, where the application of the principles so readily understood when one life is taken by murderous homicide, to the evidence of this case, will establish murders and mass murders by these defendants. Furthermore, other crimes common to the criminal laws of civilized nations, such as enslavement, kidnaping, or mayhem, have been committed by these defendants, which can

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be established by the application of similar basic principles to the evidence, which should make the task more simple and at the same time, by reducing the seeming complexities of mass criminality under international law to concepts with which the average citizen of a nation is acquainted, seem to serve the salutary purpose of increasing the hatred of the average man for war and to warn him of the dangers inherent in the totalitarian police state, dominated by the philosophy that the end justifies the means used to attain it.

The crimes charged in count two and in count three fall generally into several categories.

Substantively, there are first those war crimes which arise out of the violation of the laws and customs of war, including section I, articles 4–7; section II, article 23; section III, articles 43, 45, 46, and 50 of the Hague Regulations of 1907; and chapter 6, title I, articles 2–4 of the Prisoners of War Convention (Geneva 1929); and the decision and judgment of the IMT of 30 September and 1 October 1946.

These defendants, in one or more of the relationships set out in paragraph 2 of article II of Law No. 10, committed numerous criminal acts as defined in Law No. 10, article II.

These include, as the first substantive group of crimes, the wrongful extension of German law and German courts into and over the Eastern Territories and other overrun nations and the Protectorate, each of which, we contend, was not only an act done by these defendants in connection with, and in furtherance of, aggressive war, but also done by them for purely political reasons which made no pretense of being based upon military necessity, so that it was *ipso facto* unlawful or *malum per se* and made every act initiated thereafter under such wrongful extension, as against any of the defendants who are responsible under Law No. 10, article II, for that wrongful extension of German law, fall into the category of a felony, murder, or a criminal enslavement, mayhem, or atrocity; or a larceny while armed, or a robbery as to plunder of public or private property.

The other large group in this category of war crimes is the acts done in connection with the promulgation of the Nacht und Nebel decree of 7 December 1941 and the acts thereafter done in carrying out that program.

The second substantive group consists of the crimes arising out of the activities of the defendants in connection with the Gestapo, SIPO, SS, and other police groups in which either under the façade of judicial proceedings or by open violation of the meager protection afforded the individuals under Nazi law, Germans and non-Germans were turned over to enslavement and in many cases to

demonstrable certain deaths in concentration camps, or in prisons where no pretense was made to operate them other than as concentration camps or human slaughterhouses.

The third group is the cases where, under alleged trials, in the People's Court, Special Courts, and civilian courts martial, certain of these defendants, by the use of the prescribed procedures or those actually practiced, the fixing of penalties which outrage the universal moral judgment of mankind, and through convictions based only upon the subjective conclusions of the prosecutor or judge, which we describe now only as examples, give rise to the legal conclusion that the defendants thus convicted were murdered or unlawfully enslaved under the guise of exercising a judicial process.

The Court will get a better understanding of these basic categories of substantive crimes by the following illustrations from the evidence, which I will now ask Mr. Douglas King to first present at this time.

a. Murder Committed in Violation of Articles 43, 46, etc. of the Hague Convention

MR. KING: The extension of German law and German courts into conquered and occupied countries followed as a matter of course after the victorious German armies had done their work. In Poland and the Eastern Territories decrees of 4 October 1939 and 6 June 1940 introduced and extended the German jurisprudence into these countries. It was, however, unthinkable to the Nazi mind that a Pole should be able to appeal to German law, that he should have the right to sue a German before a German court in the capacity of a plaintiff, or to appear against a German in a case, or even to serve a writ of execution with the assistance of a bailiff.

To remedy this intolerable situation, the defendant Schlegelberger drafted a decree which, by its terms, placed beyond the reach of the Poles and Jews in the Eastern Territories the last vestige of protection of even the German law. This decree was made effective on 4 December 1941 and from time to time was later amended as the need arose. For instance, approximately a year later, it was amended and made retroactive for crimes committed prior to 4 December 1941. We think it will be of interest to the Court to have in Schlegelberger's own words some of the background of this special treatment for the Poles and Jews in the Eastern Territories and his own statement as to the purposes which the decree was intended to accomplish. This letter was addressed to the Reich Minister and Chief of the Reich Chancellery (Lammers) and refers to Schlegelberger's draft of the decree

which a few months later was made effective on Hitler's orders (*NG–144, Pros. Ex. 199*):*

"On being informed of the Fuehrer's intention to discriminate in the sphere of the penal law between the Poles (and probably the Jews as well) and the Germans, I prepared, after preliminary discussions with the presidents of the courts of appeal and attorneys general of the Eastern Territories, the attached draft concerning the administration of penal laws against Poles and Jews in the annexed Eastern Territories and in the territory of the former Free City of Danzig.

"This draft amounts to special legislation both in the sphere of substantive law and in that of criminal procedure. In this connection the suggestions made by the Fuehrer's deputy have been taken into consideration to a great extent."

In referring to the various provisions of the ordinance, Schlegelberger has this to say (*NG–144, Pros. Ex. 199*):

"I have been in agreement with the opinion held by the Fuehrer's deputy that a Pole is less sensitive to the imposition of an ordinary prison sentence; therefore, I have taken administrative measures to assure that Poles and Jews will be separated from other prisoners and that their imprisonment will be rendered more severe * * *.

"For these new kinds of punishment the prisoners are to be lodged in camps—outside of prisons—and are to be employed with hard and very hard labor. There are also administrative measures which provide for special disciplinary punishment; that is, imprisonment in an unlighted cell, transfer from a prison camp to a more rigorous prison camp, etc.

* * * * * * *

"A Pole or a Jew sentenced by a German court is not to be allowed in the future any legal remedy against the judgment. Neither will he have a right of appeal or be allowed to ask that the case be reopened. All sentences will take effect immediately. In the future Poles and Jews will also no longer be allowed to object to German judges on the grounds of prejudice nor will they be able to take an oath. Coercive measures against them are permissible under easier conditions.

* * * * * * *

"In this sphere of criminal procedure the draft clearly shows the difference in the political status of Germans on one side and Poles and Jews on the other.

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* Reproduced below in section V D 2.

"Criminal proceedings based on this draft will accordingly be characterized by the greatest possible speed, together with immediate execution of sentence and will therefore in no way be inferior to summary court proceedings. The possibility of applying the most severe penalties in every appropriate case will enable the penal law administration to cooperate energetically in the realization of the Fuehrer's political aims in the Eastern Territories."

One of the amendments to this decree, on 3 December 1942 states that no German attorney is to undertake the defense of Polish persons before tribunals in the Incorporated Eastern Territories. This, in effect, prevented any accused person before these courts from having defense counsel, since Polish lawyers were prohibited from engaging in any legal practice. That this provision was received favorably by Ministry officials is indicated by a letter from the president of the court of appeals in Koenigsberg addressed to the Reich Minister of Justice shortly after this supplementary decree became effective. The judge, in the course of his letter, says this:

"It is in the German interest to continue to prohibit the defense of Poles by German jurists * * *.

"I see no cause to lift or even to modify the present ban on defense of Poles by attorneys. On the contrary, the ban placed on the principle of rendering legal assistance to Poles by attorneys should be still further stressed and made more extensive."

To put to rest any fear that the ban of German attorneys would result in a competitive hardship on them, this judge has the following to say:

"The fear that, in the future, former Polish attorneys or counsel may be called in to act as legal advisers to Poles and may gain influence over them (i.e., German counsel) seems to me improbable. In the Incorporated Eastern Territories of my district, where, although the population numbers about one million, only three attorneys are established, it has not been observed that former Polish attorneys or counsel are engaging in activities connected with matters of law.

"It is, of course, much easier for the tribunal to have the case of a person charged put before them by a lawyer nicely arranged and in the German language. But the judge must dispense with these facilities when such great issues are at stake for the German people."

The Court will, in due course, have an opportunity to examine all of these documents and an opportunity to observe the ruthless manner in which this "special legislation" was administered. It is

perhaps superfluous to quote a statement by the president of the court of appeals of Danzig summarizing the "situation" in his district for a 2-month period in 1942 following the effective date of the decree of 4 December 1941. "There were," he says, "no complaints about too lenient decisions during the period reported on."

The defendant Schlegelberger, shortly after the decree became effective, conferred with the Reich Governor of Eastern Territories and worked out a system of administration pursuant to the decree of 4 December 1941, which (1) provided for summary courts martial, (2) delegated to the Reich Governor the sole right to grant amnesty, and (3) agreed to the holding of civilian prisoners as hostages. In summarizing the results of this conference the defendant Schlegelberger assured the Reich Governor that the "interest of the State can best be served by regulating matters along the lines of our unanimous consent."

Thus, it is clear that the extension of German law and German courts into the Eastern Territories, especially insofar as the Poles and the Jews were concerned, eventually deprived them of any legal recourse whatsoever.

What has been said respecting the part played by key officials of the Ministry of Justice in extending German Law and the German court system to the occupied territories is equally true of Czechoslovakia and particularly the Protectorate of Bohemia and Moravia. In one sense, by virtue of the fact that Czechoslovakia fell to the Nazis before the war, the experience there served as a proving ground for measures which were later extended to the Eastern Territories and other occupied countries.

The decree of 14 April 1939 and the decrees of 2 November 1942 and of 1 July 1943, the texts of which, among others, will be presented in evidence, mark the progress of the Nazis in extending German jurisdiction to Czechoslovakia and are mute evidence of the "legal" justification for the robbery, extortion, and atrocities, the knowledge of which has already shocked the world. The prosecution will show that the Ministry of Justice not only had full knowledge of what was going on in the Protectorate, but its "experts" took a leading part in the establishment and administration of the court system in the Protectorate from the very outset to the end of the war as they did in the Eastern Territories.

As the evidence unfolds we will see the defendant Schlegelberger active in drafting "legal justification." We shall see the defendant Lautz concerned with even minute matters of administration of the People's Court in the trial of Czechoslovak nationals both in Prague and those removed for trial to Berlin, and we shall note that many of the other defendants were called upon

from time to time for their assistance in making the court system function to the maximum required by National Socialist policies as they were enforced upon the Czechoslovak nation.

In refusing citizens of occupied territories protection of the law, the defendants abetted and brought about the murder of thousands of persons. The acts of the defendants violated the laws of the countries where committed and were repugnant to the laws of every civilized country. In administering occupied territory, the defendants were bound by the Hague Convention to respect "family honor and rights." These obligations the defendants ignored, and so squarely placed themselves in the category of common war criminals.

b. The Night and Fog Decree

On 7 December 1941 the so-called Nacht und Nebel, or Night and Fog Decree was issued pursuant to the orders of Hitler and Keitel. Perhaps never in world history has there been a more perverted and diabolical plot for intimidation and repression than this. Its terms provided that in case of continued resistance on the part of the inhabitants of certain of the occupied countries, but largely aimed at France, Belgium, and the Low Countries, the suspected perpetrators should be spirited away without any indication of their whereabouts or eventual fate. The victims were to be tried by the OKW in the occupied territories only when it appeared probable that death sentences would be quickly passed and executed. The others were to be taken to Germany, there to be tried by Special Courts. Whether the death sentence was there imposed, prison sentences given, or the individuals "acquitted," the first and foremost purpose—that of complete secrecy so far as their family and friends were concerned—was to be preserved. Thus, it is clear that the cognomen of Night and Fog was well chosen since in theory and practice the victims vanished as in the blackness of night and were never heard of again.

In the IMT opinion, the Court observed that—

"The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. * * *. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came or even their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the family of the arrested person. Hitler's purpose in issuing this decree was stated by the defendant Keitel in a covering letter, dated 12 December 1941, to be as follows:

" 'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the rela-

tives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.' " [1]

Preparations for the carrying out of the decree on the part of the Wehrmacht were entrusted to Lieutenant General Lehmann[2] of the legal department of the OKW. He conferred with various members of the Ministry of Justice to determine whether the Ministry would be able and willing to assume the trials of the captured individuals shipped to Germany from the occupied countries. It is more than interesting to note from a statement signed by General Lehmann that, in his opinion, the defendant Schlegelberger was the only official in the Ministry of Justice at that time who had the authority to agree to assume the trial of these cases.

The total number of victims of Nacht und Nebel may never be known, but we do know that as of 1 November 1943 the Wehrmacht had delivered a total of more than 5,200 Nacht und Nebel prisoners for trial to the several courts throughout Germany designated by the Ministry of Justice for that purpose.

Originally there were four Special Courts assigned to handle the Nacht und Nebel cases. The Special Court at Kiel was assigned to the cases arising in Norway; Cologne to the French cases; Essen to Belgium; and Berlin for cases of a special nature. In the later stages of the Nacht und Nebel program the effectiveness of Allied bombing made it necessary to shift the location of some of these courts, principally in the transfer of the Cologne court to Breslau.

When we call the roll of the defendants before us today who acted in and were principally responsible for the large part which the Ministry of Justice played in the Nacht und Nabel program, we find there the names of Schlegelberger, von Ammon, Mettgenberg, Lautz, Engert, and Joel, in addition to others who played less conspicuous, if not less important, roles. If we were to select one of these men who above all others should have known the criminal nature of the Nacht und Nebel program, such a man might very well have been the defendant von Ammon who was the Ministry of Justice's specialist in international law. Yet the fact is that the name, von Ammon, together with that of Mettgenberg recur again and again as the principal negotiators with the OKW in matters concerning the application of law and the administration of the Nacht und Nebel program.

The Reich Minister of Justice, in a letter to the public prosecutors charged with trying Nacht und Nebel cases, outlined in

[1] Trial of the Major War Criminals, *op. cit.*, pages 232 and 233.

[2] Rudolf Lehmann was a defendant in Case 12, the "High Command Case." He was convicted and sentenced to 7 years' imprisonment. See volumes X and XI, this series.

detail the measures which were to be taken to assure complete secrecy of the trials. This letter, from which we quote extensively as follows was endorsed, among others, by von Ammon (*NG–269, Pros. Ex. 319*):

"With regard to criminal procedures on account of punishable offenses against the Reich or against the occupying forces in the occupied territories, I request observance of the following directives, in order not to endanger the necessary top secrecy of the procedure, particularly regarding the execution of death sentences and other cases of death among prisoners:

"1. The cards used for investigations for the Reich criminal statistics need not be filled in. Likewise, notification of the penal records office will be discontinued until further notice. However, sentences will have to be registered in lists or on a card index in order to make possible an entry into the penal records in due course.

"2. In cases of death, especially in cases of execution of NN prisoners, as well as in cases of female NN prisoners giving birth to a child, the registrar must be notified as prescribed by law. However, the following remark has to be added:

" 'By order of the Reich Minister of the Interior, the entry into the death (birth) registry must bear an endorsement, saying that examination of the papers, furnishing of information and of certified copies of death or birth certificates is admissible only with the consent of the Reich Minister of Justice.'

"3. In case an NN prisoner sentenced to death desires to draw up a public will, the judge or notary public and, if necessary, other persons whose presence is required will have access to the prisoner. Only officials of the Ministry of Justice may be called as witnesses. The persons who assist the drawing up of the will are, if necessary, to be sworn to secrecy. The will has to be taken into official custody according to article 2 of the Testaments Law. The disposition receipt has to be kept by the prosecution until further notice.

"4. Farewell letters by NN prisoners as well as other letters must not be mailed. They have to be forwarded to the prosecution who will keep them until further notice.

"5. If an NN prisoner who has been sentenced to death and informed of the forthcoming execution of the death sentence desires spiritual assistance by the prison padre, this will be granted. If necessary, the padre must be sworn to secrecy.

"6. The relatives will not be informed of the death, especially of the execution of an NN prisoner. The press will not be informed of the execution of a death sentence, nor must the execution of a death sentence be publicly announced by posters.

"7. The bodies of executed NN prisoners or prisoners who died from other causes have to be turned over to the State police for burial. Reference must be made to the existing regulations on secrecy. It must be pointed out especially that the graves of NN prisoners must not be marked with the names of the deceased.

"The bodies must not be used for teaching or research purposes.

"8. Legacies of NN prisoners who have been executed or died from other causes must be kept at the prison where the sentence was served."

It is not our purpose here to review all of the gruesome details of carrying out the spirit of the Nacht und Nebel program which became the daily routine of these defendants. As the Court will see, all of the stipulations regarding the secrecy of the original decree and indeed the addition of other unbelievably harsh and inhuman provisions were systematically executed and improved upon by these men. If, to take one example, the Wehrmacht erroneously arrested in the occupied countries individuals who were patently innocent of any resistance to the Nazis, these victims, in order to preserve the secrecy of the program, had to be treated in exactly the same way as other individuals who managed to escape with a prison sentence. Never did the families and friends of the convicted or innocent know their fate. In the alleged trials before the Special Courts none of the accused was, at any time, ever able to introduce evidence from his own country as to his innocence and, in no case, were the accused permitted to choose legal counsel other than that assigned to them by the court.

Again the defendants flagrantly violated rights secured by the Hague Convention of citizens of countries occupied by the German armed forces—the right of family honor, the lives of persons, and the right to be judged under their own laws.

c. Illegal Transfer of Prison Inmates to Concentration Camps

MR. WOOLEYHAN: A Ministry of Justice policy of extermination through calculated denial of all judicial and penal process, in close collaboration with the Gestapo and SS, characterizes the second substantive group of crimes previously mentioned. By 1939, inspections of Reich penitentiaries operated by the Ministry of Justice disclosed that large numbers of political prisoners in security detention were engaged in paid labor on projects incompatible with the rearmament effort which then was at a climax. At Hitler's order these prison inmates were transferred to concentration camps where their work could be both unpaid and of

more use to munition requirements. Thus was initiated a program which was to eventually erase any practical difference between the fates of those victims who were put through the shams of criminal court procedure, and those who were thrown by the police into concentration camps without the formality of a hearing.

Apparently noting that transfers from Reich prisons to concentration camps aroused no immediate public clamor or official opposition, judges saw therein an outlet for increasingly burdensome numbers of criminal cases, particularly political cases, as the defendant Engert has stated (*NG–471, Pros. Ex. 276*):

> "In 1940 or 1941 I wrote to Himmler suggesting that he take me into the Gestapo. My idea was to get in closer touch with the Gestapo in order to get an insight into the activities of the Gestapo, and then to reach a better relationship between the Gestapo and the People's Court. * * * I also wanted to prevent the possibility of insignificant cases being brought up in the People's Court, which could be better handed over to the Gestapo for a short term internment in a concentration camp."

About the time that Engert, then vice president of the People's Court, made this overture to Himmler, he began to complain officially that it was incompatible with the respect, dignity, and tasks of the People's Court to try minor political cases. He opined that such cases could be settled more quickly and effectively by transferring the culprit to a concentration camp. Thierack, then president of the People's Court, in heartily endorsing Engert's attitude, wrote to the Minister of Justice in 1940 in part as follows:

> "However right it is to exterminate harshly and uproot all the seeds of insurrection, as for example we see them in Bohemia and Moravia, *it is wrong for every follower,* even the smallest, *to be given the honor of appearing* for trial and being judged for high treason *before the People's Court, or* failing that, *before an appellate court.* In order to deal with these small cases and even with the smallest, the culprits should surely be shown that German sovereignty will not put up with their behavior and will take action accordingly. That can be done in a different way and I think in a more advantageous one, than through the tedious and also very expensive and ponderous channels of court procedure. I have therefore no objection whatsoever, if all the small hangers-on who are somehow connected with the high treason plans which have been woven and abetted and plotted by others are brought to their senses by being transferred to a concentration camp for some time."

These opinions and desires of Engert and Thierack found eager and sympathetic audience with the Gestapo and SS, resulting in

working agreements between these agencies and the Ministry of Justice whereby such illegal transfers could be accomplished outside the law. As the International Military Tribunal in its judgment has found—

> "An agreement made with the Ministry of Justice on 18 September 1942 provided that antisocial elements who had finished prison sentences were to be delivered to the SS to be worked to death."*

This agreement, it will be noted, expanded the initial ideas of Engert and Thierack far beyond any more hastening of minor political court cases or exploitation of prison labor. The agreement introduced the ideas of exterminating the so-called "asocials," i.e., persons who for either racial, political, or personality reasons were deemed unfit to live. Within a month after this agreement had been worked out and put into practice, it was expanded further to include not only those "asocial" elements who had finished their prison sentences, but also all Jews, gypsies, Russians, and Ukrainians who were detained under arrest or imprisonment in any Reich penitentiary or work house, as well as all Poles who were sentenced to more than 3 years.

Now, since the intentional design was to literally work these people to death once they were transferred to concentration camps, this expanded illegal agreement actually rendered any court sentence for any crime tantamount to a death sentence.

In some cases the death awaiting these unfortunates was not long in coming. For example, a situation report in 1942 from the Attorney General of the Court of Appeals in Berlin to the defendant Schlegelberger, while the latter was Acting Minister of Justice, revealed the following episode:

> "In this connection I think I ought to point out that only recently perpetrators have been repeatedly handed over to the Gestapo. Also, there was no sufficient cause therefore, to be found in my opinion, in the conduct of the justice authorities. I am referring to criminal procedures against Skibbe and others * * *."

Then follows the citation of the case in the German files:

> "* * * in which 4 defendants—26, 22, 20, and 18 years of age, respectively—accused of committing 23, 19, 15, and 12 completed or attempted robberies, respectively, by taking advantage of air raid protection measures, were sentenced by the Special Court of Berlin to 7, 6, and 5½ years of penal servitude and loss of civil rights for 10 years' each. Although 3 of the perpetrators had not been convicted previously and the fourth one only of 2 comparatively minor crimes, in addition to all

* Ibid., p. 271.

of them still being comparatively young and, at least in my opinion, the pronounced penalties being not inadequate, these perpetrators were handed over to the Gestapo. They were shot, as could be seen from the newspaper reports 'because they offered resistance.' May I remark that it is hardly unknown to the public any longer that these shootings 'because of resistance offered' are actually caused by other considerations."

Still operating completely beyond any existing law, decree or regulation, this same cabal of justice officials, SS and Gestapo extended this policy of extermination through the Occupied Eastern Territories. As the SS and SD offices throughout those eastern countries were instructed in November 1942—

"The Reich Leader SS has come to an agreement with the Reich Minister of Justice Thierack that the courts will forego the carrying out of regular criminal procedures against Poles and members of the eastern peoples. These people of foreign extraction henceforth shall be turned over to the police. Jews and gypsies are to be treated likewise. This agreement was approved by the Fuehrer."

These instructions to the SS and SD in the East continue:

"Those considerations which may be right for the punishment of an offense committed by a German are wrong with regard to the punishment of an offense committed by a person of foreign extraction. The personal motives of the offender are to be disregarded completely. Important only is that this offense endangers the order of the German community, and that, therefore, measures must be taken to prevent further dangers. In other words, the offense committed by a person of foreign extraction is not to be judged from the point of view of legal retribution by way of justice, but from the point of view of preventing danger through police action. From this follows that the criminal procedure against persons of foreign extraction must be transferred from the courts to the police."

With the Jews, Poles, gypsies, Ukrainians and other so-called "asocial" persons throughout the occupied east relegated to a carefully prepared death, this same unholy alliance returned its attention to the Reich and the Protectorate of Bohemia and Moravia. There, by the infamous decree of 1 July 1943,* signed among others by Thierack, all of the foregoing perversions of judicial and penal process were tardily "legalized" by officially denying to all Jews any recourse to the criminal courts and committed any Jews accused of an undefined "criminal action" to the police.

* 1943 Reichsgesetzblatt I, p. 372.

With grim humor the following article of that statute ordered the confiscation by the Reich of a Jew's property after his death. This decree completed the absolute disfranchisement and expropriation of property of Jews in the Third Reich and Bohemia and Moravia who had not already, by that time, been deported or slain.

Prison inmates not transferred to concentration camps, pursuant to the foregoing program, were hardly better off in Reich prisons under the hospitality of the Minister of Justice. The defendant Joel had a working agreement with a deputy of Himmler's whereby he turned over to the SS, for shooting, those defendants whose sentences by the courts were deemed insufficient by Hitler who followed published decisions in the newspapers. A number of charts tabulating the shootings of such defendants, many of whom had received only minor sentences, attest to Joel's zealous activity on this score. Schlegelberger, too, studiously concocted what was deemed a "legal basis" for these shootings of prison inmates serving minor sentences.

d. Judicial Murders in Violation of International Law

Victims of the People's Court, Special Courts, and civil courts martial were judicially murdered by certain of the defendants using a variety of legalistic artifices, all of which had the obvious common denominator of a zealous desire to exterminate even trifling activity not even deemed misdemeanors by the community of civilized nations. One such artifice frequently employed was a subjective, conclusive assumption by the judges and prosecutors of proof of the very issues tried. For example, after the Nazi importation of forced labor from the occupied East had collected large numbers of foreign workers within the Reich at various war jobs against their will, escape efforts by such workers across Reich frontiers to their homeland or elsewhere became frequent. These escapees, when apprehended by border officials, were normally handed over to the People's Court for trial for preparation of high treason, which bore a mandatory sentence of death. The applicable section of the German criminal code defined high treason in this context "as an attempt to incorporate by violence or by threat of violence the German territory in its entirety or in part into a foreign State or to detach from the Reich territory belonging to the Reich." The escapees were indicted, inconceivable as it may be, for the violation of this provision.

In grasping for some legal straw upon which to base a conviction on these grounds, the courts created a whole-cloth assumption that such escapees were heading through Switzerland, or wherever they might have been picked up, in an effort to join some military

legion hostile to the Reich. The Reich prosecutors were drawn into this scheme. Walter Brem, a former assistant to the chief Reich prosecutor at the People's Court, described the situation thus (*NG–316, Pros. Ex. 79*):

> "The majority of these cases concerned foreign laborers who wanted to look for a job in Switzerland because of inadequate salaries and insufficient food rations in the Reich. The prosecution, however, claimed that foreign legions were being established in Switzerland and that every foreigner wanting to cross the border illegally did so in order to join up with such legions. I was ordered by the prosecutor of the People's Court to connect the defendants somehow with the foreign legions. I have never received a positive answer about those alleged organizations, and the whole concept was known to the foreigners only as a rumor. Individual proof of any acts of high treason could not be established; however, the prosecution based its claims on the assumption that such foreign laborers would behave in a hostile manner against Germany once given the opportunity."

This contention was acceptable to judges of the People's Court. On 12 August 1942, three Polish defendants, Mazur, Kubisz, and Nowakowski, pursuant to an indictment signed by the defendant Lautz, were sentenced to death by the People's Court for preparation of high treason and attempting to separate a portion of the Reich by force. They had left their factory in Thuringia and proceeded across the Swiss border, where they were apprehended by Swiss officials and returned to the Reich. As reasons for their escape the defendants cited the hard working conditions to which they had been exposed. Kubisz testified that the meals consisted only of soup. Mazur stated that his work in the quarry was so hard that he feared he would not survive the winter. The defendants stated they had hoped to find better working conditions in Switzerland. They denied having had any knowledge of the existence of a Polish Legion in Switzerland. The prosecution offered no evidence to impeach these statements in any way.

Nevertheless, the People's Court found that the defendants' statements were mere excuses, that the existence of a Polish Legion in Switzerland was "generally known," and that the defendants intended to join this legion. This judicial assumption was buttressed by a physician's certificate which showed all three defendants to be in excellent health and qualified for active service. Therefore, the court "was convinced" that the defendants had discussed the fate of Poland and her people with their camp mates in the factory barracks and had decided to join the Polish Legion in Switzerland. The court said that it knew of a pact with Russia that the Polish government in exile had formed, and that

this fact had been broadcast by the British radio. The court knew, furthermore, that in the past Polish workers had repeatedly fled to Switzerland where they were recruited for the Polish Legion, and I quote a portion of the court's decision:

> "These circumstances force the court to the conclusion that the defendants intended to join the Polish Legion in Switzerland."

With regard to verbal remarks deemed seditious or deleterious to the "German people's defensive strength," People's Courts sentences were not only outrageously unjustified, but reached the climax of judicial caprice. The Austrian taxicab driver, Rudolf Kozian, pursuant to an indictment signed by Lautz, was sentenced to death on 26 June 1944 for making certain uncomplimentary remarks concerning Hitler and the progress of the war. In the course of conversation while driving a female customer, who later denounced him to the Gestapo, he made remarks typified by the following:

> "To us Viennese it's all the same from whom we receive our bread whether his name is Stalin, Churchill, or Hitler. What matters is that we can live. When I quarrel with someone and see that I can no longer carry on, then I stop and do not continue the fight until everything is destroyed. The Fuehrer in his speech said that he would destroy us all. The Fuehrer has said that this war will be fought until one side will be annihilated. Every child knows that we are that side, unless the Fuehrer will come to his senses before then and offers peace to the enemy."

The court found the defendant guilty of having attempted to undermine the German morale to such an extent that he was deemed to come within the special Emergency Decree authorizing death for impairing German defensive strength.

Contrast the foregoing case of the Austrian taxi driver, resident of a country occupied and annexed by illegal aggressive acts, with that of Mrs. von Brincken, a German Nazi, who was indicted in August 1944 for having made similar statements in a conversation with friends at the seashore. When the man who had rented her a beach chair became angry about the careless way in which his chair was treated, Mrs. von Brincken was alleged to have said: "Well, don't worry, the Russian commissars will be sitting in them next year." She was also vocally indignant to her neighbors because her 17-year-old daughter had just been drafted for labor assignment in the country, and said: "It would do the farmers no good; they would only get more work and more worry since the girl could not do anything but eat." Due to the intercession of

both her husband, a colonel, and a notorious SS general who was a friend of the family, she was released with an admonition.

Such judicial discrimination with death as the forfeit, is explained by the defendant Petersen, a lay judge at the People's Court from 1941 until the end of the war (*NG–396, Pros. Ex. 176*).

> "The sentences of the People's Court can be understood only if one keeps in mind the intent underlying the penalties. This was not primarily that of imposing punishment in accordance with normal 'bourgeois' conceptions of crime and punishment, but rather of annihilating an opposition which could become detrimental to the German aims."

DR. ASCHENAUER (defense counsel for defendant Petersen): By my motion of 21 February 1947 I objected to the submission of the affidavit of the defendant Petersen. On 27 February 1947, I specified the motion. It says: "The defense is not permitted to introduce the affidavit and the interrogations under oath of the defendant Petersen into the proceedings. On 21 February 1947 I gave the reasons for the motion which are as follows: From 12 June until the end of 1946, the defendant Petersen was in the Langwasser camp. As a patient, he was moved to the Regensburg camp where his medical treatment was continued. Already at Langwasser, Petersen was pronounced unfit for transport. In spite of medical treatment, he was moved to Nuernberg. As he collapsed in Regensburg, medical treatment for circulation disturbance was continued at the court prison here; the circulation disturbance improved only at Christmas 1946. Accommodation in a cell in which half a window was missing, was naturally very detrimental to the state of health of the 61-year-old defendant Petersen. Therefore—

PRESIDING JUDGE MARSHALL: Counsel for the defendant is advised that the statement of counsel is not evidence in this case. It is merely a statement of what later will be introduced in evidence. If this statement is introduced in evidence, you can make your objection and it will then be ruled upon. For the moment, the prosecution will continue its statement.

DR. ASCHENAUER: I should only like to point out that this is the same affidavit which is being presented here and that this affidavit is due to the psychological condition of the witness.

PRESIDING JUDGE MARSHALL: I repeat. This is not evidence. This is merely a statement of what will later be introduced in evidence. At that time, if you have an objection, it will be considered. At this time, you may not interrupt the statement of the prosecution.

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DR. ASCHENAUER: I will raise my objection at a later time.

MR. WOOLEYHAN: To get the proper context, I will begin at the beginning of the excerpt included in the opening statement (*NG–396, Pros. Ex. 176*).

"The sentences of the People's Court can be understood only if one keeps in mind the intent underlying the penalties. This was not primarily that of imposing punishment in accordance with normal 'bourgeois' conceptions of crime and punishment, but rather of annihilating an opposition which could become detrimental to the German aims. This was our duty. Hence, after a defendant had been brought before the People's Court because of some act or utterance, his actual deed was of no particular importance in the determination of the punishment within the framework of the law. The important thing was whether the man had to be exterminated from the community of the people as a 'public enemy' because of his personal attitudes and his social or anti-social tendencies."

The further artifice of "punishment by analogy," previously mentioned generally, was as tyrannical in practice as it seems in theory. Revolting examples of this procedure in action are legion. A particularly notorious case that turned on this ground was that of Lehmann Katzenberger, 68-year-old former chairman of the Nuernberg Jewish congregation. Katzenberger was indicted before the Nuernberg district court for so-called "racial pollution," having been accused of sexual relations with one Irene Seiler, an Aryan woman. The police tried desperately without success to secure the necessary conclusive evidence, but Katzenberger and Seiler, both well-known figures of some prestige in the community, denied under oath any illicit relationship. There were no witnesses to or other evidence of the accused act. Since an acquittal of the Jew was unthinkable, particularly in Nuernberg which was the hearthstone of the Jew-baiter Streicher, and whose newspaper "Der Stuermer" widely publicized the story, Katzenberger was remanded to the Nuernberg Special Court, tried as a "public enemy," sentenced to death, and executed. Seiler was indicted for perjury and was joined with Katzenberger as codefendant; her sentence of two years' imprisonment was later suspended.

As Hans Groben, Nuernberg district court judge for preliminary investigations, describes the case (*NG–554, Pros. Ex. 153*)—

"As I had no reason to doubt the truth of Seiler's sworn statement it was clear to me that I could not keep Katzenberger in custody any longer. Therefore I informed his counsel, Dr. Herz, about the result of this interrogation and gave him to understand that this was the right time to act against the warrant of arrest. Dr. Herz naturally understood this hint, and at

once he filed a complaint against the warrant of arrest. According to the regulation (section 33 of the Code of Criminal Procedure) I put the complaint before the public prosecution, adding in my report that I had the intention to comply with this complaint (section 306, paragraph 2, Code of Criminal procedure), i.e., to set Katzenberger free. I thus clearly expressed with this additional remark that I believed Katzenberger to be innocent * * *. As was later explained to me, the indictment already filed with the penal chamber of the district court was thereupon withdrawn and replaced by one filed with the Special Court.

* * * * * * *

"I was shocked when I heard the result of the trial. The fact that Rothaug combined the trial against Seiler, a case of perjury, with the trial against Katzenberger, shows clearly that he took over the case of Katzenberger with definite prejudice and that he was determined to exclude Seiler as a witness for the defendant. For, according to normal procedure, Seiler should have been a *witness* in Katzenberger's trial and should have testified for him stating that the charges against Katzenberger were not true. This normally should have led to the acquittal of Katzenberger, as otherwise there was nothing decisive against him. Rothaug's verdict, in my opinion, was based solely on blind hatred of Jews. While there were no reasons for Katzenberger's condemnation on the ground of so-called race defilement, there was still less reason to apply section 4 of the 'Decree against Public Enemies,' because if it was altogether impossible to ascertain when or if Katzenberger and Seiler had the alleged sexual intercourse, it was still less possible to explain that this had happened 'in exploitation of war conditions.' To arrive at Katzenberger's condemnation on the grounds of so-called race defilement in connection with section 4 of the 'Decree against Public Enemies,' it was necessary to violate all the facts of the case. It has always depressed me that such a verdict, which cannot be designated as anything but judicial murder, was pronounced by Rothaug."

One further sampling of the prosecution's evidence will serve to reveal how the protection against double jeopardy, keystone of criminal procedure the world over, was abrogated and used for the murder of civilians of occupied countries.

The Nuernberg Special Court, under the leadership of the defendants Rothaug and Oeschey, used this fiendish practice in the case of Jan Lopata, a Polish youth brought during the war to work on a German farm. The accused was sentenced in 1940 to 2 years' imprisonment by the Neumarkt local court for indecent

assault on his employer's wife. A plea of nullity against the decision was filed by the prosecution on the grounds that the sentence was too lenient and the case was reviewed by the Reich Supreme Court with the result that it was referred to the Nuernberg Special Court for retrial. In the court's verdict sentencing Lopata to death, the presiding judge (the defendant Rothaug) observed (*NG–337, Pros. Ex. 186*)—

> "The total inferiority of the accused lies in his character and is obviously based on the fact that he belongs to the Polish subhuman race." [1]

In reliance upon the decrees "legalizing" nullification and retrial of criminal cases at the prosecution's behest, defendants were deprived of any assurance that a sentence of less than death was their final fate. Ministry of Justice officials, working through the prosecution, joined in this infliction of double jeopardy. For example, in a case involving a non-German, the defendant Klemm wrote to the president and attorney general of the Stuttgart District Court of Appeals on 5 July 1944 and directed the following (*NG–676, Pros. Ex. 178*) :

> "For some time now, the jurisdiction of the penal senate of the district court of appeals in Stuttgart has given me cause for grave thoughts with regard to matters of defeatism. In the majority of cases, the sentences are considered too mild * * * and are in an incompatible disproportion to the sentences which are in similar cases passed by the People's Court and by other district courts of appeal. I refer especially to the following sentences which lately attracted my attention:
>
> "1. Criminal case against Friedrich Linder, sentence of the Second Penal Senate of 7 January 1944 (President of the Senate, Dr. Kiefer) * * *. You made a report under date 28 April 1944 on this case regarding the sentence. In view of the danger and of the frequency of the statements made by the defendant, I must maintain the interpretation already expressed in my decree of 15 March 1944, IV Secret I 5045B/44 that the defendant, a foreigner, deserved a serious sentence of penal servitude. I have therefore directed the files to the chief Reich prosecutor at the People's Court to examine the question whether the extraordinary appeal should not be applied against the sentence * * *." [2]

It is technically true that an extraordinary appeal or plea of nullity could, on the face of the enabling decrees, operate to a defendant's benefit as well as to his detriment; but this possibility was illusory in practice. Dr. Josef Grueb, former judge of the

[1] Reproduced below in section V E.

[2] Reproduced below in section V C 3 b.

Nuernberg District Court of Appeals, says (*NG–672, Pros. Ex. 179*):

"It was obvious that the Ministry of Justice only admitted a petition for nullity when it was unfavorable to the defendant. Cases in which the Ministry ordered a nullity plea unfavorable to the defendant were, at any rate, much more numerous than cases where the petition for nullity was demanded for the benefit of the defendant on the Ministry's own initiative. * * * It was mainly a means employed by the State to cancel sentences which seemed inadequate in the light of the political conceptions of those times."

A terrifying glimpse of the actual extent to which double jeopardy was exploited during the Third Reich's last years, is furnished by the defendant Nebelung (*NG–333, Pros. Ex. 177*).

"If the Chief Reich Prosecutor, Dr. Lautz, was not satisfied with the sentence, he could file an extraordinary appeal against it. This was done, in my opinion, mainly as a result of orders by Reich Minister Thierack. After 1943, extraordinary appeals became frequent. All cases in which an extraordinary appeal had been filed were tried again before the special senate of the People's Court. This special senate concerned itself exclusively with extraordinary appeals. Of all senates of the People's Court, this special senate pronounced the largest percentage of death sentences. According to statistics which I saw myself, 70 percent of all sentences passed by the special senate during 1944 were, as I recall, death sentences."

By the foregoing samples from actual case records and comments thereon by German jurists involved, the prosecution has sought to typify rather than specify the war crimes and crimes against humanity committed by the defendants. Detailed accounts are unnecessary at the moment to exemplify the judicial murders and legalistic perversions for which these defendants have been indicted; that will be fully developed by the evidence.

e. Evidentiary Considerations

MR. LAFOLLETTE: We believe it will expedite the trial of this case and be of assistance to the Court and evidence a proper attitude of fairness toward the attorneys for these defendants if we discuss now some of the theories of evidence and of the relevancy and materiality of evidence under which we shall present the proof in this case.

Law No. 10, which is the inter-power act from which this Court springs, contains some matter relevant to the issue, while Ordinance No. 7, of necessity, treats the matter very fully. Between them they deal adequately with the matter of the compe-

tency of proof, intelligently relaxing the rules of the necessities of presenting proof in a country which has not only been physically destroyed, but which has had its government disintegrate and also suffered the demoralization which follows the defeat of a vicious ideology which has permeated the thinking of far too many of its people.

But relevancy and materiality—the relationship of primary facts to the ultimate fact—involves a cerebral process, the method of finding the existence of an ultimate fact by logical processes from objective proof.

These latter standards lie within the consciousness and the conscience of man. Thus, they are not affected by the external considerations which justify the relaxation of the rules regulating the competency of proof. They should not have been and they were not relaxed. We endorse the decision to retain them and welcome the opportunity to work under them.

Article II, paragraphs 4(*a*) and (*b*) of Law No. 10, are the same in substance, although differing slightly in the use of language to express the substance as articles 7 and 8 of the Charter, respectively.

These paragraphs of article II of Law No. 10 read as follows:

"4. (*a*) The official position of any person, whether as Head of State or as the responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

"(*b*) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation."

Paragraph 4 (*a*) is a sound rule and applies to most, if not all, of these defendants. Paragraph 4 (*b*) is likewise sound. We point out, however, that these defendants are lawyers who are charged fundamentally with perverting or converting a system of justice into an instrument for committing crimes under international law. Since this paragraph affords them the right to offer evidence in mitigation and to plead for mitigation from that evidence, the prosecution is entitled to answer that plea by two arguments. First, that a lawyer has special knowledge of the perverting effect upon the dispensation of justice not only of his own acts, but of the acts of others of which he has knowledge—knowledge as an ultimate fact. Second, that a lawyer entrusted by his very calling with a sacred duty must of necessity offer strong proof indeed in mitigation of the prostitution of that duty.

We shall introduce proof on this issue from which knowledge, as an ultimate fact will arise, and also proof from which the plea of mitigation will be shown to be fanciful and hypocritical.

Again upon the subject of relevancy and materiality—probative value—we shall offer evidence of other acts of these defendants and also acts of persons other than these defendants, knowledge of which as an ultimate fact can be inferred to the defendants. These acts shall include those which constitute evidence of other crimes committed both by these defendants and by others. We are convinced that this evidence is relevant and material, and therefore admissible under accepted rules of evidence supported by Wigmore, an acknowledged authority.

Certainly, a brief exposition of our position will expedite the trial by enabling the Court to rule expeditiously, but at the same time judiciously, and it is also our hope that by furnishing defense counsel with an understanding of the legality of the rules under which this evidence will be offered, they will not find it necessary to resort too frequently to empty objections.

We can afford to be candid with Court and counsel. It is only the lazy, the uninformed, or inherently dishonest and therefore unethical lawyer who seeks recourse to silence or obtusion. We refuse to follow a course of conduct from which either of the foregoing can be charged to the prosecution of cases before this Tribunal and its sister Tribunals.

Evidence of acts, including other crimes not only of the defendants but of others, is permissible and most often offered to show knowledge, intent or design. They are also relevant upon the issue of motive. Because of the nature of the crimes charged in this indictment, each of the foregoing, knowledge, intent, or design and motive, is an essential ultimate element or ingredient of those crimes. Therefore, the rules which authorize the introduction of such proof are of concern to this Court.

Before treating the subject affirmatively, we shall prepare the way by eliminating the supposed objection of unfair surprise. We offer the following quote:

> "Of the other objections (other than undue prejudice) from the point of view of that auxiliary policy which creates the character rule, the objection of unfair surprise is the only one that could be supposed to be here applicable. But it has never been treated by the courts as of consequence. * * * Evidence tending to show, not the defendant's entire career, but his specific knowledge, motive, design, and the other immediate matters leading up to and succeeding the crime, is of a class always to be anticipated and is in such given instance rarely a surprise; moreover, the kernel of the objection of unfair surprise, namely, the impossibility of exposing fabricated evidence,

is wanting where the evidence deals with matters so closely connected with a crime as design, motive, and the like." [1]

The above quote referred to the further objection of undue prejudice. That objection does not arise here. This is a trial by the court—by judges. It is a trial by judges who by training and character rely only upon objective standards in determining guilt or innocence. The rule was never considered in America as a necessary protection to a defendant in trials by court.

In fact, the very contrast between the system and standards of judicial conduct by which these defendants are being tried and the subjective personality yard sticks which they, particularly the judicial defendants, will be proved to have acted under and used, it is to be hoped, will have some effect in serving the declared purpose of Potsdam, "to prepare for the eventual reconstruction of a German political life on a democratic basis * * *."

In treating the subject under discussion, we must refrain, because of time limitation, from presenting Wigmore's excellent philosophical discussion of the basic principles which govern the proof of knowledge, intent, and design. Therefore we limit ourselves, from necessity, to an exposition of those statements which are applicable to the crime which most, if not all, of these defendants have committed—murder.

We shall offer the type of evidence under discussion, first under the knowledge principle:

"The knowledge principle has practically little application here, though it would be available to show a knowledge of the nature and injurious effect of a lethal weapon." [2]

We point out that in this case "knowledge of the nature and injurious effect of a lethal weapon" is of first importance. The defendants had full knowledge of the character of this lethal weapon—a judicial system deliberately fashioned into a headman's axe. In fact, most of them directly and actively fashioned it. Consequently, under each of the categories of the substantive law of murder, which we have heretofore expounded, and particularly under the second, proof of prior acts, including crimes of those defendants and of others of which they had knowledge, are clearly relevant.

The same type of evidence shall be offered under the following rule relating to the intent principle:

"The intent principle receives constant application; for the intent to kill is in homicide practically always in issue, and is to be proved by the prosecution, and the recurrence of other

[1] Wigmore, John Henry, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Wigmore on Evidence), (Little, Brown & Co., Boston, 1940), 3d Ed., vol. II, p. 206.

[2] Ibid., sec. 363, p. 274.

acts of the sort tends to negative inadvertence, defensive purpose, or any other form of innocent intent. For this purpose, therefore, the evidence is receivable irrespective of whether the act charged is itself conceded or not * * *." [1]

Also the rule of anonymous intent authorizes the introduction of proof of such other crimes and of the crimes of others.

"The principle of anonymous intent finds occasional application, particularly in poisoning cases. Other instances of death by poison under somewhat similar circumstances serve to negative the supposition of inadvertent taking or of mistaken administration, even though the person responsible for the other poisonings is not identified; and thus, a criminal intent having been shown for the act charged, by whomsoever done, the defendant may be then shown to be its doer." [2]

This Court shall be called upon to determine whether a so-called judicial execution was a true judicial decision or poison handed the defendant in a disguised chalice having the exterior appearance of judicial purity. When we produce innumerable cases of such acts, can a defendant be heard to say he did not know his monstrous chalice was lethal and intended it so to be?

Also the principle of design or system is applicable for identical reasons.

"The principle of design or system finds here frequent application. It supposes that a design or plan in the defendant is to be shown, as making it probable that the defendant carried out the design or plan and committed the act; and it receives former similar acts so far as through common features they naturally indicate the existence of such a plan, design, or system, of which they are the partial fulfillment, or means. This principle is fully recognized in the precedents * * *." [3]

And finally prior acts of violence, including crimes, are evidence of motive as well as of design:

"(3) Prior acts of violence by the defendant against the same persons, besides evidencing intent, may also evidence emotion or motive, i.e., a hostility showing him likely to do further violence; * * *.

"(4) Threats of violence are in themselves expressions of a design to injure, and are accordingly dealt with elsewhere * * *." [4]

Certainly, when we shall offer so many cases of death of Poles and Jews, no one of these defendants will have the temerity to say we cannot show proof of their own prior utterances, as well

[1] Ibid., p. 275.
[2] Ibid.
[3] Ibid., p. 275–276.
[4] Ibid., p. 287.

as those of others of which they had knowledge, as a clearly inferred ultimate fact, demanding death to Poles and Jews, and also that haste and more haste must be made to turn the Nazi judicial system into a headman's axe, for the purpose of showing their motive when they killed Poles and Jews with their so-called "judicial" system and processes.

It would be a strange law, indeed, which would say that if a man killed the Pole or one Jew, his prior threats to and assaults upon that Pole or Jew were relevant evidence of the motive with which he acted, but would deny the same proof, when the same man, or in this case men, killed millions of Poles and Jews.

Of course, the law is neither so blind nor so callous.

The accepted rules of proof in an objective system of law justify every offer of proof of prior statements, acts, and crimes of these defendants, and of those others of which they had knowledge, as an ultimate fact, which we should make in this case.

We need not, nor shall we attempt to, evade or circumvent those salutary rules.

These defendants can and should be convicted, but only under law. Because we believe that, we have not been afraid to predeclare our understanding both of the substantive law and the rules of evidence under which just convictions shall be asked, and which we believe will be rightfully rendered under the proof adduced.

Although the matter is not related to the theories under which evidence will be offered by the prosecution, there is one other matter relating to the evidence which the prosecution feels it is entitled to discuss at the opening of this case.

During the introduction of the evidence, certain names of important officials recur—Thierack, Freisler, Vollmer, Westphal, Crohne, Laemmle, Haffner, and others. Since these men are not in the defendants' dock, the Court is entitled to know why. Thierack committed suicide on 26 October 1946. Freisler was killed in an air raid which demolished the People's Court building in Berlin, early in 1945. Vollmer forsook the Ministry of Justice for the Luftwaffe (air force) during the last days of the battle for Berlin in 1945, and was reported to have died in action. Westphal committed suicide in the Nuernberg prison following service of the present indictment upon him. Crohne, Laemmle, and Haffner cannot be located, despite all efforts.

THE GERMAN LEGAL PROFESSION UNDER THE THIRD REICH

We have sketched the steps by which the judicial organization of Germany was turned into a mere agent of the criminal policies of the Third Reich, and have outlined some of the crimes which

the defendants committed by means of the perverted judicial machinery. Before taking up the fourth and final count of the indictment, which rests upon a somewhat different footing than the first three counts, it is appropriate to examine very briefly the German legal profession and its degradation under the Third Reich. This brief survey, we think, will help to explain why these atrocities came to pass.

a. Before 1933

During the pre-Hitler decades, the professional life of German jurists flourished. Independent societies were formed which published law reviews of high caliber and participated in international conferences of jurists and in international legal institutions, such as the International Arbitration Courts.

Originally, the judges of the various German States had separate professional organizations, but in 1908 these were combined into the Association of German Judges (Deutscher Richterbund). This organization sponsored lectures on new legal problems, on comparative law, on modernizing penal law, and similar subjects. The association edited the "German Judges' Times" (Deutsche Richterzeitung), which published court decisions and articles by learned jurists. Another organization of German judges was the Association of Republican Judges (Republikanischer Richterbund), founded in 1926. Its members were primarily interested in the reformation of the German court system and in bringing German legal institutions into line with the democratic principles of the new Weimar constitution. They published the periodical "German Justice" (Deutsche Justiz).

Most practicing German attorneys at law belonged to the Association of German Attorneys at law (Deutscher Anwaltsverein), the largest professional organization of jurists. This association, founded in 1871, comprised about 15,000 members in 1933. It published the "Juridical Weekly" (Juristische Wochenschrift), which had thousands of subscribers inside Germany and abroad.

Before the Nazis came to power, all organizations of jurists consisted of members of all political parties and creeds. Their officers were eminent scholars or jurists, and many of them had a high international reputation. Their yearly meetings acted according to democratic principles without interference from the executive branch of the government.

Legal education and training in Germany maintained high standards. After studying law for 3 or 4 years at a law school of one of the State universities, the candidate served a law apprenticeship, lasting another 3 or 4 years, at various courts and law firms. Only then was he admitted to the Great State Examination, known

as the Assessor Examination, which might be compared with our bar examination. The successful completion of this examination was the legal prerequisite for any appointment as judge, public prosecutor, or higher civil servant, or for admittance to the bar. The men and women who had passed this examination were highly respected by the German populace.

b. The Impact of Nazism

In the years immediately preceding the establishment of the Third Reich, the National Socialist Party started a nationwide campaign directed against the legal profession. The Nazi leadership realized that they could not gain absolute dictatorship by the seizure of the government alone, but that they must also completely subjugate German legal life. As an affiliate of the Nazi Party, a National Socialist German Jurists' League (Bund Nationalsozialistischer Deutschen Juristen) known as the BNSDJ, was formed in 1928 by the late Hans Frank. In 1931, the members of this organization, then about 600 in number, or less than 1 percent of all German jurists, were instructed to report on the political attitude and behavior of judges and lawyers. The general attitude of the Nazi Party toward independent judges was reflected in the statement—

> "One day, we will forget the independence of the judges which has no significance in itself." *

There were many other occasions when Hitler and his henchmen expressed their distaste for law and the legal profession.

Immediately after the Nazis came to power, they started to pervert German legal life and to develop it as a tool of the totalitarian machine. This was accomplished in part by measures which have already been described, such as the dismissal of judges, prosecutors, and Ministry officials considered politically unreliable, and by depriving judges of the guaranties of independence and immunity from removal from office.

But these measures were not confined to the governmental judicial organization. It extended into all branches of the legal profession. The first step was the subjugation, and later the complete elimination, of the old professional associations, such as the Deutscher Richterbund, the Republikanischer Richterbund, and the Deutscher Anwaltsverein. Their destruction was accomplished by the same sort of maneuvers that effected the dissolution of the pre-Nazi medical and other professional societies at about the same time.

In the early spring of 1933, the former officers were ousted under duress, and new officers, all of them members of the Nazi

* The Volkszeitung of Reuss, 16 March 1931.

Party, were appointed according to the newly proclaimed leadership principle (Fuehrer-prinzip). This procedure also became known under the term "coordination" (Gleichschaltung). At the same time, the membership of well-known anti-Nazi or Jewish jurists was canceled in all these professional organizations. Many of them were threatened and forced to emigrate.

Shortly afterward, in May 1933, the old organizations were completely dissolved. All organizational and professional activity was centered in the National Socialist German Jurists' League, which became one of the most important tools in the Nazi penal program.

Hans Frank reported to Hitler in May 1933 that all existing professional organizations and associations of lawyers had joined the BNSDJ.*

The cooperative entry of these organizations into the BNSDJ did not, however, imply individual membership of its members in the BNSDJ. This required an individual application. Actually by the end of 1934 there was hardly a lawyer left who had not joined the BNSDJ. Those very few who had the courage to stay out laid themselves open as opponents of the regime with the grave risks which this implied. One of the conditions of membership in the BNSDJ was membership in the Nazi Party, but non-Party members could be admitted as so-called "supporting members" (Foerdernde Mitglieder).

The constitution of the BNSDJ dates from 4 May 1933. It declares as its program the realization of the National Socialist program in the legal field. According to Hitler's order of 30 May 1933, the BNSDJ was the sole representative of the German Law Front and the exclusive professional organization of all lawyers. The seat of the BNSDJ was Munich, its leader Hans Frank, and its executive secretary Dr. Wilhelm Heuber. Regionally, it was divided into 26 regions (Gaue). Leader of the Gaue "Hanseatic Cities" was the defendant Rothenberger. At the end of 1934, the Nazi organization of jurists had approximately 80,000 individual members and its executive secretary could boast that it was the biggest lawyers' organization in the world. In 1936, the name was changed to "Nationalsozialistischer Rechtswahrerbund" (NSRB). Through the disciplinary boards of this organization, the legal chieftains of the Nazis held the lawyers under close political surveillance.

c. Under the Third Reich

Within a short time after the advent of the Nazis, the editorship of all legal journals was taken over by newly appointed Nazi

* Deutscher Juristentag, 30 May 1933, pp. 7 and 8.

editors, such as Hans Frank and his accomplices of the BNSDJ. A number of the scientific legal journals whose editors were known as anti-Nazis, such as "Die Justiz," were suppressed. The new editors perverted the legal journals by turning them into mere propaganda instruments of the Nazi government. In these journals, the jurists were informed that they were to be nothing but the legal soldiers of the Fuehrer. The legal journals were flooded with such material. The Deutsche Justiz, the mouthpiece of the Ministry of Justice, frequently printed directives of which the following by the late Under Secretary Freisler is typical:

> "But we will march as an army corps of the Fuehrer, and as such, no one shall outdo us in the willingness to self-sacrifice! We are alone responsible to the Fuehrer and that is our wish." [1]

While, on the one hand, the legal thinking of the older generation of jurists was perverted, on the other hand the future Nazi jurists received a thorough indoctrination at the law schools of the universities where they were instructed by Nazi lawyers or by opportunists who had sold their legal reputation for promotion within the Nazi hierarchy. Respected professors, who were suspected of so-called "Roman-Jewish individualistic" legal ideas were discharged, and references to such ideas were eliminated from the textbooks. The standard of legal education was considerably lowered. The students had to spend a considerable part of the time which was once devoted to the study of law, on compulsory labor and military service and exercises in the student cadres of the SA Storm Troopers and the SS Elite Guards. During the period of their law clerkship, Nazi indoctrination and exercises in military formation were substituted for the once thorough legal training. Eventually, no young lawyer was admitted to the bar whom the examination board did not consider a reliable legal soldier of the Nazi Fuehrer. In analyzing the new Nazi examination decree for lawyers, Freisler stated:

> "The experience of the candidate within the (Nazi) movement and its evaluation (by the Nazi movement) is fundamental in any evaluation of the candidate's qualifications. If such experience does not exist, he will be disqualified." [2]

In the early stages of this prostitution of German legal education, the Prussian Ministry of Justice took a leading part. The Prussian Minister of Justice was a Nazi zealot named Hanns Kerrl, a budget clerk without legal education who attained this high position under the Nazis, and who became the Reich Minister for Churches after the Prussian Ministry of Justice was absorbed by the Reich government. In April 1933 Kerrl issued a decree concerning the selection of candidates for positions as judges,

[1] Deutsche Justiz, 1941, p. 441.
[2] Ibid., p. 839.

public prosecutors, and attorneys in the State of Prussia, which provided in part that—

"The applicant for appointment as a junior judge (assessor), admission as attorney, or appointment as notary public will in future have to prove in a special hearing that his consciousness of being a member of the national community, his social understanding, and his understanding of the entire race development of the German people in the present and future constitute the basis of his personality. * * * for this purpose applicants will have to undergo a special post-examination which has the aim to convey an impression of his being rooted in the national community (Volksverbundenheit).

"The result of this post-examination will be evaluated in my decision about the appointment or qualifications of the candidate equally with the other statutory requirements." [1]

Two months later, Kerrl issued another decree which required that all candidates for the final State legal examination had to attend a special "Community Camp" for 6 weeks before they would be admitted to the final examination. This Prussian decree provided, in part, as follows:

"The National Socialist State must know above all that the man whom the State, as a sovereign, intends to entrust with the execution of the most important tasks of judge or prosecutor, must have character and be a typical German.

"One cannot get an idea of this from an examination as it has been conducted up to now, * * *.

"I therefore decree that:

"1. In the course of the final legal State examination, each candidate, during the period following the written and preceding the oral examination, that is for about 6 weeks, is to live together with other candidates under the direction of civil servants of the Prussian Administration of Justice, appointed by me * * *." [2]

This preposterous institution for the perversion of young lawyers was established, and given the name "Gemeinschaftslager Hanns Kerrl," after its creator. It was located at Jueterbog, near Berlin. An illustrated pamphlet describing the activities in this lawyers' madhouse will be introduced in evidence. According to the basic statute of the camp, the inmates were to become familiar with the leadership principle and would "experience the ideas of the Fuehrer." The commandant of the camp was a lawyer named Spieler, who had become favorably known to the Nazis through his activities as defense counsel in their behalf. He was an old

[1] Preussisches Justizministerialblatt, 24 April 1933 (I 9474) p. 130.

[2] Decree concerning Community Life of Undergraduates of Law (referendare) admitted to the Second State Examination, Preussisches Justizministerialblatt, (I 10136) 29 June 1933, p. 210.

Party member and a colonel in the Storm Troopers (SA). He was assisted in supervision of the young lawyers by a motley group of storm troopers and army officers. The extracts from this pamphlet will bear quotation:

"A further training and examination of the candidate is accomplished through ideological indoctrination. The camp directors are aware, of course, that national socialism can neither be learned nor taught. National socialism must completely determine an individual's attitude; when this is not the case, the individual can never become a real National Socialist. There are many people, however, who in their social relations or in their way of living have not become acquainted with national socialism or were even opposed to it, yet in these people there exists an unconscious National Socialist sentiment which only needs stimulation to develop. The appropriate method for this is the ideological indoctrination. The latter is therefore particularly used in the camp, not only for this purpose but also for training purposes, to strengthen and develop the National Socialist ideology.

* * * * * * *

"The day of Horst Wessel's death was also a remarkable day. This day was commemorated in a particular manner. At 4 o'clock a trumpeter blew reveille. At 4:07 all the camp inmates were already assembled in the courtyard. A brief order, 'column right, forward march.' Then the various platoons of the school took different routes across the drilling field and marched on into the country."

After the dissolution of the Prussian Ministry of Justice in 1934, the Gemeinschaftslager Hanns Kerrl was brought under the supervision of the Reich Ministry of Justice. The illustrated pamphlet to which I have just referred contains photographs of Reich Minister Guertner, Under Secretary Freisler, and others visiting the camp. The photographs also show a gallows from which was suspended a symbol of German statutory law, the sign for the paragraphing of legal codes. Guertner and Kerrl are both photographed standing under the gallows. It would be hard to conceive a more appropriate symbol for the degradation of the legal profession under the Third Reich.

COUNT FOUR

MEMBERSHIP IN CRIMINAL ORGANIZATIONS

GENERAL TAYLOR: The fourth and final count in the indictment contains the charge that seven of the defendants are guilty of

membership in organizations declared to be criminal in the judgment of the International Military Tribunal. Four of the defendants, Altstoetter, Cuhorst, Engert, and Joel are accused of membership in the SS. The defendant Joel is also accused of membership in the Sicherheitsdienst (commonly known as the SD). The defendant Cuhorst is also accused, together with three others, Oeschey, Nebelung, and Rothaug, of membership in the Leadership Corps of the Nazi Party. All three of these organizations were declared criminal in the judgment of the International Military Tribunal.

The legal basis of the charges in count four is quite distinct from that of the first three counts in the indictment. The charge derives from article 9 of the Charter of the International Military Tribunal, which authorized that Tribunal, under specified circumstances, to declare that certain "groups" or "organizations" were "criminal organizations." The prosecution before the International Military Tribunal sought such declarations in the case of each of the three organizations involved in count four of this indictment, and the International Military Tribunal rendered such declarations. In the meantime, it had been provided in article II of Control Council Law No. 10 that "membership in categories of a criminal group or organization declared criminal by the International Military Tribunal" should be "recognized as a crime." Paragraph 3 of article II of Control Council Law No. 10 specifies the punishments which may be imposed for membership in such organizations.

In its decision, the International Military Tribunal set forth certain limitations upon the scope of its declaration that these organizations were criminal.* Under these limitations, in order to render membership criminal, two things, in addition to membership, must be shown—

1. That the individual in question became or remained a member of the organization after 1 September 1939, and

2. That the individual in question either (*a*) became or remained a member with knowledge that it was being used for the commission of acts declared criminal by article VI of the London Agreement, or (*b*) was personally implicated as a member of the organization in the commission of such crimes.

The prosecution believes that, once it has established that a defendant was a member of one or more of the criminal organizations, it is incumbent upon the defendant to come forward with evidence that he neither knew of the criminal activities of the organization, nor participated in their commission, or that he

* Trial of the Major War Criminals, *op. cit.*, pp. 255–257.

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ceased to be a member prior to 1 September 1939. We believe that any question concerning the burden of proof will be entirely academic in this case, in as much as the positions which these defendants held, and the evidence embodied in the documents which we will offer in evidence will show beyond question that they both knew of and participated in the criminal activities.

a. Membership in the SS

I will deal first with the four defendants charged with membership in the SS. The evidence will show that the defendant Altstoetter became a member of the SS in 1937, that he remained a member after 1939, and attained the rank of Oberfuehrer (senior colonel) in June 1944. The defendant Cuhorst became a sponsoring member (Foerderndes Mitglied) of the SS in January 1934 and remained such after 1939. The defendant Engert joined the SS in 1936 and thereafter attained the rank of Oberfuehrer (senior colonel). The defendant Joel joined the SS in 1938, and attained the rank of Obersturmbannfuehrer (lieutenant colonel).

The activities for which the SS was declared a criminal organization are set forth in the judgment of the International Military Tribunal.* These activities included the extermination of numerous "undesirable" classes, including Jews, and the transfer of numerous Jews and foreign nationals to concentration camps where they were murdered and tortured.

It will be abundantly apparent from the proof that if any member of the SS knew of, and participated in, its widespread criminal activities, surely these defendants did. They were directly concerned with penal problems, and, as we have seen, of necessity their cooperation with the SS was extremely close. In fact, Himmler himself took special pains to insure that the German judiciary would be fully advised on the ideology of the SS and of its nefarious aims and purposes. In July 1944 at the special invitation of Thierack as Reich Minister of Justice, Himmler made a speech to the presidents and the attorneys general of the courts of appeal. A report from the files of the Ministry of Justice describing this occasion reads as follows:

> "On the invitation of the Reich Minister of Justice Dr. Thierack, the Reich Leader SS, spoke to the presidents and the attorneys general of the courts of appeal at the Reich Castle of Cochem on 20 May 1944. The question of the development and the aims of the SS was dealt with, in particular the importance of the racial question, questions of national biology,

* Ibid., pp. 270–273.

fighting selection, racial community, the importance of the Waffen SS (armed SS) and the greater German concept.

"The judges and public prosecutors were to receive the information through the presidents of the courts of appeal and might have been informed in the meantime.

"You are respectfully requested to submit a detailed report on the reception and the effect of this speech on the judges and the chief public prosecutors."

Himmler's well-known views on the value of non-German human life were thereby made available to all German judges and chief prosecutors. They surely came to the attention of the defendant Cuhorst, in this and numerous other ways. They surely were well known among the higher officials of the Ministry of Justice, including Altstoetter, Engert, and Joel.

Indeed, long before Himmler's speech to this judicial assembly, the Ministry of Justice had been collaborating actively with Himmler in turning over Jews, Poles, Russians, gypsies, and others from the ordinary prisons to the concentration camps. The whole evil process must have been particularly well known to Engert, who was in charge of Division XV of the Ministry of Justice, which was charged with carrying out these transfers. A Justice Ministry document written in October 1942 gives complete information concerning the agreement between the Ministry and Himmler, and specifically delegates the execution of the agreement, on behalf of the Ministry of Justice, to Engert and his associates in Division XV. Engert thereafter visited various prisons throughout the Reich, checked over the lists and arranged for the delivery of these unfortunates to the SS.

Nor could these arrangements, or other activities of the SS, have been any secret from Altstoetter, who was a division chief of the Ministry of Justice throughout this period. Furthermore, Altstoetter was a particular personal favorite of Himmler's. Correspondence which we will introduce will show that the most cordial relations existed between Altstoetter and Himmler and between Altstoetter and other high SS officers including Mr. Karl Gebhardt, the Chief Surgeon of the SS. At a conference in 1942 with Thierack, Rothenberger, and other judicial officials, Himmler singled out Altstoetter as being "reliable." The defendant Joel was not only an officer of the SS, but also a member of the Sicherheitsdienst, the branch of the SS particularly concerned with intelligence and with the extermination of Jews in Poland and the Soviet Union. Joel was particularly familiar with these murderous activities. A memorandum signed by Joel in 1942 described a plan which Goering had concocted for picking out "daring

fellows" from among the prison inmates who would carry out special tasks behind the lines on the eastern front. Joel's memo recites that Himmler had already selected a large number of such men for his purpose, but that Goering wanted the field picked over again. Joel's memo goes on to state:

> " * * * the only suitable men are those with a passion for hunting, who have poached for love of the trophy, not men who have laid snares and traps. The Reich Marshal also mentioned fanatical members of smuggling gangs, who take part in gun battles on the frontiers, and whose passion it is to outwit the customs at the risk of their own lives, but not men who attempt to bring articles over the frontier in an express train or by similar means.
>
> "The Reich Marshal Goering leaves it to us to consider whether still other categories of convicts can be assigned to these bands of pursuit commandos.
>
> "In the regions assigned for their operations, these bands whose first task should be to destroy the communications of the partisan groups could murder, burn, and ravish; in Germany they would once again come under strict supervision * * *."

b. Membership in the Nazi Party Leadership Corps

The defendant Cuhorst again, along with Nebelung, Oeschey, and Rothaug, is involved in the charge of membership in the Leadership Corps of the Nazi Party. The declaration of criminality rendered by the International Military Tribunal includes all the "leaders" in the hierarchy of the Nazi Party from the Reichsleiter down through Gauleiter and Kreisleiter, to Ortsgruppenleiter. It also includes the heads of the various staff organizations, down to the staffs of the Kreisleiter.

The evidence will show that Cuhorst became a member of the Nazi Party in 1930 and in 1933 was given the status of Gaustellenleiter. The defendant Oeschey joined the Party in 1931 and in 1940 was given the status of Gauhaupstellenleiter. Rothaug joined the Party in 1938 and attained the status of Gaugruppenleiter. All three of these defendants were therefore heads of staff organizations at Gau level. The defendant Nebelung joined the Party in 1928 and soon thereafter became an Ortsgruppenleiter. All four of the defendants, therefore, fall within the categories of the Leadership Corps specified in the decision of the International Military Tribunal.

The criminal activities of the Nazi Party Leadership Corps are also set forth in the judgment of the International Military Tribunal.* These included the persecution and extermination of Jews,

* Ibid., pp. 258–261.

administration of the slave labor program, mistreatment of prisoners of war, and the lynching of airmen who had bailed out over Germany. The evidence which we will offer will show knowledge of and participation in all or most of these activities by all four of the defendants.

c. Summary

In conclusion on count four, the prosecution wishes to point out certain factors which it believes should be borne in mind in considering the degree of culpability to be attributed to membership in organizations declared criminal by the International Military Tribunal. The charge of membership in these organizations, coupled with knowledge of the crimes that were committed or participation in those crimes, is a very serious one. Its consequences will, we believe, have to be more closely examined at the conclusion of this proceeding, but certain factors can be pointed out here and now.

It is true, for instance, that in a sense none of the seven defendants involved in count four were "full time" or "paid" members of these organizations. All seven of them had full time jobs as judicial officials but, under the circumstances which the evidence in this case will disclose, we do not believe that this fact is significant in estimating culpability.

It is true that the high officers' ranks in the SS held by Altstoetter, Engert, and Joel were chiefly honorary. It was part of Himmler's calculated policy to draw support to himself from all quarters by distributing honorary SS ranks and decorations. But those who accepted special ranks thereby lent the weight of their names and prestige to Himmler and to Himmler's policies. If they did not agree with these policies, they prostituted themselves for whatever prerequisites or security these shameful ranks and awards might bring.

Where it can be shown, as it will be here, that the defendants not only were fully familiar with the horrifying scope of Himmler's program, but also participated directly in its execution, it should be considered no defense whatsoever that an individual's SS activities were extracurricular rather than his daily bread and butter.

Similar considerations apply to the defendants who were members of the Party Leadership Corps. Cuhorst, Nebelung, and Oeschey were all members of the Party years before Hitler came to power; all three of them, and Rothaug, too, played a leading

role in Party affairs. They too, by the very nature of the positions they occupied in the judicial system, to say nothing of the fact that they were high in the Party councils, must have been aware of the activities recited by the International Military Tribunal as the basis for its declaration of criminality.

Indeed, the guilt of these seven defendants under count four is, in many respects, deeper than that of many full-time officers of these organizations. The defendants were highly educated, professional men, and they had attained full mental maturity long before Hitler's rise to power. Their minds were not warped at an early age by Nazi teachings; they embraced the ideology of the Third Reich as educated adults. They all had special training and successful careers in the service of the law. They, of all Germans, should have understood and valued justice.

Conclusion

Crimes, theoretically and, more often than not, actually, are these acts, which are so contrary to the moral conscience of the community or so dangerous to the maintenance of a reasonable degree of order, justice and peace in the community, that the community, by appropriate processes, demands their elimination and suppression in the interest of the individuals who constitute the community. Therefore, those within a nation or a state who institute proceedings to enforce this community decision as prosecutors, speak for the community conscience or community decision. For this reason, criminal prosecutions within states or nations are brought in the name of the State or the Commonwealth, or by the use of words suitable to describe the offended community.

In this proceeding at Nuernberg, the world is the community. The four nations which have written the substantive law under which we proceed, their responsible government heads and their elder statesmen, have proclaimed it as a codification of crimes denounced as such by the moral conscience of that community where the crimes we try were committed.

Therefore, although this indictment is brought in the name of the Government of the United States, this case in substance is the people of the world against these men who have committed criminal acts against the community we know as the world. For surely few spots on this earth are so remote that they have not felt in some degree the disruptive, if not indeed the destructive, impact of the criminal acts of these men or those others whom they served and with whose acts they were criminally connected. Therefore, unless all the countries of the world fight a continuous struggle to match the moral conscience of the world which has

been asserted here, the result will be a cynical Germany and an apathetic amoral world which drifts aimlessly because it sees no national conduct which matches the standards of moral conduct which are proclaimed here. The true significance of these proceedings, therefore, far transcends the mere question of the guilt or innocence of the defendants. They are charged with murder, but this is no mere murder trial. These proceedings invoke the moral standards of the civilized world, and thereby impose an obligation on the nations of the world to measure up to the standards applied here.

Although this Tribunal is internationally constituted, it is an American court. The obligations which derive from these proceedings are, therefore, particularly binding on the United States. True it is that two wrongs do not make a right, and equally true that the crimes charged against these defendants and the other leaders of the Third Reich were "so calculating, so malignant, and so devastating" that they find no modern parallel. But, underlying these crimes, there are myths, superstitions, and more sophisticated distortions of philosophy which do not know national boundaries. If we, of all nations fail to rise above these malignant doctrines by actions which manifest a steady growth in national fiber and character, then all that we do here will come to nothing, and will leave us and mankind an easy prey to their next violent eruption.

We have still other obligations here which must not be overlooked. As was pointed out earlier, we have undertaken, together with other nations, the task of preparing "for the eventual reconstruction of German political life on a democratic basis and for eventual peaceful cooperation in international life in Germany."

These proceedings are dedicated to that end. Punishment of these leaders of Germany whose crimes made this task necessary is only a part of what we seek to accomplish here. We seek to resurrect the truth in Germany, and to reinvigorate those ideals that have been so long desecrated. The people of Germany sense the need for this, but they will measure our efforts by the measure of our own devotion to the ideals which we proclaim.

The United States cannot evade the challenge of these responsibilities. We can fulfill only the smallest part of them at Nuernberg. But Nuernberg must be a symbol, not of revenge or of smug self-satisfaction, but of peace and good will among nations and peoples. It is the crime of shattering the foundations of peace and denying the very fact of humanity that is charged in this and other proceedings at Nuernberg. It is by trying these charges under law, and in quest of truth, that Nuernberg will find its full measure of justification.

B. Opening Statement for all Defendants*

DR. KUBUSCHOK (counsel for defendant Schlegelberger, speaking on behalf of all the defendants) : May it please the Tribunal. In the following statements I shall briefly describe the manner in which the defense believes, by summarizing the treatment of individual general problems, it will expedite the trial. My following statements are to be interpreted in that sense.

The prosecution views the development of justice in administration and jurisdiction during the period of the National Socialist State. It limits its reflections to this period and perceives in everything the consequent execution of National Socialist totalitarian thought. It believes to be able to reduce all phenomena to this denominator.

It must be the task of the defense to extend the boundaries of this reflection beyond this period. The defense will show that no new legal system was created, and that no new system of jurisdiction was developed. Thus, the historical development which had been built on, also in the period from 1933 onward, must be presented in its fundamental traits.

The defense must also be aware of the difficulties encountered in the treatment of the subject matter before a non-German court. The difference between the Anglo-American legal system and the German law, in accordance with which the acts of the German defendants are judged, lies not only in the solution of individual legal questions and problems, but is fundamental and systematic. Anglo-American law appears to us vitally progressive by the effect which decisions of the highest courts carry in setting precedents. German law, on the other hand, is a codified law, much less suitable to development by the administration of justice, but a law which in itself demands observance of the legal standard. The written law is inflexible. New concepts of the law cannot succeed in the administration of justice as is the case in the gradual development of the "common law." The German—as well as the continental—principle of the codified law permits the incorporation of new legal concepts only through sudden changes [sprunghafte Veraenderungen] of the written law. Thus the supplementary laws of the penal code in force in Germany since 1877 show an abrupt change at shorter or longer intervals. For this reason the positivism of law has played a far more important part in Germany since the end of the nineteenth century than has been the case in legal systems outside the continent. Only the written

* This general opening statement by Dr. Kubuschok was made, as noted by the Tribunal, "in behalf of all of the defendants." (Tr. p. 4055.) Both this statement (Tr. pp. 4057–4083) and those on behalf of each defendant (Tr. pp. 4084–4221) were delivered on 23 and 24 June 1947.

law [statutory law] and not general ideas on morals and rights constituted the directive for administration of law and justice. Also in Germany this principle of absolute codification has, with regard to its expediency, been the object of legislative discussion for some time. Finally, in 1935, it culminated in the amendment of article 2 of the penal code, and thus, a synthesis was found between codified law and the development of law as interpreted by the decision of the judge; and historical reflection on this event will show the inaccuracy of the prosecution's conclusion that, being instituted during the period of the National Socialist State, it must of need be the product of National Socialist thinking and its corresponding political aim. We shall prove that the fundamental basis for this norm was created by plans for reform drafted long before 1933, and that the necessity of supplying the judge with a means, enabling him to counterbalance the defects of an absolutely codified law to a limited degree by analogous application of a penal regulation had been realized long before that. It was recognized that the multiformity of life, the constant change of its forms with regard to social, political and economic aspects could not be regulated by codified law alone; especially so, because codified law always lagged one step behind the case in need of settlement of law. Such cases could not, as is possible in "common law," be regulated and decided on by general concepts of law; they merely gave cause for establishing new legal standards. This one example already reveals the necessity of dealing with the existing German legal system and with plans for reform entertained in Germany for decades.

German law will form the basis for all considerations. We will, therefore, also have to deal with constitutional law and the technique of legislation. We shall proceed from the provisions of the Weimar constitution. We shall observe there the legislative functions of the Reichstag, the Reichsrat [Council of the Reich] and the Reich President. It will be shown that, since Bruening was Reich Chancellor, the weight of legislation shifted in ever increasing measure toward the right of the Reich President to issue emergency decrees.

The turning point was formed by the Enabling Act [Ermaechtigungsgesetz] of 24 March 1933 which represents the basis for all future legislation. The cabinet was now empowered to pass laws on its own authority and even the right of the Reich President to draft and promulgate laws was abandoned. Thus, under consideration of article 56 of the constitution which allocated powers of policy determination to the Reich Chancellor, the right to legislate was practically conferred upon Reich Chancellor Hitler who, in the absence of time, made increasingly extensive use of it. The

lawful passing of a law and its legal effects will necessarily be the subject of presentation.

Thus, we are faced with the legal problem of the binding effect of the Fuehrer order. It will have to be examined whether this Fuehrer order was a literal order in the meaning of the Control Council Law, the effect of which is not to be looked upon as exempting from guilt, or, at the most as mitigating, or, whether we are not dealing here with a legislative act, to which this provision of the Control Council Law does not apply.

We shall have to deal with the entire legislative machinery as it was developed at that time. It will be shown that meetings of the cabinet took place even after Hitler's cabinet had been formed, that they were, however, of an essentially different character already than formerly. Questions were no longer put to the vote. In individual questions of legislation too, Hitler stood on his right as Reich Chancellor to determine directives of policy, in accordance with article 56 of the constitution. As Hitler's position grew stronger, especially after, in August 1934, the positions of Reich Chancellor and President of the Reich had been combined in his person, cabinet meetings served actually only the purpose of issuing Hitler's instructions. In accordance with instructions, members of the cabinet were to submit bills that concerned their departments. In accordance with Hitler's request these bills were submitted to other participating members of departments prior to the cabinet meetings, in order to obtain their opinion and at this stage only objections with regard to departmental competency of other ministries were taken into consideration. The bill, thus having become "ripe for the cabinet" [kabinettreif] was then passed in the cabinet meeting without debate. Since the uselessness of the cabinet meetings thereby became obvious, they were discontinued completely in 1937. Laws were then legislated by means of a so-called circulation procedure [Umlaufsverfahren] in which the individual ministers were given opportunity to voice their objections. These objections could, however, deal with purely departmental aspects only, whereas objections against a basic political idea founded on one of Hitler's instructions could not be raised or remained ineffective. As we will show, this had, at the same time, the effect of declassifying certain ministries and resulted in their being subordinated to other ministries. This started already in 1935. By the secret National Defense Law, the OKW, [High Command of the Armed Forces], the Minister of Economics as Plenipotentiary General for the Economy, and the Minister of the Interior as Plenipotentiary General for the Administration of the Reich, were brought into prominence as legislative bodies and were combined in Board of Three [Dreierkollegium]. The other

Ministries were subordinated to them and depended on them for instructions. The Ministry of Justice was subordinate to the Plenipotentiary General for the Administration of the Reich and was permitted to present bills only through him. The Ministry of Justice's signature on a law was therefore only of nominal significance; it indicated that the judicial departments had been concerned with the contents of the law. We will show that after the outbreak of the war the Ministerial Council for National Defense was added as legislative body to the Board of Three. Here too, the Ministry of Justice was subordinated to the Plenipotentiary General for the Administration of the Reich, who was a member of the Ministerial Council for National Defense. Bills were drafted in accordance with his instructions. If the initiative for drafting a bill came from the Ministry of Justice itself the Plenipotentiary General for the Administration of the Reich had to concur in the matter.

To judge the position of the individual defendant in the Ministry, a detailed presentation of the organization of the judicial administration becomes necessary. We must deal with the problem of subordination of the various offices in their relations with each other. In particular, the defense will attempt to give the Tribunal a picture of the actual workings of the Ministry of Justice. Within the framework of a bureaucratic organization the sphere of activity of a minister, an under secretary, division chiefs, subdivision chiefs, a Referenten, and co-workers [Mitarbeiter], will be defined and certain organizational changes wrought in the course of time will be taken in consideration. The scope of authority pertaining to the superior-subordinate relationship is also of importance. Of equal importance are the limits of signing power fixed for each individual official of the Ministry of Justice as well as the degree of responsibility he assumed whenever he affixed his signature. A signature does not always imply the assumption of a responsibility nor does it always signify that someone in particular was charged with the handling or discharging of a specific task. A document has quite frequently been submitted to an official of the Ministry of Justice for the sole purpose of having him take official notice of its contents, i.e., the only object being to apprise the official in question of some measure or other. This method of passing on information, of course, could serve many other purposes which remain to be discussed. A simple request, however, to take official notice, combined with an accompanying acknowledgment of receipt signed by an official, never meant that the official had, by affixing his signature, assumed responsibility for the matter on hand. Finally, there remains the problem of throwing light upon the relationship existing between individual

departments of the Ministry of Justice and that of defining the meaning and aim of a cosignature. The act of cosigning indicated primarily that the subject matter and its treatment as viewed in the light of the cosigner's own field of activity, i.e., from an expert's point of view alone, gave rise to no objections.

A study of departmental limitations will afford insight into the nature of the judiciary in its relationship with, and its dependency on, other Reich Ministries and Party offices. An understanding of the reciprocal connection between the Ministry of Justice and the Reich Ministry of the Interior, as well as the limitations imposed upon both will yield enlightening information on many questions. We shall also find these necessary connections with other Ministries existing before 1933 and thereby refute the assumption of the prosecution that these intersectional connections which are to be found in any system of government constitute a creation of the Nazis and were adopted by them for the purpose of achieving their own ends. It will be necessary, in this connection, not only to discuss the strictly legal aspects involved, but also to show what the actual conditions were with respect to power and authority. We will have to reconstruct the events as they occurred at that time in a state under dictatorship and show what legal consequences a necessary examination conducted from the viewpoint of constitutional law will yield. The question will be raised as to what would have been the consequences of a failure to comply with an order, and would obedience, therefore, legally exclude guilt. A factor of great importance in considering that problem is the determination of the relationship between the judiciary and the police. The effective role played by Himmler, as chief of the entire police force, must also be taken into consideration. The full presentation of facts will show how the police interloped in affairs of the judiciary, and how this interference led, during the course of the years, to an appreciable weakening of the position held by the judiciary. We shall see what means were and had to be employed to fight that battle. The contrast between the position of the justice administration which was weak by nature and that of the police which was equipped with all the instruments of power it employed ruthlessly through the offices of Himmler and Hitler will become manifest. Again and again one will perceive how the judiciary was confronted with accomplished facts, how it strove to defend or recapture lost ground, how all of its activities, as a matter of fact, were overshadowed by the constant pressure and expansionistic aims brought into play by the police. It will be shown how everyone in the Ministry sought to retain as a last bulwark the concept of the constitutional state for practical usage. It will be brought out how the police, beginning with the

protective custody order and ending up with the establishment of its own preserve in the concentration camps and the subsequent creation of its own SS jurisdiction over its members finally secured their exemption from the judiciary. Yet in spite of the constant rivalry between the judiciary and the police we must not lose sight of the fact that certain contacts between both offices had to be maintained because of the very nature of German criminal procedure. Since the judiciary had no investigation agencies of its own, it was dependent upon the cooperation of the police in that respect. Finally, I shall also show how Himmler attempted to wrest all public prosecutor offices from the justice administration for systematic absorption by his police machine, although he did not succeed in doing so. When the unique position held by the judiciary within the entire administrative system is made clear in the presentation, one will become aware of the difficulties of the situation in which the judiciary found itself in this battle. We need but have a clear conception of the difference in denotation of the terms "dictatorship" and "justice" in order to gain an appreciation of the difficulties of that situation. The dictatorship derived both stimulus and pattern from the Party in its manifold manifestations. We will show up the predominance and influence of the Party offices, some of which were legally established, and demonstrate how both expanded in all directions and by the employment of any and all means through the person of the Fuehrer of the Party, namely the dictator.

The defense will show, at the proper time, how the Party sought to push its interests ruthlessly in opposition to the judiciary. The activities of the Party constituted a perpetual obstacle to the progressive administration of justice. It will be shown how the Gauleiter, either directly or indirectly through Bormann, deliberately added fuel to Hitler's repugnance against the judiciary and thereby shoved the Reich Ministry of Justice into a spot similar to that of an isolated animal at bay.

The various aspects just outlined will also furnish us with a broad foundation for those laws to which objections were raised in the indictment, and the substance of which we shall subject to an exhaustive examination.

We will show, when dealing with the problem of violation of the principle *nullum crimen sine lege*, that all those laws with which the indictment is concerned and which had been made retroactive do not furnish a basis for punishment. The punishable offense itself, to which they referred, had already been made punishable by laws in force at the time the deed was committed.

The *rules* of penal laws were not only already part and parcel of the general body of law, but had also been fixed long before

by virtue of positive law at the time the appropriate supplementary laws went into effect. In every instance revisions were applied only to the evaluation of a crime in relation to the amount of punishment. Since the prescribed rules of the German Penal Code, generally speaking, did not allow a judge much leeway in awarding punishment, it was found necessary to provide for changes with regard to the fixing of penalties.

We will show that conditions of public distress in Germany were in each instance responsible for the changes and, furthermore, that these legislative measures were, above all, inspired by criminological propositions that had played an important part in scientific discussions long before 1933. We will also show that the drafting of such legislative measures was strongly influenced by the knowledge and experience of other countries.

We shall have to proceed from the assumption that a retroactive measure characterized only by an increase in severity of punishment does not constitute a violation of the principle *nullum crimen sine lege* according to common German continental legal conceptions.

If the prosecution should construe the substance of various laws as crimes against humanity, we will have to enter into an investigation of the actual living conditions which gave rise to the necessity for the legislation of strict measures. One of the cardinal determinants of any system of penal law is the principle of the deterrent influence of punishment. Variations in the forms and uses of deterrents are at all times dictated by circumstances. Thus, when living conditions everywhere are at high tension, deterrents, if they are to be effective at all, must be accompanied by a corresponding increase in severity of legislative measures.

Some of the legal terms found in German court decisions that are to be examined by the Court will require explanation. Such terms as "dangerous habitual criminal," "perpetrators of crimes of violence, juvenile major criminals," "public enemies," "asocials," and "criminal type" [Taetertyp]. In defining these terms it will become apparent that they were used as necessary aids in the quest for laws and that they represented, by no means, a one-sided attempt at increasing the harshness of measures in the administration of justice. These terms were established for the purpose of setting up clear-cut, definable boundary lines encompassing a definite group of major criminals. Such a move paved the way for pronouncements of restricted judgments, i.e., less severe ones upon those who did not fall within that group.

In answer to the question of sterilization, we shall outline its historical development in Germany and other countries both in theory and practice. We will find that sterilization, as a program,

was advocated long before 1933 in Germany and even found champions in Socialist and church groups. Closer examination of the law under consideration will reveal the great care and caution exercised in hedging in its specific provisions. Should the law itself, however, lie beyond the pale of any possible extensive explanation, we shall then furnish proof that it has never been misapplied for political or race-political purposes.

The subject of euthanasia will be dealt with at length and judged with fairness and justice. We will show that the measures originated with Hitler himself, and in the Chancellery of the Fuehrer. We will also show—and this is symptomatic of the position held by the judiciary in the administration—that the judiciary did not receive word of the existence of those measures directly but in trailing stages from outside sources. We will bring out how the Ministry of Justice attempted to thwart the execution of those measures, and then disclose how those same attempts led to a premature discontinuance of the program. In order to decide the question of whether the judiciary is responsible for these measures, which they neither caused to be put in effect nor carried out, we again must consider the actual existing facts.

A trial which concerns verdicts rendered by various courts calls for a study of the organization of these courts as well as their manner of functioning. We will deal with the structure of the Special Courts and of the People's Court as well as the courts before them. We will consider whether the Special Courts are extraordinary courts in the sense of the indictment, which were prohibited by the constitution. We will also define the term "extraordinary court," and we shall see that a court which has not been established for the purpose of bringing certain persons to trial, but for the purpose of passing judgment on certain punishable acts cannot be considered an extraordinary court. The legal regulations which are prescribed for proceedings in Special Courts and which deviate from regulations prescribed for regular proceedings will be scrutinized with regard to extent and purpose. We will deal with the structure of the People's Court in like manner.

In order to discuss these questions, it will also be necessary to give the Tribunal a clear-cut, plastic picture of German criminal procedure. We hope to be able to achieve this by interrogating an expert on the characteristic features of German criminal procedure. Thus, we will be able to show the fundamental differences between German and Anglo-American criminal procedure. We will become acquainted with the preliminary proceedings as well as with the actual main proceedings. Preliminary proceedings are in the hands of the public prosecutor. The necessary investigations to ascertain the facts of the case must be carried out with the

aid of the police and through its own or judicial interrogations. The public prosecutor is bound by law to an objective consideration of the matter. The prosecutor in so doing of course represents the instance which later on submits the indictment in court; yet he is under obligation to draw up the indictment not as an agent of an interested party, which he will represent later on in the main proceedings, but as a purely objective agent engaged in clearing up the facts of the case. He is also charged with procuring and submitting facts which serve the purpose of the defense. After the facts of the case have been established in this manner and the transcript of the interrogations of the defendant, the witnesses, and the experts as well as the record on any inspections, seizures, or searches have been recorded to the court, then the public prosecutor draws up a written indictment and submits to the court the documents which contain the entire material collected by him with the request that a date be set for the trial. In considering the question whether action should be brought, or whether proceedings should be quashed beforehand, he must take into consideration whether the findings are sufficient to justify the suspicion that a punishable act has been committed. This question will then be examined by the court, which has to decide on the opening date of the trial. If, in the opinion of the court, the findings as laid down in the documents are not sufficient to warrant a conviction of the accused, then the court may decide against instituting trial or it may request the public prosecutor to collect further material, which will be of an exonerating nature also. After the trial has been ordered, the proceedings are entirely in the hands of the judge, and in the case of the courts attended by several judges [Kollegialgerichten], in the hands of the presiding judge. By studying the documents, the court finds out how the preliminary proceedings were conducted as well as the results obtained. However, except in a few instances, the court may make use of the preliminary proceedings for informational purposes only, so to speak, only as a jumping-off point for the main proceedings, which alone are decisive for the final decision. In these main proceedings the oral principle alone applies. Only that which is presented at these proceedings by the defendant himself, by witnesses, experts, and documents can be considered by the court in passing judgment, but not the interrogation transcript of the police or the public prosecutor. The presiding judge guides the proceedings. He examines the defendant who can make statements pertaining to the case in question, but who may not take the stand as a witness as is the case in American proceedings and who can also not be sworn in. Should the public prosecutor or the counsel for the defense desire to ask questions of the defendant, they

may do so only through the presiding judge. The examination of the defendant is followed by the hearing of the witnesses and of the experts. This is also carried on by the judge. The public prosecutor and the defense counsel have the right to put pertinent questions to the witnesses and to the experts, which the judge must permit in accordance with the regulations within the framework of the code of criminal procedure.

The role played by the counsel for the defense must be described in detail. In comparison with his role in the Anglo-American procedure, he is not so important here. Whereas in Anglo-American procedures the prosecution as well as the defense, so to speak as two parties, submit their case for the decision of the court, in German procedures the investigation of the facts of the case in the trial, the rules concerning the extent of evidence to be collected, the serving of summons to witnesses for the prosecution and defense, without the prosecution or the defense filing any requests, are in the hands of the court. According to that, the public prosecutor and the counsel for the defense in reality only support the court in investigating the facts of the case, which is the duty of the court itself. Because of this role played by the counsel for the defense, it follows that in German criminal proceedings the defendant is represented by a counsel only in a comparatively small percentage of cases, and in all the other cases the defendant just does not employ a counsel for his defense.

The question regarding the contesting of a verdict rendered by a court of first instance demands thorough clarification. In this connection, we will demonstrate the meaning and the purpose of the nullity plea and of the extraordinary objection. We will prove that it was not National Socialistic thinking in terms of violence [Gewaltdenken] which gave rise and impulse to their introduction, but rather considerations regarding the technique of procedure. By extending the competency of such courts, which had to decide only in one instance, the necessity arose for a higher instance to be able to take care of reviewing decisions. To be sure, considerably eased regulations regarding the review of verdict rendered by special courts had already been introduced when these courts were first established. However, these regulations proved by providing a resumption of proceedings [Wiederaufnahme des Verfahrens] insufficient in practice, particularly after it became evident that economic offenses called for uniform laws throughout Germany. Considerable divergence insofar as the legal interpretation of the new laws was concerned and with regard to the meting out of punishment became apparent in the procedure of the different courts, through a constant surveillance, which became especially necessary in view of the changing economic con-

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ditions. To obtain uniformity in this respect, new opportunities for additional legal redresses were created. We shall demonstrate that the nullity plea is a method of procedure which has been taken over from the former Austrian law. The diversity in legal conceptions concerning the principle of *ne bis in idem* [double jeopardy] with regard to legal remedies will be treated in this respect.

The indictment also makes it necessary for us to decide how far a state may and can consider itself competent to extend its power to punish [Strafgewalt] acts committed abroad. Is it consistent with international law to prosecute foreigners for punishable acts committed abroad? The extent to which a state may take it upon itself to take action for acts committed abroad depends on whether such state inclines toward the principle of personality [Personalitaetsprinzip], the principle of territoriality [Territorialitaetsprinzip], the principle of protective law [Schutzrechtsgrundsatz], or the principle of universal law [Weltrechtsgrundsatz]. As can be seen from a study of comparative law and from the history of law, diverse and variable opinions are held about this in the different countries, and the science of international law after the First World War shows this in particular. We shall point out the basic principles which are contained in sections 3 and 4 of the Penal Code of 1870, and we shall find again in the Supplementary Law (Novelle) of 6 May 1940, which extends the sphere of authority of the penal law, and which is now being assailed by the prosecution, ideas drafted for the reform of the penal law conceived long before 1933. article 153a of the Code of Criminal Procedure is, to a certain degree, intended to act as a safety valve against a too exaggerated application, and has in fact greatly reduced prosecutions, and it shall be dealt with in this context.

The discussion on the introduction of German law and the establishment of German courts in the Protectorate will cover the three decrees of the Ministry of Justice, which were also issued as a result of a decree published by Hitler in the form of a law, and an ordinance supplementing this decree, both of which were not countersigned by the Reich Ministry of Justice. In this connection, it is necessary to clarify the international relations existing between the so-called Protectorate and the German Reich. Are we concerned with a bilateral international treaty negotiated between Hacha and Hitler, an intervention, an annexation, or an occupation? From the subjective point of view, what the German public and what the defendants actually knew about conditions then prevailing will be decisive in each case. We shall have to discuss here and at other occasions—and this is not dependent on the above—

whether within the scope of the indictment concerning a crime against humanity, the actually selected form of legislation and administration of justice is not also justified in its scope under different international conditions. Can one, to give an example, consider it inhuman if members of the Protectorate were subjected to the provisions of the German Criminal (Penal) Code regarding treason and high treason, if the provisions of the law governing occupied territories would also have justified the same penalties for aiding and abetting a hostile army?

With regard to the introduction of German law in the Eastern territories we must first of all consider that they were essentially divided into the following three groups, namely:

1. Territories which were part of the Union of Soviet Republics after September 1939;

2. The so-called Congress Poland [Kongresspolen], the principal part of the Polish Republic, which was administered under the designation of Government General, and finally;

3. The western parts of Poland, which before 1918 were made up mainly of the German provinces of Poznan, Upper Silesia, and other small parts of provinces. German jurisdiction was introduced only in areas mentioned under 3, and they were designated as "Incorporated Eastern Territories." The former Russian territories mentioned under 1 were subordinate to the military and civilian governors, and the Government General mentioned under 2 to Governor General Dr. Frank. Both these groups were completely outside the administrative competency, or even the sphere of influence, of the Reich Ministry of Justice.

If, therefore, we have to concern ourselves with the question of the introduction of German jurisprudence only in the so-called Incorporated Eastern Territories, then we shall call attention to a point of view widespread in science and actual application, whereby a declaration of war renders treaties [staatsrechtliche Vertraege] meaningless between the parties at war. Not only was this point of view especially advocated in a detailed justification by the Reichsgericht, as the German Supreme Court, already after 1918, but it was also championed in French works on international law, as for instance in Foignet's Droit International Public [International Public Law]. It will be shown that other states have in fact also accepted this point of view. The recognition that this viewpoint concerning international relations was actually followed in practice will be shown by an agreement concluded between Germany and the Soviet Union, which pertains to judicial procedure in civilian matters in Polish territories incorporated into the Soviet Union in 1940.

The answer to the question—which has already come up many times during the examination of witnesses by the Court—namely the question, whether it was permissible to apply the criminal ordinance for Poles [Polenstrafrechtsverordnung] also to those Poles who did not come to Germany of their own volition, will depend on whether we consider the introduction of German jurisdiction in the above-mentioned extent admissible. I don't believe that the evidence presented by the prosecution covers a case which proves that a Pole who did not come to Germany voluntarily, was sentenced. Generally speaking however, we will have to take into consideration the fact that the Pole who came to Germany was subject to that law which then applied in his former place of residence.

So that the jurisdiction in so-called Night and Fog [Nacht und Nebelsachen—NN] cases, can be judged, we shall put in evidence that in the main the military courts alone were competent. Section 3, paragraph 2, of the Decree for Military Jurisdiction During Wartime [Kriegsstrafverfahrensornung] formed the legal basis for handing over those cases to the general courts. This decree concerning military jurisdiction during wartime and special operations was issued on 17 August 1938, and published in the Reich Law Gazette 1939, part I, page 1457. It was only signed by the Fuehrer and Reichskanzler and by the Chef des Oberkommandos der Wehrmacht [Chief of the Supreme Command of the Armed Forces].

This decree fixes the scope of military jurisdiction and subordinates all foreigners and Germans to this military jurisdiction for all criminal offenses committed by them in the area of operations. According to section 3, paragraph 2, of this decree, military courts however are to prosecute such crimes only if it is judged necessary for military reasons. It is within their discretion to turn over the prosecution of criminal cases to the general courts.

On the basis of this legal foundation, and in accordance with an agreement between the Chief of the Armed Forces Legal Department, Dr. Lehmann—who has appeared here before the Tribunal as witness—and the former Under Secretary Dr. Freisler, prisoners held in Night and Fog cases were placed before a German court in the sense of paragraph 30 of the Hague Regulations on Land Warfare.

The fact that the proceedings [of an NN case] were kept secret in all its phases was justified for military reasons. According to paragraph 6 of the basic treaty of the Hague Regulations on Land Warfare, military interests come first, and then comes the protection of the civilian population. The administrators of justice could not decide about the scope of the military interests. It

could never be the task of the civilian judicial authorities to judge whether the military commanders correctly interpreted the competition of military necessity in the sense of subparagraph 8 of the introduction to the basic treaty of the Hague Regulations on Land Warfare.

Within the framework of these military necessities we will also clarify the motive of intimidation which follows from this. A deterrent could, according to the views of the parties concerned, be achieved only by the severest punishment, with a judgment in the enemy country. The legal basis for this was given without more ado in accordance with those existing provisions of military law which correspond to international law. It concerned cases throughout which can be punished with death, according to general military law, such as espionage, sabotage, aid and comfort to the enemy, and illegal possession of arms. Is it then a violation of the law of humanity if allowance was made for the principle of a deterrent in another manner, and standards were introduced into the proceedings before the courts in Germany which, regarded absolutely, are attacked by the prosecution, but which have been introduced here to avoid an administration of justice which would pronounce the death sentence excessively? We will prove that in the proceedings before the Night and Fog courts, sentences of imprisonment were pronounced in an overwhelming proportion, and that the quota of death sentences was very small. It will be clearly shown that the deviations from the normal proceedings which were shown by the Night and Fog proceedings were all conditioned by the principle of secrecy. A full consideration of German criminal procedure will show that many limitations in the leading principles of German criminal procedure mean either no disadvantage at all, or at any rate merely a far lower degree of disadvantage than it may appear to a person accustomed to thinking only along American principles of procedure.

Article 3, paragraph 2 of the Rules of Military Criminal Procedure will also prove that the Night and Fog prisoners had been handed over to the civil authorities only for the purpose of the execution of the criminal proceedings, and that moreover the power of disposal over these prisoners was reserved for the offices of the Wehrmacht.

When we see that the Night and Fog proceedings had been taken over by the judicial administration by virtue of an order of the Fuehrer and by virtue of the delegation of the military authorities competent therefor, the question of the relationship of international law to the German State law will also be submitted for consideration. The German science of political and international law has always unanimously advocated the view that state law

takes precedence over international law. This would be of significance in each case for the question of a consciousness of injustice on the part of the defendants.

The prosecution has also concerned itself with "lynch justice" [Lynchjustiz]. The defense will present documents proving that the judicial authorities criminally prosecuted, in spite of the violent opposition of the Gauleiter concerned, Germans who had mistreated or shot Allied fliers forced to abandon their planes, and that they protected Germans who treated such Allied fliers humanely. This positive attitude of the judicial offices will constitute an illustration of the relations of the powers [Machtverhaeltnisse] at that time. The Party and the police in their attitude were opposed to each other. The leader of the Party Chancellery had ordered all State and Party offices not to interfere with the execution of "lynch justice" on Allied fliers. The Minister of Justice could not ignore this order. He applied it in a manner that could be interpreted as quashing the proceedings. This weakening of an order instigated by the Party and the cases in practice mentioned show here, too, the basic tendency in the consideration of the actual relation of the powers.

Arguments from the aspect of reprisal will also be made, which are supplementary to the question of "lynch justice."

The German Law of Pardons needs also to be presented and dealt with in detail, since it represents the basis, after all, for the proper evaluation of numerous documents presented by the prosecution, including the report lists of the Reich Ministry of Justice in matters of the death sentence. It has been fully codified, and we will refer to the numerous legal provisions. The entire system of pardon will justify the statement that it was most painstakingly built up with every safety measure and must withstand any criticism as a system. The law of pardon was incumbent upon the head of the State. Hitler transferred his executive power to Reich Minister Thierack, even for death sentences, whereas the latter's predecessor in office, Reich Minister Guertner, and after his death, Under Secretary Schlegelberger, were restricted in the execution of the law of pardon in that they could recommend to Hitler to pardon a person sentenced to death, but they themselves could not pardon a person. What resulted is necessarily an orientation toward the utmost which could be obtained from Hitler. The manner they used and how the whole tendency on the part of the participating offices was to exhaust fully the possibilities for pardon which were offered will be shown in the evidence.

From the individual provisions we will see that in matters of death sentences, for example, the Oberstaatsanwalt, regardless of whether the condemned person had personally submitted a peti-

tion for pardon, had to make a thorough report on the question of pardon after he first gathered the attitude of the court, the presiding judge, the prison authorities, the police, and still other offices prescribed in special cases. This report goes to the Generalstaatsanwalt who on his part must then state in detail his attitude about the pardon report. In the Reich Ministry of Justice, special Referenten had been appointed for dealing with pardon questions. These Referenten were supported by numerous co-workers. The co-worker had to present an opinion with an exact report of the facts, an opinion on the legal question of the individual case, a criticism of the judgment with regard to the factual and legal aspects, and a detailed statement on the question of pardon. The Referent, on his part, as well as the division chief, had to add their attitude to this opinion. Only if all reporting offices, the co-worker, the Referent, and the division chief unanimously recommended that the sentence be carried out was the matter designated as a so-called smooth affair [glatte Sache]. In this case the Referent in charge of death sentences reported personally to the Minister, calling special attention to all the circumstances of the case worth remarking on. On the other hand, even if one of all these participants recommended commuting the death sentence to a prison sentence, then the co-worker had to present his detailed opinion in person to the Minister; and the Referent, the division chief, and the under secretary stated their attitude at the request of the Minister.

The same procedure was also used in principle in cases of so-called immediate execution [Blitzvollstreckung]. This concerned cases from the last years of the war, in which the facts of the case and the legal question to be decided on were straightforward; moreover, it concerned cases in which, on account of the fact that the deed had caused considerable stir among the public, a special deterrent effect should be obtained by carrying out the sentence as soon as possible after the deed had been committed and judged. The only difference in dealing with these immediate executions and the usual procedure was that all reports and opinions were given by telephone, telegraph, teletype, or verbally, and on account of its being a straightforward case no files were submitted.

The indictment also contains the charge that the amnesty laws were administered according to political view. The provisions in question will be discussed in detail when the evidence is presented.

Hitler's constitutional right to quash pending criminal proceedings [Abolitionsrecht] will be shown in its practical meaning.

Regarding the carrying-out of sentences we will deal with the legal provisions and the regulations applicable in penal institu-

tions. The defense will prove that no crimes against humanity were committed in penal institutions of justice by its officials with the exception of occasional violations which are unavoidable even under the best directions. The rules of the strict legal provisions of the German Penal Law against the ill-treatment of prisoners will emphasize this point. The cases mentioned which date from the last days before the collapse offer, as a singular sign of that moment, no basis for a general judgment of the German execution of punishment and will be referred to as each individual case comes up.

The action of the Spruchrichter dealt with in the indictment and the charges raised in this connection will bring the legal position of the German judge up for discussion. We shall see the judge as an independent official who is not bound to directives but only to the law. We will discuss the positivism of the German interpretation of law. We will deal with the prosecution's charges arising from the directing regulations. We will show that they are merely a reference to the motive and aims of the law in question, and that they, to some extent, give a clear conception of the policy of the legislator regarding crime. They are a clue to the way in which the legislator imagines punishment should be awarded by the judge. They are in no case a general directive or a directive pertaining to an individual case.

In dealing with the position of the public prosecutors we will refer to the principle of legality which is laid down by law, and according to which the public prosecutor was bound to prefer a charge as soon as there was sufficient suspicion that the criminal facts as laid down in a legal provision existed.

In conclusion the defense will also deal with the legal questions, arising from Control Council Law No. 10 itself. We know that the Tribunal has been called together in order to pass judgment on the basis of this law.

On the basis of this actual fact and in compliance therewith, we will for practical reasons refrain from repeating the relevant objections already raised in the proceedings before the IMT and other proceedings before similar Tribunals in session. On account of these considerations we will restrict ourselves to the real legal questions as to whether an indictment is permissible from the point of view of conspiracy in war crimes and crimes against humanity of Control Council Law No. 10. In this respect my colleague, Dr. Haensel, will provide detailed statements hereon in due course.

At the beginning of the evidence for the defense and in connection with the opening statements on behalf of the individual defendants, the defense intends to call in two experts for the legal

questions of general interest, namely Dr. Jahrreiss, Professor of Public and International Law at the University of Cologne, and Dr. Niethammer of Tuebingen, formerly attorney at law, now Honorary Professor of Criminal Law and Criminal Procedure.

As far as documents being introduced with regard to the general questions discussed—

We will not be able to produce Dr. Jahrreiss at this time. Professor Jahrreiss cannot get away; he will only be available later on in July, and perhaps a suitable moment will come then when he can be examined when we have dealt with the cases of the officials of the Ministry of Justice.*

As far as documents being introduced with regard to general questions discussed, they will be handed over during the defense of the individual defendants. For the purpose of survey we will at the conclusion hand over the documents relative to a particular subject compiled in a special document book.

The defense has distributed the subjects which have arisen as a result of my survey among the individual counsel for the defense. Counsel in question will go into these cases during the proceedings and in particular at the time of the closing statement.

The subjects are classified in the following manner:

1. General questions on public law and international penal law —Dr. Schilf.

2. Legislative—machinery and technique—myself [Dr. Kubuschok].

3. Relationship between judicial authorities and police—myself.

4. Relationship between judicial authorities and the Ministry of Propaganda and the news service in the Nazi State—Dr. Schilf.

5. System and structure of Reich Administration of Justice—Dr. Schilf.

6. Introduction of German law and German jurisdiction in the Protectorate and the Occupied Eastern Territories—myself.

7. Sovereignty of justice in the incorporated and occupied territories—myself.

8. German court organization, Special Courts and People's Court—Dr. Brieger and Dr. Grube.

9. German criminal procedure—Dr. Doetzer.

10. Extraordinary objection—Dr. Grube.

11. Nullity plea—Dr. Schilf.

* Professor Jahrreiss appeared as a defense witness on 25 and 26 June 1947. Extracts from his testimony are reproduced below in section IV D. Dr. Niethammer did not appear as a witness.

12. Retrospectiveness of penal laws and legal analogy—Dr. Aschenauer and Dr. Schilf.

13. Types of perpetrators—Dr. Schubert.

14. Military penal law—Dr. Koessl.

15. Independence of judges and directive measures—Dr. Aschenauer and Dr. Schilf.

16. Law of pardon—myself.

17. Execution of sentence—Dr. Marx.

18. Lynch law—Dr. Orth.

19. Sterilization and Euthanasia—Dr. Orth and myself.

20. Conspiracy and Control Council Law No. 10—Dr. Haensel, Dr. Doetzer, and Dr. Wandschneider.

May I now begin making my statement for the defendant Schlegelberger?

PRESIDING JUDGE BRAND: Do you have that in the translated form for us? We have it, thank you.

C. Opening Statement for the Defendant Schlegelberger[1]

DR. KUBUSCHOK: If, in my statement concerning the defense in general,[2] I have just pointed out that the administration of justice in the National Socialist State cannot be judged separately but must be judged in the light of the whole administration of the Reich and its head, the dictatorship, I shall have to refer thus in defending the defendant Schlegelberger again and again to his personality, quite apart from dealing with the objective facts as propounded by the prosecution in order to judge and interpret actions in their proper light.

Franz Schlegelberger was, after many years of service to both the administration of justice and the jurisprudence, already Under Secretary when Hitler came to power. He kept this position until August 1942 when Hitler, according to his pronouncements wanted to build up a National Socialist administration of justice. Schlegelberger had always been dealing with civil law. We will outline this, his activity, in general. When in January 1941 after the death of the Minister of Justice Guertner, he took over the administration of the Ministry of Justice as the then oldest Under Secretary according to rank, so to speak; only then did he, in this

[1] Tr. pp. 4084–4089.

[2] The general opening statement on behalf of all defendants is reproduced immediately above, section III B.

position, and to the extent of that position, have to deal with criminal cases.

If the prosecution on account of this, his position, has indicted him on these individual counts and included him in the common legal framework of conspiracy, the defense will first of all show that Control Council Law No. 10 does not provide a legal basis for an indictment of conspiracy to war crimes and crimes against humanity. My colleague, Dr. Haensel, responsible for the entire defense, has taken over this subject and will make the necessary statements and put forward motions. In addition, I, myself, will submit sufficient evidence to prove that with a person of Schlegelberger's caliber, conspiracy and violent thinking are incompatible. I shall submit proof, as to his basic attitude during the whole of his tenure of office, that he could never have either favored or promoted principles of violent thinking, that on the contrary, all his activities were aimed at preventing or at least modifying the course set by Hitler's dictatorship. We shall see, how he wrestled with the opposing forces of the Party, and how unequally distributed the powers were, and how his defensive attitude was breached but forcibly. We shall learn how much Hitler had always disliked the administration of justice and its expert administrators, and that, at a time, when not only the whole of the administration in Germany but also the entire public life, even to a certain extent private life, had already been "coordinated" and shaped according to National Socialist ideas. On 20 August 1942, he had to realize the fact that he had to build up a "National Socialist administration of justice." Does this not constitute the truest judgment of Schlegelberger that he be judged by a man, who after all, was best qualified to judge? Is it not evident that the administration of justice under Guertner and Schlegelberger had done their utmost to face the avalanche? Is Hitler not best qualified to testify against the charges brought by the prosecution, namely that Schlegelberger had lent himself to the carrying out of National Socialist ideas of violence as personified by Hitler?

With this point of view in mind we shall have to judge the defendant Schlegelberger: A man, known to us only by his work, performed with integrity, and whose activities, viewed from National Socialist aspects, Hitler criticized in the above-mentioned way both in his Reichstag speech on 26 April 1942 and in his decree of 20 August 1942. Such a person has a right to point out: "The charges brought by the prosecution which superficially regarded, appear to be against me, and the charges that the prosecution has brought against me in order to incriminate me for my 10 years of service as Under Secretary cannot be judged as isolated facts and without considering motives but must be evaluated

as a whole." Thus, we will best be able to gain breathing space after the speech of the prosecution, which is necessary in order to reach impartial judgment and which culminates in the conclusion that Schlegelberger "had indeed played a prominent part in the destruction of German law," a reproach which he rightly rejects: with which also the statement of the British Broadcasting Corporation on the occasion of his retirement from office in August 1942, namely, that with Schlegelberger, the last judge in Germany, had disappeared—is incompatible.

Schlegelberger, under secretary for civil law, certainly knew how to supervise the orphaned Ministry of Justice for a year and a half in an administrative capacity. The one who succeeded him, his appearance already threateningly forecast, and to the stemming of whose course Schlegelberger devoted his whole self, escaped judgment. The aspect of being the representative [Gesichtspunkt der Repraesentanz] which obviously has influenced the prosecution essentially, has to be disregarded.

We will also have to take the fact into account, that Schlegelberger's position as interim administrator of the Reich Ministry of Justice, did by no means equal that of a minister. If, in spite of these hectic times when everything was being infected by the National Socialist virus, he succeeded in retaining the position taken over from Guertner, his decision alone to remain in office until the limits of what could normally be expected of anyone, certainly not an easy decision, would fully justify this step. Judging by his personality and studying in detail the real and true situation during those years we shall explain what really was behind the Rostock speech mentioned by the prosecution. Evidence will be offered as to Schlegelberger's real relations with the Party and how this was evident in the policy he pursued concerning questions of personnel.

His attitude toward Hitler will be subject to a careful examination. We shall be unable to do justice to this task if we do not also acquaint ourselves with those who blindly followed Hitler, and rendered the task of Schlegelberger and prior to that, Guertner's, so difficult. Freisler, his antipode, whom Hitler by entrusting him with all matters concerning criminal law had made into a guardian of National Socialist ideas within the Ministry of Justice and all the other party officials who hated the last bulwark of constitutional thought.

With reference to individual counts of the indictment I shall point out that as "seditious undermining of the military power" [Wehrkraftzersetzung], so-called passive defeatism only became a punishable offense in 1943, and it was precisely for this purpose that the competency of the People's Court was established as per

decree of 29 January 1943. The practice of seditious undermining of the military power, to which the indictment refers, therefore did not take place until Schlegelberger's retirement. At the time of Schlegelberger's tenure of office these cases of defeatism were judged according to the Insidious Statement Law [Heimtueckegesetz] and were not punishable by death but by a maximum penalty of 5 years' imprisonment. The extension of the German criminal jurisdiction to include crimes committed abroad as well was practiced before Schlegelberger took over the administration.

I shall deal in detail with the legal question of the extension of German law to the occupied territories and I shall throw some light on the origin and the application of the ordinance concerning crimes of Poles and Jews. I shall show by means of the documents already submitted by the prosecution what demands were made by the Party concerning the treatment of the Poles and Jews and how these requests were opposed by law and in practice. Schlegelberger's general attitude toward the Jewish question will be the subject of the discussion.

Even if the prosecution connects the defendant Schlegelberger with the extradition to the police of so-called asocial persons as well as of Poles and of Jews, the defense will prove that those orders were only given according to an agreement made between Himmler and Thierack in September 1942. Previous, special cases only concerned direct orders by Hitler given to the police and which could not be prevented by the administration of justice. We shall see that the police had started during the time of Guertner to remove prisoners from the prison by command of Hitler if Hitler considered the sentence passed during the criminal procedings, a too mild one. Only in order to prevent this if possible or at least to restrict it did Guertner insist that he be informed of this order at the same time as were the police. It was only because of that request that the administration of justice dealt with these matters at all. It will be proved that everything possible was done in order to prevent extraditions to the police.

I shall also speak of the practice of granting pardons and find here also a confirmation of Schlegelberger's general attitude.

The indictment also deals with the so-called euthanasia. We shall see that Schlegelberger opposed the carrying out of the euthanasia program soon after taking over the administration. He obviously succeeded, for we shall establish that the measures were stopped in August 1941 and were only started again at the time of Thierack as can be seen from the meeting described by the witness Suchomel.

Concerning sterilization, we shall offer abundant evidence to prove that the practice of the courts for protecting the hereditary

health of the German people was unobjectionable, that those courts had examined conscientiously whether evidence as to the facts required by the law had been submitted and especially sterilization for political or racial reasons was never decreed. I shall produce a witness to show that this procedure had been carried out in an unobjectionable way, even where Jews were concerned.

Regarding the question of the Night and Fog cases, it will be explained for what reasons and with which results the Night and Fog cases were taken over by the general courts. It also will be set forth what regulations were in force up to the date of Schlegelberger's retiring from office. The extent and the consequences of restricting the proceedings necessitated by maintaining secrecy will be explained.

By submitting documents I shall present evidence about the political development of the National Socialist State and the structure of its administration. I shall present documents referring to legal provisions and their explanations concerning the questions raised by the prosecution. Finally, I shall submit several affidavits which deal with certain questions and help to form a judgment of Schlegelberger's entire personality. I shall produce a witness for the political and administrative conditions in the National Socialist State. Another witness will, as already mentioned, give evidence on the practice of the courts for the protecting of hereditary health of the German people and on general questions regarding sterilization. Finally, I shall name as witness the personal Referent of the defendant who for many years held this position up to the time of Schlegelberger's retirement from office, and who by virtue of his knowledge gained through professional and personal experience will be able to give evidence on numerous questions which have to be discussed.

D. Opening Statement for Defendant Klemm*

DR. SCHILF: May it please the Tribunal. By way of introduction, I should like to call attention to the fact that the indictment also clearly implies with regard to my client Herbert Klemm that, permeated as he was with National Socialist convictions, his one endeavor was to realize, by judicial methods and throughout the judicial field, the aims of National Socialist despotism. The indictment also, indeed, implies that he was acquainted himself from the start in detail with the great extent of these aims. The prosecution has tried, in connection with each action and with each event that came to light anywhere in the files, to refer everything with which my client was concerned back to that funda-

* Tr. pp. 4090–4106.

mental conception. Yet in my opinion the prosecution does not make any effort to embark upon proof that the defendants had come to a mutual agreement in their own minds, such as must constitute the prerequisite for the conspiracy of justice, for the furtherance of the Hitler regime as alleged by the indictment. Instead, the prosecution is content to trace in every statement and every action simply a sign of malicious intent and bad faith without stopping to consider how such actions are to be estimated in the light of historical development and within the limits of the phenomenon as a whole and the practical possibilities. Just as the indictment desires to see in the legislative power [Rechtsschoepfung] conferred upon the judge by the alteration of paragraph 2 of the German Criminal Code an example of the judicial intention to try cases unrestrictedly and arbitrarily, without attention to legal guaranties, so also my client Klemm is credited with completely false motives in detail. Just as it will be proved by the defense that such legislative power for the judge had already been planned, long before 1933, in draft proposals for reform, with the object of creating the necessary synthesis between merely codified law and the actual development of law through the giving of legal judgments, so also shall I show, in my defense of the defendant Klemm, in general, that he, too, was concerned, in his measures, with the preservation of real justice. Reference will therefore inevitably be made to the background of historical development behind the measures with which he is charged, to the related points in the German legal system, and to the actual distribution of power existing during the Hitler regime. In this connection a great deal will depend on the view that is taken of his position, his potential influence and the limits of his authority.

In particular, I shall divide the subject matter of my proof into sections.

In the first place, it will be necessary to begin with the fact that, outwardly, the defendant Klemm has to bear a certain amount of odium: he had joined the NSDAP before it took over power, and he remained in it until the capitulation; he was at first Oberstaatsanwalt and Ministerial Councilor in the Reich Ministry of Justice, he was chief of liaison with the SA and reached high rank in that organization, he was a group leader in the Party Chancellery, and he was finally to become Under Secretary in the Reich Ministry of Justice, the last position he held, and a personal friend of and very close collaborator with Thierack, the Minister. The indictment evidently intends, by giving this outward impression, to exhibit Klemm as a man who considered justice to be a means, and treated it as a means, to exclusively

political ends. I shall prove that this was not the case. In order to demonstrate the seeming contradiction between outward appearance and actual private character, I consider it my duty to give the Tribunal a comprehensive picture of the personality of my client as a jurist and as a man. It will become evident that he was and remained a simple and straightforward person, even after he rose higher in his career, that he was a man of sensitive disposition and refined feeling and always endeavored to act objectively and above all justly. I shall therefore have to ask my client to explain in the witness box the ideas he had conceived as to the aims of the NSDAP, the hopes he had before him in the legal and political field, and the way in which he believed it possible that the political intentions of the leadership of the state could be combined with the idea that law has to prevail. He will have to explain to the Tribunal how many things he actually did not know in order to enable us to gain an accurate picture of the situation at that time and of the developments.

So far as the separate phases of the activity of the defendant Klemm are concerned, it must be said—

The indictment takes as the first phase his activity as Oberstaatsanwalt and Ministerial Councilor in the Reich Ministry of Justice. The two charges specially raised against him in this field are concerned with the so-called "more severe interrogations" through organs of the Gestapo and with the fact that he was the Ministry's chief of liaison with the SA. I shall prove that it was not the duty of the defendant to suggest in certain cases "more severe interrogations," in other words, maltreatment of prisoners by the Gestapo. It was, on the contrary, his duty to prosecute such cases through criminal proceedings, since also the Gestapo and its organs were prohibited from ill-treating prisoners. In this connection I shall be able to take the opportunity to describe the attitude of my client by reference to the documents which were submitted in the IMT trial. It was the defendant Klemm who as an official in the Ministry of Justice of Saxony suggested the strict prosecution which was made so much of both in indictment and in the judgment given in the IMT trial of those SA men who had rendered themselves guilty of ill-treatment of prisoners in the concentration camp at Hohenstein in Saxony. There is no ground for the assumption that Klemm's attitude changed at a later date, when he worked in the Reich Ministry of Justice.

The position of a chief of liaison between the Ministry and the SA leaders will be described by me through reference to the documents. The judiciary as a public authority, had the duty to inform the SA leaders of any prosecution or condemnation of a member of the SA. It was the purpose of such information to

give the SA leaders the possibility of removing criminal elements from their ranks. This purpose was known to the Reich Ministry of Justice. The chief offices of both organizations had to exchange information and experience and were obliged to ascertain in which special cases they had to be interested. It was necessary to appoint a special Referent for this purpose, merely in order to simplify the handling of these matters. This post was filled by my client Klemm, since he was simultaneously both a member of the SA and of the Ministry of Justice. I hope, indeed, to prove with special effect that it was absolutely opposed to Klemm's conception of his office as such a liaison chief to suppress criminal proceedings against SA members or protect them against prosecution, but that on the contrary he thought it necessary to support vigorously the interests of justice against the SA leaders. An individual case will give me the opportunity to demonstrate how also in this field Klemm was guided by legal consideration alone, and this individual case will be symptomatic of the attitude of my client.

In order to be able to judge correctly the activity of my client in the Party Chancellery, I consider it my duty to describe first of all the sphere of work and problems with which the Chancellery itself had to deal. This seems to me all the more necessary, as evidently completely false ideas of this organization are prevalent. I shall therefore have to show that by reason of legal regulations the latter had to take part in all the legislative and administrative work done by the Ministry of Justice and that it was not simply an office that carried out tasks concerned purely with Party politics. In the constitutional structure of the Third Reich, the Party Chancellery had to perform public functions. I may already at this point draw the attention of the Tribunal to the fact that my client is not affected by count four of the indictment, in spite of the fact that he was employed in the Chancellery of the Party. It is indeed a significant indication that the prosecution has formed an incorrect view of the Party Chancellery, if an official could be employed there who did *not* belong to the corps of leaders of the Party.

An explanation of the bureaucratic structure of the Party cannot be avoided; its division into separate departments and groups will have to be described. The defendant Klemm was at the head of only a subordinate group in the Party Chancellery. Its number was IIIc. I would ask the Tribunal to be so good as to take due note of this number IIIc in my speech for the defense, so far as the latter is concerned with the Party Chancellery, and also when I come to explain the documents relative to the Party Chancellery. My client was employed exclusively in this legal group. This outward sign alone is an important circumstance to be considered

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in arriving at a correct estimate of the work of my client. The special task of this Group IIIc was to deal with all matters which affected law, codification, and the administrative work of the Ministry of Justice. The officials in this legal group remained, as did Klemm also, officials of the Ministry of Justice; they were merely delegated by that ministry. They also therefore represented in the Party Chancellery the idea of justice and the concerns of *their own* ministry. Whenever different questions were raised in Group IIIc, for example, questions as to the legal disposition of the affairs of foreign peoples, a different department or group of the Party Chancellery dealt officially with and decided upon the matter. Owing to this restriction of the field of their work the legal group could only raise objections against the treatment of any matter in another department if formal questions were handled. The legal group had no right of appeal if a matter had been decided on principle by other groups. Thus, it will be shown that the decree about penal law with regard to Poles was not dealt with or decided upon in Klemm's legal group but in Group IIIa of the Party Chancellery, which was concerned with questions on ethnic origin [Volkstumsfragen]. The defendant Klemm, therefore, could not exercise any influence whatever, during the period of his employment in the Party Chancellery, on the provisions of this law.

Through further evidence it will be made clear that Klemm's position in the Party Chancellery, as a consequence of the latter's special method of working, could only have slight influence on decisive matters. Really important affairs concerned with politics or both politics and law, so far as they may interest the Tribunal and the prosecution, were not handled by the legal group headed by Klemm.

The officials of the Party Chancellery, so far as they were group leaders, had no influence whatsoever on politics. On the contrary, this was done by the Party's own office. The latter had no state functions as had the Party Chancellery. The NSDAP had offices for agricultural policy, people's welfare, people's health, a national legal office, an organization of Germans living abroad, and many more. There the political principles were planned, there the influence was exercised that found expression in the sentence; "The Party gives orders to the State." All these offices of the NSDAP must be separated clearly from the Party Chancellery with its function of a public nature. These Party offices transmitted their plans through the competent "Reichsleiter" directly to Hitler as the Party leader and head of State.

Also the position of Bormann must be explained. He also had a variety of offices and functions as Reich leader, secretary of the

Fuehrer, and leader of the Party Chancellery. At the time when Klemm was working in the Party Chancellery, Bormann was regularly in the Fuehrer's headquarters and thus away from Munich. All important questions of a general nature, also those affecting justice and its policies and organizations went directly to Bormann in the Fuehrer's headquarters. There Bormann himself ordered that most of the matters be handled at once. In such cases Klemm's legal group often received no information at all of his decision, or at the most a copy subsequently. When Bormann transferred a job to the legal group in Munich he included as a rule instructions for the handling of the matter. When things were handled in this way by Bormann no objections could be raised. Moreover, the evidence I will produce will destroy the rumor that my client had close contact with Bormann. They disliked each other very much. The main reason was that Klemm did not accede willingly enough to the wishes of Bormann. It occurred only very rarely that Klemm reported to Bormann. To a much greater extent than other subdepartment heads of the Party Chancellery, Klemm also informed Bormann about his own point of view.

After I shall have tried to clarify the unclear and dark picture of the Party Chancellery, I shall discuss in detail the *working method* of my client and I will outline in what matters he participated and how far he is, therefore, responsible and in what matters he did not participate.

(*a*) A series of documents submitted by the prosecution carry the dictation symbol of Bormann; I shall show that all these documents can have nothing to do with my client, Klemm. They were prepared solely by Bormann and his staff at the Fuehrer headquarters. No copy was sent to the Party Chancellery at Munich, so that the legal group never received any knowledge of them. This is the reason why it is so important to draw attention to the symbol of the legal group, namely, IIIc. Klemm neither prepared, nor had any knowledge of, any letters of the Party Chancellery which do not bear this file number. Just as an example I mention Thierack's letter to Bormann on the collaboration of the judicial authorities in the extermination of Poles, Jews, and gypsies (*NG–199, 199A, Pros. Ex. 243*). As "Top Secret Reich Matter" this writing never reached section IIIc of the Party Chancellery.

(*b*) I will show that the defendant cannot be held responsible for a possible crime in which the huge organization of the Party Chancellery may have been involved, but not the defendant, if he had never participated in the planning, and if he could never have received information about it. It is my opinion that this is also

not possible by using the concept of conspiracy or the broadly defined forms of participation according to the Law No. 10 of Control Council. Such a reasoning is not possible especially if I will prove how strongly Klemm advocated—especially in the Party Chancellery—the idea that law has to prevail in a state, and how he tried to prevent that Party organs be influenced in any unfavorable way. Every day the Group IIIc received complaints against the justice, the judges, and against the offices of the administration of justice which wanted to influence pending proceedings or even to change sentences which had already been passed. Work in connection with such complaints made up the biggest part of the working time of this group. In all these cases the complaints were rejected by stating that the judge is independent. I shall submit evidence to show that the Party Chancellery, particularly Group IIIc, expressly forbade all political leaders (that is, the Fuehrer Corps of the NSDAP) to interfere in the jurisdiction. It will be demonstrated that this circular decree was issued on Klemm's initiative. I shall disprove the assertion of the prosecution and shall show that my client advocated emphatically the punishment of Party members who were found guilty of an offense. Accordingly, Klemm did not use his position in the Party Chancellery to keep justice under pressure but on the contrary tried to promote the interests of justice and the idea that law has to prevail in a state. In the year 1941, for example, he succeeded in persuading Bormann in a memorandum to reject the plans of Himmler, who attempted already at that time to transfer the jurisdiction over the Poles to his police.

(*c*) The documents submitted by the prosecution, so far as they really affect the legal group of the Party Chancellery, will not be able to invalidate my above assertions. When I will submit the evidence for the defense I will have the opportunity to explain the purpose and the context of these documents. It will be possible to correct many misinterpretations.

In this connection it seems to be necessary to explain briefly the fact that Klemm's influence in the Party Chancellery was never so great that it could have played any part in the appointment of Thierack to Minister of Justice in the year 1942. Many a person who could not know the actual events and their background may have had some fantastic ideas in this respect. The explanations of the defense will destroy these conceptions.

(*d*) With regard to the activity of my client as Under Secretary in the Reich Ministry of Justice, it will be the task of the legal presentation to separate those actions and measures for which he is responsible from those for which he is not responsible. Also with regard to this point I shall emphasize my point of view that

on basis of Law No. 10 of the Control Council, my client cannot be held responsible for what he himself did neither instigate nor approve. In order to be able to find the facts which will serve as the basis for such legal arguments, I must give you during the proceedings of evidence a detailed picture of my client's position as Under Secretary, of his working field, and of the extent of his personal influence. Even externally the position of the Under Secretary had changed considerably since the appointment of Thierack. While before this time the Under Secretary in the Ministry of Justice stood on principle between a section chief and the minister, after that time his function declined to the extent of being a figure [figurehead] beside the minister. Formerly the Under Secretary had a broad working field and had authority to make important decisions himself, and only the most important matters reached the minister himself, such as bills or critical matters with regard to policies of the State and of justice. Thierack himself on the other hand, handled all matters with regard to the administration of penal law which the section chief was not permitted or did not want to decide, and he degraded the under secretary to a position in which the latter could merely give his opinion like any other expert. It is correct, that from an external point of view the working field of my client seemed to be greater than that of his predecessor, Dr. Rothenberger. The sections of Ministries III (legislation in the sphere of criminal law), IV (administration of criminal law), and V (execution of sentences), which were not under the latter's jurisdiction were formally reassigned to Klemm. This seeming extension—my client was thus practically in charge of the whole Ministry of Justice with all its main sections but with the exception of section XV (section for secret matters) which was already in the process of dissolution—actually resulted in a curtailment of his executive powers. Only in a limited field did he receive the authority to make independent decisions, namely as chief of section II, which was concerned mainly with educational problems and whereby Klemm was entitled in personnel matters to propose appointment and promotion of officials up to the grade of Landgerichtsdirektor and officials of equivalent rank. In all other fields he was subjected to the domineering orders of the minister in the same way as every other official of the Ministry. Although he could call for the report of an expert and could thus bring a matter to be decided within his sphere, he was prevented from doing so if the minister himself reserved the final word for himself. Through presentation of my evidence it will be made clear how Thierack, because of his previous career, directed his interest, perhaps his only interest, to problems of criminal law and execution of sentences.

Thus, we will recognize that the above-mentioned main sections of the Ministry were only formally under the jurisdiction of Klemm and that no change "in the line of the direction of justice," as Thierack expressed it in a discussion of the section leaders on 7 January 1944 (*NG–195, Ex. 45*) resulted from the appointment of a new Under Secretary. It will be proved through the evidence how little the Under Secretary could care for other sections, and that because of the external circumstances, as for instance the evacuation of whole sections from Berlin, he was only rarely present at conferences with the minister or was left out intentionally.

(*e*) This limitation of the tasks of the under secretary through the organization was furthered through the personal qualities of the Minister, Thierack. A picture of Thierack will result from the documents and the statements of witnesses. He was an autocratic, brutal, and even a rude person. He pursued his views and objectives with remarkable stubbornness. Accordingly, he was hardly to be persuaded from an opinion once formed. He tolerated no one next to himself in his struggle for power. For such a person it must have been easy to suppress such a soft and yielding personality as Klemm. Thierack was not interested in problems of the jurisprudence in concepts of law. He thought that he was a politician and merely a practitioner of the administration of justice. The contrast in the characters had an especially unfavorable effect on Klemm's method of working since Thierack thought he could treat Klemm merely as an official dependent on him personally. That resulted from the previous personal relations of the two men. When Thierack filled the post of Minister of Justice for Saxony immediately after the seizure of power by the NSDAP, Klemm was his adjutant. When Klemm after many years again had to come into personal contact with Thierack through his appointment to under secretary, he was in the opinion of Thierack, not more than his adjutant again. When he contacted his Under Secretary Klemm, his manners were just as rough as in his contact with other subordinate officials. Even in the presence of other officials he showed tactlessness, and treated him, too, with disdain and certainly not as a "friend and confidant," as the prosecution obviously assumes. Thierack would not attach such weight to an opinion voiced by Klemm as would have been appropriate because of the latter's official position. In my defense plea this personal relationship is of importance, so that it must also be shown that Thierack was an extremely reserved person. He disclosed his plans and intentions to nobody before they were carried out. He kept the most important political-judicial events and decisions secret even from his under secretary. When he received

the visits of other Ministers, or higher Party and SS officials nobody else was present as a rule. This was particularly true in his contacts with Himmler and the people surrounding him, such as Kaltenbrunner. Of the contents of the discussions Klemm like th eother officials of the Ministry was not informed until a decree of Thierack was published for the individual sections of the Ministry.

As to the outside Thierack used Klemm only if he considered it as advisable to emphasize his position as Under Secretary. Thus, Klemm signed legal decrees not really as deputy of the Minister who was absent, but only when Thierack thought that he should put his signature under a document of little significance. Klemm had to sign the correspondence with other ministries if Thierack preferred this procedure for reasons of prestige. This is the only reason for the fact that the so-called directing letters [Lenkungsbriefe] to the presidents of the Appellate Courts Stuttgart and Hamburg do not bear Thierack's name but that of Klemm in spite of the fact that it was Thierack who, in individual reports, complained about the sentences as being too light.

(*f*) Starting from this general statement with regard to the evidence concerning Klemm's position as Under Secretary, I will have to discuss in detail the documents submitted by the prosecution and the statements of the witnesses. Here it will be proved that the main counts of the indictment have no relation at all to the activities of my client. Almost all the measures which the prosecution declared as objectionable, were completed when Klemm took over the position of Under Secretary. The special regulations against members of foreign nations were issued, the Jews were already excluded from the jurisdiction of the justice authorities, the so-called transfer of asocial "prisoners to the police"—handled by department XV, which was never subordinated to Klemm, not even formally—was carried out. My client practically had nothing to do anymore with the Nacht and Nebel cases. The interpretation of the laws by the courts was distinctly crystallized; a steady practice had already developed during the preceding 4 years of war, when the sentences became more severe because of the conditions caused by the war. The prosecution did not submit any evidence showing that Klemm during his time in office as under secretary advocated more severe sentences, especially in cases of high treason. The award of punishment and the granting of clemency took place in accordance with distinctly developed standards. In this connection I will have to demonstrate in detail the proceedings which developed for the clemency questions in cases where a death sentence had been imposed. It will be proved that Klemm did not adopt Thierack's severity-on-princi-

ple [grundsaetzliche Haerte], but that on the contrary, especially if the absence of the Minister offered an opportunity, he was inclined to be lenient. Impressive examples for this fact will be given to the Court from the document book of the prosecution 3–L, Document NG–414, Prosecution Exhibit 252.

In this connection the opportunity will arise to prove in general that it is only a mere assertion of the prosecution that the Ministry of Justice illegally ordered that a death sentence be carried out. Klemm did not participate in the issuance of directives concerning the clearing of jails when the enemy approached. These were affairs which were ordered by the executive department of the ministry (Dept. V). Evidence will be submitted which will prove that my client had practically nothing to do with Department V. They will prove that all decisions in these questions were always made by Thierack, without consulting his Under Secretary. Concerning the individual case about the illegal murder in the penitentiary Sonnenburg, the evidence obtained up to now through the cross-examinations of witnesses will be supported by additional evidence. It will clearly be shown that the Ministry of Justice was not responsible for these measures. It will be seen that Klemm did not know anything about the common plan of the Reich defense commissioner and the general public prosecutor and that therefore, he did not have the possibility to prevent that their intentions were carried out.

By reference to individual cases I will prove that, in accordance with the plea made by the entire defense the judiciary did not do anything which made the lynching of Allied fliers who were shot down possible. The contrary will be proved. It was Klemm who ordered that criminal proceedings should be started against Germans who had killed Allied fliers illegally. The disputes with the Party offices with regard to these orders will be shown. Furthermore, it will be proved that Klemm saw to it that Germans, who treated bailed-out enemy fliers decently were protected from subordinated authorities of justice who showed over-great zeal.

(*g*) When discussing the individual counts of the indictment I will try to find the basis of the evidence for subsequent legal considerations. This includes especially the question, whether it can be at all important for the judging of the facts of a crime, to examine the actions of a superior Minister in which the subordinate Under Secretary had also no part. Here the problem will not be the importance of an order with regard to criminal law, but it will be discussed that the necessary causal connection is missing. Going further we will have the opportunity to produce evidence before this Tribunal with regard to the subjective side.

I will demonstrate that Klemm, due to his conviction that law had to prevail in the state and due to his generally decent human attitude interceded on behalf of the law. It will be proved that my client was held in high regard by his co-workers in the Ministry, that he tried in many individual cases to mitigate the fundamental harshness of Minister Thierack who was severe on principle, that he always was ready to listen to other officials, that he always was ready to accept sensible suggestions; in general he was thus just the opposite of Thierack. This attitude also showed results, as will be proved, in the sphere of personnel policy. On principle he did not give any preference for positions to so-called "old Party members." In case of promotions and appointments he recommended persons who did not belong to the NSDAP. I shall be able to show cases where he also recommended persons who were on the other side [gegnerischen Lager], if they had special professional qualifications. He tried to aid officials of justice who, for political reasons, were personally in difficulties.

(*h*) Extended fields which Klemm handled in the Ministry of Justice have not been mentioned by the prosecution. When submitting evidence I will have the opportunity to show especially that my client had to spend most of his working time in the Ministry for Department II of the Ministry. This department handled all questions which were concerned with the general training of all German jurists. Here the special difficulties which arose with regard to the personnel of the authorities of justice on account of the events of the war had to be surmounted. The evidence will show that my client in training the young jurists omitted all politics, that his work was absolutely unpolitical. Thus, the so-called ideological training and examinations which were very much favored in the time shortly after the assumption of power of the NSDAP and which found a specially exact expression in the "Referendar Lager [camp for prospective lawyers] Hanns Kerrl" were excluded from the professional education of the jurist. At the time when Klemm, at the beginning of the year 1944, took over his position in the ministry, all these things had been settled a long time ago. The most urgent practical problems, where one should get young judges, when and in what manner young jurists should make their examinations, how former soldiers were to be treated, and similar questions belonged to Klemm's working field. This was practical work, also this field had nothing to do with "politics." Thus, if the picture and the activity of my client will be made clear to the Tribunal, then it will be proved that it is not a cheap attempt of throwing the blame upon dead persons, then it will become clear that it has been tried to make my client here in the dock the deputy of Thierack and

perhaps also of Bormann. Klemm is, however, not responsible for their guilt.

E. Opening Statement for Defendant Rothenberger*

DR. WANDSCHNEIDER: May I begin my opening statement? At the beginning of my opening statement I want to say a few words about the task of the defense as I see it.

I. The task of the defense

With the presentation of its theory of proof [Beweistheorie], the defense really starts its task in this trial. It is confronted with an indictment presented in the name of the world community against the justice officials in National Socialist Germany and referring to the moral conscience of just this world community. This situation requires a few words about the duties and position of the German defense in this trial. It is a cheap trick, if Germans now, subsequently, *merely because the National Socialistic State* has collapsed, declare very simply and without resistance that Hitler was "not right," and if these same Germans during the National Socialist regime, completely renouncing their own attitude and personality, were opportunists and cooperated with the entire National Socialist Policy with just as little resistance. Such a confession on the part of the defense, which would be considered suitable only *because* the sentence of the International Military Tribunal established the amoral character of national socialism, would also be a cheap trick and valueless. Opinions are not formed on the basis of outward conditions, but on the basis of one's own knowledge. Of course, we do know on the basis of our knowledge that under national socialism the basic rights and worth of the free individual and of the human community whose interests are inextricably bound together became corrupt and were destroyed and that is, by misuse and waste of the most valuable sources of power of the German nation itself and of other non-German nations. Only self-recognition, self-education, and efficient responsible cooperation of all members of a community lead to a really democratic way of life and state.

The above statements which were made in order to be honest and above board have not been made from the standpoint of any disinterested neutral third party. How could a German defense counsel be inwardly untouched by the arguments of the prosecution, regardless of whether and to what extent he, as a German, considers himself "guilty." In view of the fact that the German

* Tr. pp. 4106–4119.

people were entangled into error, misery, and guilt, should he not feel even more that he is one of them, and should he not try to gain that which cannot be lost—self-reflection, principles, and dignity. The defense wishes to thank the Tribunal for having given it full opportunity to represent the interests of its client in this spirit during this trial.

II. Criminal facts of the case according to the indictment; conspiracy and the individual facts of the case concerning war crimes and crimes against humanity

Dr. Rothenberger is charged with the crime of conspiracy, committing war crimes and crimes against humanity. According to the prosecution, the same concrete facts form the basis for the last two charges. In like manner, the charge of conspiracy is connected with the planning of the afore-mentioned war crimes and crimes against humanity. The facts presented by the prosecution to prove these crimes are in accordance with the IMT judgment only relevant from the penal point of view since the beginning of the war. We are concerned with the following facts:

Numbers 9 and 21 of the indictment—Use of the Special Courts and the People's Courts for the oppression of political enemies.

Numbers 10 and 22 of the indictment—Participation in the discussion between Himmler and Thierack of 18 September 1942.

Numbers 11 and 23 of the indictment—Sentencing and execution of Germans and non-Germans for high treason.

Numbers 14 and 26 of the indictment—Illegal execution.

Numbers 16 and 28 of the indictment—Preferential treatment shown Party members who are to be punished and collaboration in the introduction of the special penal law for Jews and others.

III. Nonexistence of a conspiracy on legal grounds

Before starting to discuss the basis for the above charges in the indictment, it seems fitting to treat briefly the question of conspiracy. From a legal standpoint, attention must be called to the fact that according to the statute of the London Treaty, as well as the Control Council Law No. 10, the conspiracy, or plan, can only be considered as a crime in itself if it concerns a crime against peace but not if it concerns a war crime or crime against humanity. This viewpoint was maintained also by the IMT in trial No. I.

IV. The general circumstances of the case which form the basis for the charges of the indictment

1. *Memorandum of Dr. Rothenberger*—In its opening statement against Dr. Rothenberger the prosecution called particular attention to his memorandum to Hitler for the year 1942 and entered it as Document NG–075, Prosecution Exhibit 27. The prosecution characterized this as a "peculiar document" and commented upon it from its own point of view. The defense will also have to analyze the memorandum minutely and discuss in detail its previous history and what has happened to it. It appears that the chief problem here is the basically important question of the dominating position of the judge in the life of a nation. The appointment of Dr. Rothenberger as Under Secretary can be traced back to this memorandum, the character of which is clearly open to a psychological judgment. Naturally the reasons for his appointment will have to be discussed in greater detail. The memorandum presents therefore the very first of those important developments which put Dr. Rothenberger in the defendant's dock in Nuernberg.

2. *Dr. Rothenberger's reaction to the Hitler speech of 26 April 1942*—The prosecution has further produced against Dr. Rothenberger his report on conditions to the Reich Ministry of Justice, dated 11 May 1942, as Document NG–389, Prosecution Exhibit 76, which describes the reaction to Hitler's speech of notorious fame, dated 26 April 1942. The prosecution blames him for the measures taken after the Hitler speech, just as for the corresponding measures of autumn 1942. It will therefore be the task of the defense to show how the measures taken by Dr. Rothenberger in 1942 following the Hitler speech were meant, and what was their effect.

The documents specified under this as well as the previous number, in fact in the opinion of the defense, touch upon crucial questions of the whole trial; namely, the place of the judiciary in the National Socialist state. They require therefore a full description in the presentation of evidence by this side.

3. *Dr. Rothenberger's ideas on reform*—Dr. Rothenberger failed with the plans for reform contained in his memorandum. It may also be conceded that they were bound to fail, by virtue of a historical necessity. However, that is not the point, but rather to demonstrate that Dr. Rothenberger exerted himself again and again to the utmost for the preservation of the foundations of justice, in particular for an independent judiciary, and used all his strength to that end. The defense will clearly show that in the case of his discharge after he had served only 15 months as Under Secretary, not personal but decisively factual

differences were at stake, on account of which Dr. Rothenberger was no longer acceptable to the rulers in the Third Reich.

4. *Dr. Rothenberger's personality and career from the prewar period and into the Second World War*—The above events falling directly within the war period, become fully understandable only by showing the development of Dr. Rothenberger's personal and professional circumstances before the war. It will be demonstrated that even before 1933 he was a professionally able lawyer, interested solely in civil law, energetic and conscious of his responsibility. It will further be shown that after 1933 he succeeded in having his proposals for a constitutional state adopted in Hamburg. He did become involved, in constantly growing opposition to radical Party circles and to the SS, especially after the outbreak of the war.

All the facts of the case expounded above under IV are legally relevant from the viewpoint of war crimes and crimes against humanity, as well as from that of conspiracy; they are therefore presented with reference to all charges against my client.

V. The various facts of the case in the order of the indictment and the position taken with regard to them

All the charges made against Dr. Rothenberger have to do with the field of criminal law and administration of punishment. It will be shown by the prosecution's own documents and by further evidence, that Minister of Justice Thierack reserved for himself all matters of criminal law and criminal law procedure as well as of administration of punishment, and accordingly by the exclusion of Dr. Rothenberger, placed Departments III, IV, V, and XV of the Ministry under his own direction. Dr. Rothenberger, therefore, neither had influence on the whole field of criminal law nor was he responsible for it. Neither Special Courts nor the People's Court, neither general public prosecutors nor any sort of criminal courts nor prisons were under his direction. The description of Dr. Rothenberger as successor of Freisler in the opening statement on page 64 of the German translation is therefore incorrect and an error. Without question, the entire criminal law was under the direction of the latter as Under Secretary, which from the beginning was not the case with Dr. Rothenberger.

1. *Concerning numbers 9 and 21 of the indictment*—According to the above general statements, therefore, Dr. Rothenberger did not cooperate in the improper use of the Special Courts and the People's Courts for the suppression of political opponents.

2. *Concerning numbers 10 and 22 of the indictment*—On 18 September 1942 an agreement was reached between Himmler and

Thierack which according to a file note by Thierack, among other things, provides for the delivery of criminal prisoners to the SS for the purpose of "extermination by work" and for the transfer to Himmler of criminal justice in cases concerning Jews, Poles, etc. It will be shown that Dr. Rothenberger did not take part in the discussion of these points, was not responsible for them, and had no knowledge of them at that time.

3. *Concerning numbers 11 and 23 of the indictment*—Dr. Rothenberger never took part in the sentencing of political opponents for high treason. If the prosecution takes the view that nonexercise of the right of clemency after valid sentence applies, then in the cases in question with which Dr. Rothenberger dealt in the absence of Minister Thierack, an opinion having regard to factual and legal points will be given.

4. *Concerning numbers 14 and 26 of the indictment*—Insofar as the four executions which took place erroneously on 8 September 1943 in Ploetzensee, may be referred to by the charge of illegal executions, Dr. Rothenberger's lack of responsibility will be demonstrated by the documents of the prosecution and by further evidence.

5. *Concerning numbers 16 and 28 of the indictment*—Dr. Rothenberger had no share in the preference given to Party members in clemency proceedings, as is also established on the basis of the documents of the prosecution. Nor did he take a responsible part in depriving the Jews, and others, of their civil rights [Entrechtung], as will be shown in detail.

VI. General aspects of criminality

To understand the line of reasoning on which this presentation of evidence is based, attention is called to the following general criminalistic points of view which in themselves of course are known to the Tribunal. If, nevertheless, they are emphasized here, it is because the Tribunal is confronted with the extraordinarily difficult task of having to form a judgment of events, people, and mental processes from a world of thought which is alien to it.

1. *Limited sphere of activity of individuals under a dictatorial regime*—Undoubtedly it is a characteristic of a dictatorial regime that the great majority of the population sinks into more than average passivity and paralysis of responsibility, in contrast to a democracy where the average citizens, too, the majority of the population, display a far greater initiative out of the practical experience of their liberty and their own sense of responsibility. However, it is a certainty that the few, who, under such a regime

stand in opposition to the rulers, thereby doing something which in a democracy would carry no risk worth mentioning, thus risk their lives and liberty. Consequently, it is not possible to do justice to the circumstances involved, if one minimizes the courageous actions of individuals in a dictatorial system by inept comparisons with conditions obtaining in a democracy. It is obvious, that the question to which degree an individual had the power and opportunity in a police-state system to call a halt to developments felt by him to be wrong, must in all fairness be judged by other standards.

2. *Necessity of individual method of observation*—A dictatorship blurs, especially to the foreign observer in a completely inconclusive manner the actually existing, great individual and basic differences, on accuont of the "coordination" which to begin with was effected in the exterior sphere. Thus, for example a German or Frenchman will hardly succeed in picking out one Chinese face out of a crowd of Chinese. One looks just like another. For that reason it is the more imperative to take into consideration the individual personality and its historic as well as geographical background, like that which binds Dr. Rothenberger to the Hanseatic tradition of the old trading and harbor city of Hamburg; the more inapplicable generalization and standardization may lead to misjudging the specific importance of a personality and the particular nature of his work.

3. *Methodical ineptness of a retrospective view*—Evaluation from the point of view of criminal law is concerned with the possible participation in the commission of a criminal act and the possible personal guilt. It is decisive for judging a person's guilt to establish whether he shared in and had knowledge of the crime and whether he is conscious of it; so for instance in the case of the conspiracy which is alleged to have existed since 1933, knowledge of the criminal development of national socialism since that time is decisive. In spite of some disappointments and bad experiences in individual cases surely none of the defendants considered the National Socialist development in principle and as a whole as criminal, nor was he necessarily compelled to do so. It is not intended to question the statements of the IMT about the destructive development of the NSDAP, which according to article X of Ordinance No. 7, are binding until the contrary is conclusively proved. Nevertheless, it so happened that the National Socialist era produced a number of events and institutions which were either politically indifferent or even appeared as the expression of peaceful reconstruction; they were not mentioned in the findings of the IMT. Public opinion, however, was formed on the basis of those manifestations. Questions such as the revival

of trade, the construction of Autobahnen [super highways], the elimination of unemployment, the creation of great social institutions, as for instance the National Socialist Public Welfare Association (NSV) and the Winter Relief Scheme (WHW), continuously, year in, year out, were in the limelight with the German public and overshadowed everything else, not to mention events in the field of foreign policy like the Anglo-German Naval Treaty, international sport events such as the Olympic games, etc. The greater part of the population, even the educated classes, were not aware that unemployment was only eliminated by an ever more formidable increase of the economic capacity for the purpose of the coming war, and that the donations and subscriptions which the people collected by hard work for their social institutions, disappeared in the gorge of rearmament. Did not Hitler's protestations that the construction of Autobahnen was to be considered proof of Germany's peaceful intentions of reconstruction, and not as the expression of militaristic mentality, sound entirely convincing in view of the fact that should it come to the point these same Autobahnen would operate strategically to Germany's disadvantage which actually did happen?

By his systematic and indubitably extremely cunning propaganda policy, Dr. Goebbels brought about step by step a constantly increasing isolation from foreign countries which made it more and more impossible to form a truly objective judgment about other countries and questions of foreign policy. It is true, treaties with foreign countries were heralded with much publicity as proof of the desire for amicable cooperation with other nations. Considering these circumstances, were men, even those in higher positions, as for instance, Dr. Rothenberger, who did not have the slightest insight into matters of foreign policy, to show less confidence in the National Socialist leadership of the state than evidently was manifested by the foreign statesmen who concluded treaties with the Third Reich. Suspicious events were not discussed by the press and the public and thus escaped public attention and judgment to a large extent. Insofar as dangerous practices of national socialism were still discernible in domestic and foreign policy, they never appeared as naked facts before the German public as is stated by the IMT verdict but were exhaustively "disguised" in comments rendered harmless or even excused and justified as the results of alleged intrigues by the opposing camp.

Without wishing to deny that there exists a certain predisposition on the part of the German people for the reception of authoritarian wisdom, bad though it may often be, one cannot get around the fact, that, based on the circumstances described above, the

process by which Germans, even those on a higher level, arrived at an opinion and judgment, of necessity moved and was bound to move along certain lines. The question as to knowledge of certain criminal acts and developments, or better yet, the question as to recognition of the criminality of certain acts and developments can therefore be judged psychologically correctly only on the basis of all the conditions and contexts prevailing at that time. That applies particularly to wartime, which in all countries produces special exigencies and places the strongest emphasis on certain desirable facts while suppressing undesirable ones. Retrospective observation which, in examining facts, does not put itself into conditions existing at that time, projects into the past, knowledge and opportunity of knowledge gained later. Applied to this trial, the above-named method imputes to the defendants a knowledge, an awareness of the criminality of circumstances, which they did not have at that time and makes demands on their faculties of perception which they could never have satisfied under the circumstances then prevailing.

VII. Principles of the constitutional state: "nulla poena sine lege," "nullum crimen sine lege"

The inner connection between the afore-mentioned train of thoughts and the principles *nulla poena sine lege* and *nullum crimen sine lege* is obvious. The question is whether facts constituting criminality were created after the war by the Charter of the London Agreement and the Control Council Law No. 10 which, in violation of the above principles, are applied retroactively to previous acts, which at the time of commission did not constitute criminal acts. The resulting cardinal problem will be discussed by the defense.

VIII. Conclusions

The great and famous American judge, Oliver Wendell Holmes, said in 1896, "The real reason for a decision are considerations of a political or social nature. It is erroneous to believe that a solution can be found solely with the aid of logic or general legal doctrines which no one contests." (Quoted from quotation in "Majority Rule and Minority Rights" of Henry Steele Commager, page 46 of the German translation.)

The defense can but concur in these words. The defense requests that consideration be given to its train of thoughts as derived from this attitude, and stated in VI, 3, which are the corollary of similar thoughts of the prosecution, without the Court having to fear a misunderstanding concerning the above quotation.

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F. Opening Statement for Defendant Lautz*

DR. GRUBE: May I begin my opening statement? The prosecution in its arraignment of Lautz has obviously started from three wrong suppositions. The first erroneous supposition was that Lautz evidently was confused with the Ministry official Letz and therefore it was erroneously assumed that Lautz had also been working in the Reich Ministry of Justice. Only thus can it be explained why in several counts of the indictment with which the prosecution is expressly charging the Reich Ministry of Justice only, Lautz also is mentioned. I do not want to lose myself in details. That the defendant Lautz never worked in the Reich Ministry of Justice has been proved without a doubt by the evidence submitted so far. But I shall furnish further proof that Lautz did not take part in any of the measures, with which the Reich Ministry of Justice is charged.

The second erroneous supposition from which the prosecution sets out is the assumption that there was only *one* chief Reich public prosecutor [Oberreichsanwalt], viz, defendant Lautz. The evidence taken so far has shown that beside the chief Reich public prosecutor of the People's Court, viz, defendant Lautz, there was still another chief Reich public prosecutor, viz, the chief Reich public prosecutor of the Reich Supreme Court. It is due to this error on the part of the prosecuting authority that matters have been made the subject of this procedure with which defendant Lautz had nothing to do. It is the nullity plea for instance of which I am thinking here; I shall prove in the course of my submission of evidence that this nullity plea could be filed only by the chief Reich public prosecutor of the Reich Supreme Court and not by the chief Reich public prosecutor of the People's Court. It is due to the same erroneous supposition on the part of the prosecution, according to which there was only *one* chief Reich public prosecutor, that in the "information on the outlines of the German judicial system," which was submitted by the prosecution at the beginning of the trial, it is stated on page 5—"The criminal prosecution in cases before the People's Court and before the Special courts, as well as those before the ordinary courts, lay in the hands of the chief Reich public prosecutor. Defendant Ernst Lautz was chief Reich public prosecutor." I shall prove in the course of the evidence to be submitted by me that defendant Lautz was not a superior official to the public prosecutors of the Special Courts and other courts and that he was not competent for the criminal prosecution before these courts. I shall prove that he had only a quite limited competence, viz,

* Transcript pages 4120–4124.

competence for the criminal prosecution of those crimes for which the People's Court was competent, and that he was superior only in regard to the personnel of the Reich public prosecutors at the People's Court. The position of defendant Lautz as chief Reich public prosecutor at the People's Court did not differ in any way from the position of the chief public prosecutors [Oberstaatsanwaelte] at the district courts. When these two points have been clarified, there remains of all accusations made against defendant Lautz only the one accusation of his being coresponsible for the criminal procedure carried through before the People's Court. This brings me to the third erroneous supposition on which the indictment against Lautz is based. It is the fact that the prosecution in its indictment of Lautz, as well as the other Reich public prosecutors under indictment here, obviously started from the assumption that the function and position of a German public prosecutor are the same as that of the prosecuting authority in Anglo-American criminal procedure. As will be proved by the evidence of the defense the position of public prosecutor in the German criminal procedure as well as the position of the prosecution in general in European jurisdiction always has been and still is today fundamentally different from that of the prosecution in Anglo-American jurisdiction. The evidence will prove that the position of a German public prosecutor in relation to the law, the Ministry of Justice and the court in general, as well as his function in individual criminal trials always have been such that he cannot be made responsible in criminal law for the sentences and their execution, neither objectively nor subjectively. The indictment in the case in question is based among other things on the general principles of penal law, such as they are contained in the penal laws of all civilized nations. As an example of this, the prosecution has quoted legal statements by the judges Stephen and Holmes in its verbal indictment. These legal statements concerning penal responsibility are not complete however. I shall prove by further quotations from legal statements by these two judges, that also according to Anglo-American conceptions the German prosecutor is not responsible before criminal law for the sentences, provided one starts from the position which the public prosecutor always held in relation to the law, the Ministry of Justice and the court, and from the functions which he carried out in accordance with German law at all times in individual criminal trials. Although I am convinced by virtue of this legal position that defendant Lautz cannot be made responsible before criminal law for the sentences pronounced by the People's Court, I shall, nevertheless, help to prove by my submission of evidence that the People's Court was an unobjectionable institution; that any trial before it gave the defendants every guaranty of justice; and that the

sentences of the People's Court and their execution did not constitute any violation of international law, of the general principles of penal law, or of article II of Control Council Law No. 10. I furthermore shall prove that defendant Lautz had nothing to do with penal administration. It will be proved that the institutes for penal administration were not subordinated to him and that he had no possibility of influencing them or penal administration in any way.

G. Opening Statement for Defendant von Ammon*

DR. KUBUSCHOK: May it please the Tribunal. The prosecution has submitted no evidence connecting the defendant von Ammon with paragraphs 10, 16, 22, and 28 of the indictment. The defense will therefore deal only with the count concerning the NN matters while disputing the legal admissibility of the accusation of conspiracy. The defense will explain the origin and the legal basis of the NN regulations. It will be shown that the legal authorities participated in the work on the NN matters only to such an extent and so long as they were delegated to do so by the competent Wehrmacht authorities.

As regards the participation of the defendant von Ammon in this department which has been allocated to him in the course of the allocation of duties in the Ministry, the following will be dealt with: von Ammon's position as an expert, who was subordinated to the subsection chief, Ministerialdirigent Mettgenberg; section chief at first Ministerialdirektor Crohne, later Ministerialdirektor Vollmer; Under Secretary, at first, Freisler and later Klemm; and lastly the Minister himself. If, therefore, von Ammon only ranked fifth in seniority, then this fact determines also his authority to sign and his actual responsibility. All important matters required the signature of, at least, the subsection chief, in most cases that of the section chief. We therefore find that none of the letters from the Reich Ministry to another office, which have been submitted by the prosecution, were signed by von Ammon.

I shall prove that von Ammon did not participate in drawing up the basic legal regulations. Thus, the legal argument arises whether a person who has merely to carry out administrative tasks without thereby causing a wrong to be done in the sense of sufficient causality by this activity itself, bears a criminal responsibility for this.

I shall describe how the NN proceedings were carried out and shall show that no special regulations were issued restricting the

* Tr. pp. 4138–4140.

proper trial beyond the secrecy decreed by law. As can be seen from the circular of 6 March 1943, Document NG–269, Prosecution Exhibit 319* submitted by the prosecution, care was taken that the prisoners did not forego their otherwise customary rights, as long as the purpose of this secrecy was not endangered. I shall disprove the view of the prosecution that persons who had obviously not committed any act of resistance, were treated in the same way as guilty NN prisoners. I shall explain that, on principle, the Wehrmacht authorities in the occupied territories handed over only such cases to the legal authorities in Germany where the evidence was materially complete, as the witness Lehmann testified earlier. It will be proved that even where the innocence of the prisoner was established only in Germany, there was the possibility of being released to the occupied territories.

Evidence will be produced from the proceedings of the courts that the NN trials were in no way conducted differently from other trials, except for the restrictions for reasons of secrecy. It will particularly be shown that the difficulties in procuring evidence from the occupied territories favored the defendant insofar as he was protected by the principle of *in dubio pro reo,* i. e., the defendant had to be acquitted in case of doubt where the evidence in support of the indictment was incomplete. I shall endeavor to give a summary of the sentences given in actual practice.

In regard to the handing over of NN prisoners to the police, no responsibility can be attached to the defendant von Ammon for participation.

Documents will prove that the defendant von Ammon always showed a tendency towards leniency, considering the prevailing circumstances and the extent of his competence. This will also be clearly in keeping with the whole personality of the defendant. We shall find him an official who entered the ministerial career solely on the strength of his expert knowledge immediately after he passed his legal examination with special distinction, the type of man with a sense of duty who lives only for his work. Von Ammon was not an active National Socialist, this is confirmed by his entering the Party only in 1937, comparatively late for a ministerial official. I shall produce testimonials characterizing the defendant as a deeply humane and strictly religious man. I feel also that the trial will enable the Tribunal to form their own impression in this respect. In these circumstances it will have to be examined all the more carefully whether the evidence shows that this man is guilty of a crime against humanity irreconcilable with his character.

* Document is reproduced below in section V D 3.

H. Opening Statement for Defendant Rothaug*

DR. KOESSL: May it please the Tribunal. If I correctly understand the unuttered yet cogent logic of the charges listed in the indictment, the effect and example of that legal system to which the prosecution tries to attach the stigma of a criminal government institution begins with the Rothaug case. The evidence against him, out of proportion considering the entire framework of the indictment is in contrast to his mere functional position, based on his activities as judge and prosecutor.

Although I am aware of the fact that such purely external disproportion between the importance of the matter on the one hand and the deployment of means on the other hand, as seen from a higher point of view, may cause a shifting of the focus in the eyes of a superficial observer, I am however certain that the desire for a true and just sentence will prevent the overlooking of the limitations and degrees of responsibility.

Yet the direction of the main thrust of the prosecution has become rather clearly discernible by the few submitted documents, out of thousands of files. We face it with a clear conscience, calm and courageously, for documents do not lie.

What distresses us is the evidence submitted in order to impress and otherwise help the main thrust, evidence which has been available in accessible localities and without difficulties, with incriminating tendencies, sometimes even willfully incriminating, and which has offered in hundreds of variations and superlatives an almost unfathomable jungle of assertions, estimates, and opinions.

The mobilization of this evidence compels us to handle the most enervating and tedious detail for truth's sake.

I expect to relieve us of much of this wearisome detail by first treating and solving problems, touched upon by coarsening efforts, misrepresentations, distortions, and half-truths in their entirety and from the broadest viewpoints possible.

At this point in the proceedings, I do not wish to put to the fore legal questions within the framework of the defense, such as the concept of conspiracy or the subjective fact and the confines of the crimes against humanity.

On the other hand, it will be unavoidable within the frame of the producing of evidence to convince the court that the entirely individual biased power position between the state on the one hand and the individual judge or prosecutor on the other hand in accordance with the regulations governing German civil servants allows no scope in the field of the application of the law for

* Tr. pp. 4141–4148.

a simultaneously existing intellectual alliance in the sense of a conspiracy, but that a connection of this power position, in full knowledge of its legal nature, with a simultaneous assumption of a conspiracy would mean a contradiction in itself. Here it becomes necessary to prove that the activity of a judge at the Special Court or a Reich public prosecutor is limited to the application of the law which is based on the official Reich legislation in the field of criminal law. I shall demonstrate that this Reich legislation in all its harshness has, in its purpose, neither lost nor limited its character of purely criminal law and that, on this point, it has not been misinterpreted as clearly proved by the literature on the subject and the jurisdiction by the supreme judicial authorities and others.

Here must be proved a fact evident in itself, namely that judges and prosecutors in the same position as Rothaug were never and in no context expected to have objects alien to the field of criminal law in carrying out their official duties.

Records of sentences already submitted and others still to be submitted will prove that this had in no way been intended.

This touches on the legal question, whether official functions resting on the official Reich legislation which, up to this very moment, is covered in international law by the principle of nationality and sovereignty, functions which were carried out in public, may be conceived as actions of persecution on racial, religious, or political grounds and may be treated as being on the same level as actions which were carried out secretly and without control, and which could be recognized as wrong already by their cruelty and severity by every person concerned as offending against justice and law.

Here, I wish to convince the Court that offenses of the latter kind, if they ever did happen within the legal sphere could and should only be known to the immediate participants but not to persons who held positions like the defendant Rothaug.

In the concrete reflection on the relationship to the law of the position of judges and likewise prosecutors, it is of decisive importance to elucidate in public law that the German judge, under any regime, had merely to examine whether a law had been announced in accordance with rules and regulations whereas an examination from other points of view was outside his jurisdiction. In this context it is further necessary to elucidate the significance and import of the judge being subject to the law and the meaning of a sentence in the sense of German public law especially in relationship to the legislative and executive power in an authoritarian state, thus to the governing power.

Here we cannot omit to clarify the basic legal principles and corresponding regulations which determine this relationship or to

prove the practical application based on files. Thus, the question of the judge's subjection to the law calls for a clarification of the consequences on his task resulting thereof. It necessitates the recognition of the law as a form of expression of justice, as part of the legal system and as immediate emanation of the ruling state doctrine at any given time, as well as the recognition of the judge's actual position in this legal system. Therefore, it is also necessary to show in a condensed form the general basis and principle of the legal doctrine which since 1933 was decisive for the German judge in establishing the intentions of the law in a concrete individual case. The accusations which have been made in general or in individual cases concerning Rothaug's method of handling proceedings or which have been connected with such proceedings become meaningless or lose in importance if their explanation is tackled in general from the angle of the correct basic procedure regulations or from the available records of individual proceedings. This leads, as a matter of course, to a basic discussion of the individual cases which have been particularly stressed by the prosecution, and which lie in the direction of the prosecution's main thrust. No one knows better than the judge the human inadequacy and fallibility because by the very nature of his profession he deals with that aspect of life. Thus, he would be the last to believe himself immune from human error, least of all at a time of intellectual revolution and under the effect of the very highest wartime pressure. Nevertheless, I beg the Tribunal not to think me presumptuous if I try to prove that the sentences pronounced by the Special Court at Nuernberg were in keeping with the basic principles of jurisdiction of the Reich courts, and that among thousands of cases only very rarely one has been successfully contested or otherwise amended.

In this connection, one could discuss the outward development of the judgment and all those legal questions allegedly discussed in individual cases or in general in Rothaug's circle during the course of 6 years.

The submitted records of individual proceedings provide plenty of opportunity to form an opinion on all individual questions thrown up by this trial especially on the aim of judicial activity, the sentence in its relationship to the requirements of the proceedings and its assailability in the interest of legal security, from which it will clearly emerge that the sentence, even that of the Special Court, was only an intermediate and by no means the final stage of the work of ascertaining justice either when finding the defendant guilty or when pronouncing the sentence. Thereby it may be possible too, to clear up the linguistically unfortunate term of "psychological producing of evidence" which has found its way into this trial. Thus, the legal and psychological task of the pre-

siding judge in accordance with German criminal law will have to be explained, and it will have to be shown how Rothaug confronted his task, solved it in the practical legal procedure, and which objections he had to face in connection with the results of his work by departments which in the course of their own duties had to examine, control and, if necessary, correct.

Furthermore, it will be my task to prove that in Rothaug's official working sphere without exception all defendants without consideration of nationality, national origin, or race, were granted the same legal guaranties as any German according to German criminal law, thus that no case was treated as an exception to the general rule, that this was also done in all proceedings against Poles, who apart from one outstanding case bearing a special character, were the only foreigners against whom Rothaug proceeded.

This, generally and in particular, touches upon the problem which determines the judge's and the prosecutor's position to the legislation for Poles from an objective legal point of view, of which have to be discussed the actual and legal basis and aspects from and through which the German judge and prosecutor whether in the North, South, East, or West, had to view matters under the spell of the German legal doctrine.

Here the greatest importance has to be attached to the kind of offense in question, the place of the crime and last, but not least, the question whether these Poles had really been deported and had not voluntarily, accepting certain conditions, placed themselves at the disposal of the German war power.

In this context, we cannot omit to discuss the principles which the highest judicial authorities have pronounced in connection with this whole complex. Here I must leave the justification of the legislation as such to others who are responsible for it.

To this, from a psychological viewpoint, belongs the discussion of Rothaug's actual basic attitude toward the Jewish problem in order to do away with all insinuations which have willfully and on purpose been made during this trial by persons who seem to have cause to stress and demonstrate their innocence in this connection by calling "catch the thief."

Another complex fitted into the direction of the main thrust of the prosecution is Rothaug's alleged political power position, inflated so as to appear almost like a myth, which to begin with is supported by an assertion which is the object of count four of the indictment. I shall prove that Rothaug's duties did not extend beyond the professional organization of the Rechtswahrerbund and that, beyond that, he held no political post, and that in particular he did not belong anywhere, at any time, and in any function to the so-called corps of political leaders.

In this I shall take special care to reduce the case Doebig which has been brought into this context for the purpose of substantiation; to the proportions it deserves in the knowledge of the true facts of the case, as we ourselves feel urged to clear Rothaug's real relationship to the Security Service (SD) as expressed in its principles, development, contents, and Rothaug's inner attitude to it down to minute details.

Especially here as in all positions where the witnesses are interested in a certain presentation of conditions, we are fully conscious of the difficulties, and we know how easy it is today to find witnesses who by incriminating statements are given the chance to clear themselves. On the other hand, bearing in mind the totality of present psychological conditions it is difficult to find a person who would be prepared to stand up for truth's sake if he were asked to do so for a person who by reason of biased evidence has been publicly defamed in such a manner that it has given rise to the fear of becoming involved in the greatest difficulties by confessing to a mere acquaintance with Rothaug. Because Rothaug's political power position has extensively been brought in, in an attempt transparent to our eyes, to reduce the responsibility of others, he feels pressed to clarify his real relationship to his collaborators and the prosecutors within his sphere of work minutely and in its totality in its official and personal aspect irrespective of whether it concerns Rothaug's official or unofficial statements, his alleged relationship to Streicher, Holz, and Zimmermann; his actual relationship to Haberkern, the "Blaue Traube" [Blue Grape], the mysterious "Stammtisch;" his "TeNo-Rang" [rank in Teno*]; his attitude toward the judicial administration, his "recording section" [Schallplattenbetrieb] in alleged spectacular proceedings; or his representation of the devil on earth. In all these matters and questions we have but one aim —To restore the truth in all its glory, for only in truth can we see the way which honorably and serenely will lead us out of this endangered vital position.

* Technische Nothilfe, Technical Emergency Corps.

IV. GENERAL DEVELOPMENT OF GERMAN LAW DURING THE NAZI PERIOD

A. Introduction

Throughout the trial and in the judgment of the Tribunal, references were frequently made to various laws and decrees issued during Hitler's Third Reich. Some of these laws and decrees were introduced by the prosecution, some by the defense, and some by both the prosecution and the defense. Most of these laws and decrees are relevant in connection with more than one of the principal issues of the case. Hence, with respect to laws and decrees selected for publication herein, it has often been difficult to decide where a particular law or decree should appear within the sections of this volume. To reduce the complexity of this matter, more than 30 laws and decrees have been reproduced together in the chronological order of their promulgation, (Section B, "Selected Laws and Decrees, 1933–1944.") A number of other laws and decrees appear in the later sections of the volume. In a further effort to reduce the difficulties inherent in this situation, cross-references by way of footnotes have often been made to laws or decrees mentioned in the documents and in the testimony.

Since the main issues of the case involved the organization and administration of justice in the Third Reich, it was also thought appropriate to include early in the volume some general materials on the organization of the Reich Ministry of Justice and the German judicial system (sec. C). First appears a brief excerpt from the testimony of the defendant Mettgenberg concerning the position and responsibility of leading officials in the Reich Ministry of Justice (sec. C1). This is followed by parts of a "Basic Information of justice (sec. C2). This "Basic Information" was submitted by the prosecution at the beginning of the trial not as evidence, but rather as an aid to the understanding of the evidence later submitted. The parts reproduced herein include a "Summary of the organization of the administration of justice in Germany" and two charts purporting to show graphically the structure of the regular and extraordinary courts and the main positions held by the defendants in the over-all administration of justice. The next following materials are all contemporaneous documents, principally laws and decrees, concerning the establishment and functioning of the Special Courts (sec. C3), the People's Court (sec. C4), the hereditary health courts (sec. C5), and civilian courts martial (sec. C–6).

These materials on the general structure and organization of the administration of justice are followed by extracts from the testimony of the defense expert witness, Professor Jahrreiss, whose testimony dealt comprehensively with the development of German law and justice from a period far antedating the Nazi regime (sec. D). This section concludes with extracts from the testimony of the defendant Schlegelberger, under secretary (Staatssekretaer) in the Reich Ministry of Justice (sec. E). In addition to giving a leading defense point of view concerning general legal developments during the Hitler regime, this testimony introduces a number of the leading figures who played a role in the administration of justice and whose names frequently arise in the later appearing documents and testimony.

B. Selected Laws and Decrees, 1933–1944

PARTIAL TRANSLATION OF DOCUMENT NG–715 PROSECUTION EXHIBIT 112[1]

[Also Schlegelberger Document 91
Schlegelberger Defense Exhibit 84][2]

DECREE, 28 FEBRUARY 1933, BY REICH PRESIDENT VON HINDENBURG, COSIGNED BY REICH CHANCELLOR HITLER AND REICH MINISTERS FRICK AND GUERTNER, SUSPENDING CONSTITUTIONAL RIGHTS AND INSTITUTING OTHER MEASURES[3]

1933 REICHSGESETZBLATT, PART 1, PAGE 83

Decree of the Reich President for the Protection of People and State of 28 February 1933.

Pursuant to article 48, paragraph 2 of the German constitution, the following is decreed as a defensive measure against Communist acts of violence endangering the State:

[1] The prosecution collected over forty different laws, decrees, extracts from the Weimar constitution, or German legal writings in Document NG–715 and introduced these in one document book as Prosecution Exhibit 112. Numerous decrees and laws from Document NG–715 are reproduced in this and later sections of this volume. Therefore, where a particular law or decree is reproduced in different parts of this volume under the heading "Partial Translation of Document NG–715," this does not necessarily mean that only extracts from that law or decree are reproduced. It merely means that only a part of Document NG–715, which in fact contained many different "documents," is reproduced at that point.

[2] The defense often included all or parts of documents in their document books which had previously been introduced as exhibits by the prosecution. This was not necessary, of course, in order to give the defense the benefit of materials contained in prosecution exhibits, but it was apparently done to bring together in one place (the defense document books) the documentary materials upon which the defendant principally relied. In this volume the editors have occasionally noted the designation of documents as both prosecution and defense exhibits.

[3] During the early period of the Nazi regime, this decree served as the basis for numerous "restrictions on personal freedom," including the placing of persons in "protective custody" without trial. For example, see the Goering decree concerning the Secret State Police (Gestapo) of 11 March 1934, (Klemm Doc. 28, Klemm Ex. 28), reproduced below in section V B. See also Document NG–478, Prosecution Exhibit 61, in section C 3.

Article 1

Articles 114, 115, 117, 118, 123, 124, and 153 of the constitution of the German Reich are suspended until further notice.[4] Thus, restrictions on personal liberty, on the right of free expression of opinion, including freedom of the press, on the right of assembly and the right of association and interferences with the secrecy of postal, telegraphic, and telephonic communications, and warrants for house searches, orders for confiscations as well as restrictions on property, are also permissible beyond the legal limits otherwise prescribed.

[All footnote quotations from the Weimar constitution used in this volume have been taken from the translation in Select Constitutions of the World, edited by B. Shiva Rao (Mylapore, Madras, The Madras Law Journal Press, 1934), page 208 and following pages.]

Article 2

If in a state [Land] the measures necessary for the restoration of public security and order are not taken, the Reich government may temporarily take over the powers of the highest State authority.

Article 3

The authorities of the states [Laender] and local communities have to comply, within their competency, with the orders of the Reich government issued on the basis of article 2.

[4] These articles, contained in part II ("Fundamental Rights and Duties of Germans") of the Weimar constitution, read:

"Article 114. Personal liberty is inviolable. No encroachment on or deprivation of personal liberty by any public authority is permissible except in virtue of a law.

"Persons, who have been deprived of their liberty, shall be informed—at the latest on the following day—by what authority and on what grounds the deprivation of liberty has been ordered; opportunity shall be given them without delay to make legal complaint against such deprivation.

"Article 115. The residence of every German is an inviolable sanctuary for him; exceptions are admissible only in virtue of laws.

* * * * * * *

"Article 117. The secrecy of correspondence and of the postal, telegraph, and telephone services is inviolable. Exceptions may be permitted only by law of the Reich.

"Article 118. Every German has the right, within the limits of general laws, to express his opinion freely, by word of mouth, writing, printed matter or picture, or any other manner. This right must not be affected by any conditions of his work or appointment, and no one is permitted to injure him on account of his making use of such rights.

"No censorship shall be enforced, but restrictive regulations may be introduced by law in reference to cinematograph entertainments. Legal measures are also admissible for the purpose of combating bad and obscene literature, as well as for the protection of youth in public exhibitions and performances.

* * * * * * *

"Article 123. All Germans have the right without notification or special permission to assemble peaceably and unarmed.

"Open-air meetings may be made notifiable by a law of the Reich, and in case of direct danger to public security may be forbidden.

"Article 124. All Germans have the right to form unions and associations for purposes not in contravention of the penal laws. This right may not be restricted by preventive regulations. The same provisions apply to religious unions and associations.

Article 4

Whoever disobeys the orders issued by the supreme State authorities or by the authorities subordinate to them for the implementation of this decree, or the orders issued by the Reich government in pursuance of article 2, or whoever solicits or incites others to disobey such orders, will be punished with imprisonment of not less than 1 month or a fine from 150 up to 15,000 Reichsmarks, unless other regulations make his act liable to a more severe punishment.

Whoever, by a violation of paragraph 1, induces a common danger for human life, will be punished with hard labor, or, in case of extenuating circumstances, with imprisonment of not less than 6 months, and, if the violation causes the death of a person, with death, or, in case of extenuating circumstances, with penal servitude of no less than 2 years. In addition, his property may be confiscated.

Whoever solicits or incites to commit a violation under the qualifications of paragraph 2, will be punished with hard labor or, in case of extenuating circumstances, with imprisonment of not less than 3 months.

Article 5

The crimes, which under the penal code are punishable with hard labor for life, are to be punished with death; i.e., in articles 81 (high treason), 229 (poisoning), 307 (arson), 311 (use of explosives), 312 ([intentional] flooding), 315 paragraph 2 (damaging of railroad installations), and 324 (poisoning causing public danger).

Insofar as a more severe Punishment has not been previously provided for, the following are punishable with death or with hard labor for life or with hard labor not to exceed 15 years—

1. Whoever undertakes to kill the Reich president or a member or a commissioner of the Reich government or of a state government, or solicits such a killing, or volunteers to commit it, or accepts such an offer, or conspires with another for such a killing.

2. Whoever under article 115(2) of the penal code (serious rioting) or of article 125(2) of the penal code (serious disturbance of the peace) commits the act with arms or cooperates consciously and intentionally with an armed person.

3. Anyone who deprives a person of his liberty under article 239 of the penal code with the intention of making use of the person deprived of his liberty as a hostage in the political struggle.

"Every union is at liberty to acquire legal rights in accordance with the provisions of the Civil Code. These rights shall not be refused to a union on the ground that its objects are of political, social-political, or religious nature.

* * * * * * *

Article 6

This decree comes into force on the day of its promulgation.

Berlin, 28 February 1933

The Reich President
VON HINDENBURG

The Reich Chancellor
ADOLF HITLER

The Reich Minister of the Interior
FRICK

The Reich Minister of Justice
DR. GUERTNER

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112
[Also Klemm Document 1.
Klemm Defense Exhibit 1.]

THE "ENABLING ACT"*

1933 REICHSGESETZBLATT, PART 1, PAGE 141

Law for the Solution of the Emergency of People and Reich of 24 March 1933

The Reichstag has decreed the following law, which is hereby promulgated in agreement with the Reich Council [Reichsrat], after it has been duly established that the prerequisites of legislation changing the constitution have been fulfilled.

Article 1

Laws of the Reich can be decreed, apart from the procedure provided by the constitution of the Reich, also by the government of the Reich. This also applies to the laws mentioned in articles 85, paragraphs 2, and 87 of the constitution of the Reich.

Article 2

The laws decreed by the government of the Reich may deviate from the constitution of the Reich as far as they do not concern

"Article 153. Property is guaranteed by the constitution. Its extent and the restrictions placed upon it are defined by law.

"Expropriation may be effected only for the benefit of the general community and upon the basis of law. It shall be accompanied by due compensation, save insofar as may be otherwise provided by a law of the Reich. In case of dispute as to the amount of compensation, resort may be had to legal proceedings in the ordinary course, unless a law of the Reich otherwise determines. Property of the states, local authorities, and public utility associations may be expropriated by the Reich only on payment of compensation.

"The ownership of property entails obligations. Its use must at the same time serve the common good."

* This act became known as the "Enabling Act" because it authorized Hitler and his government to alter the statutory law and even the constitution of Germany without the participation or consent of the legislative bodies. See the testimony of the expert witness for the defense, Professor Jahrreiss, section D, below.

the institution of the Reichstag and the Reich Council [Reichsrat] as such. The rights of the Reich President remain untouched.

Article 3

The laws decreed by the government of the Reich are certified by the Reich Chancellor and promulgated in the Reichsgesetzblatt. Unless they dispose otherwise, they will come into force on the day following the promulgation. Articles 68 through 77 of the constitution of the Reich do not apply to laws decreed by the government of the Reich.

Article 4

Treaties of the Reich with foreign countries concerning subjects under Reich legislation do not require the approval of the authorities taking part in the legislation. The government of the Reich issues the ordinances which are necessary to carry into effect these treaties.

Article 5

This law comes into force on the day of its promulgation. It will become invalid on 1 April 1937; it will further become invalid if the present government of the Reich will be replaced by another one.

Berlin, 24 March 1933.

The Reich President
VON HINDENBURG

The Reich Chancellor
ADOLF HITLER

The Reich Minister of the Interior
FRICK

The Reich Foreign Minister
BARON VON NEURATH

The Reich Finance Minister
COUNT SCHWERIN VON KROSIGK

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

LAW, 7 APRIL 1933, CONCERNING ADMISSION TO THE BAR

1933 REICHSGESETZBLATT, PART 1, PAGE 188

The Reich government has enacted the following law which is promulgated herewith:

Article 1

The admission [to the bar] of attorneys who, according to the Law for the Restoration of the Professional Civil Service of 7 April 1933 (Reichsgesetzblatt, Part 1, page 175), are of non-Aryan descent, may be revoked before 30 September 1933.

The provision of paragraph 1 does not apply to attorneys who were already admitted on 1 August 1914 or who, during World War I, fought for the German Reich or her allies, or whose fathers or sons were killed in action in World War I.

Article 2

The admission to the bar can be refused to persons, who, according to the Law for the Restoration of the Professional Civil Service of 7 April 1933 (Reichsgesetzblatt, Part 1, page 175) are of non-Aryan descent, even though the reasons for this measure provided by the Attorneys' Ordinance do not apply. The same applies to the admission, at another court, of attorneys designated in article 1, paragraph 2.

Article 3

Persons who have undertaken Communist activities are excluded from admission to the bar. Admissions already granted will be revoked.

Article 4

The administration of justice can suspend the admission of an attorney until it has been decided whether the right to revoke his admission according to article 1, paragraph 1, or article 3 will be used or not. The provisions of article 91b, paragraphs 2 through 4 of the Attorneys' Ordinance (1933 Reichsgesetzblatt, Part 1, page 120) apply in case of a suspension.

Attorneys of the kind described in article 2, paragraph 2, can only be suspended in those cases where article 3 is applicable.

* * * * * * *

Berlin, 7 April 1933.

The Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice
DR. GUERTNER

907802—51——13

LAW OF 1 DECEMBER 1933 CONCERNING SPECIAL NAZI PARTY AND STORM TROOPS' (SA) JURISDICTION OVER MEMBERS OF THE NAZI PARTY, THE SA, AND THEIR SUBORDINATE ORGANIZATIONS*

Law for the Safeguarding of Unity of Party and State decreed on 1 December 1933

The Reich government has passed the following law, which herewith is promulgated.

Article 1

(1) Since the victory of the National Socialist revolution the National Socialist German Workers' Party is the bearer of the German State ideology and merged with the State inseparably.

(2) It is a corporate body under public law. Its statutes are determined by the Fuehrer.

Article 2

In order to guarantee closest cooperation between Party and SA offices on the one hand and public authorities on the other hand, the deputy of the Fuehrer [Hess] and the chief of staff of the SA [Roehm] become members of the Reich government.

Article 3

(1) Because they are the leading and moving power of the National Socialist State, the members of the National Socialist German Workers' Party and of the SA (including their subordinated organizations) have an enhanced duty toward the Fuehrer, the Nation, and the State.

(2) For violation of these duties they come under a special Party and SA jurisdiction.

(3) The Fuehrer can rule that these regulations be extended to members of other organizations.

Article 4

A violation of duty is represented by any action or omission, which affects or endangers the existence, the organization, the activities, or the reputation of the National Socialist German Workers' Party; for members of the SA (including all organizations subordinated to it) especially every offense against discipline and order.

* This law repealed an earlier law of 28 April 1933 creating a special basis for imposing disciplinary penalties on members of the SA and the SS.

Article 5

In addition to the usual disciplinary penalties, terms of imprisonment and arrest can be imposed.

Article 6

Within the limits of their competence, the public authorities must render official and judicial assistance to Party and SA—offices which have been entrusted with the execution of the Party and SA jurisdiction.

Article 7

The law, concerning the right of imposing disciplinary penalties on members of the SA and SS, decreed on 28 April 1933 (Reich Law Gazette I, page 230) is repealed.

Article 8

In his capacity as leader of the National Socialist German Workers' Party and supreme commander of the SA, the Reich Chancellor issues the necessary regulations for the carrying-out and completion of this law, especially those regarding the structure and the procedure of Party and SA jurisdiction. He determines the date on which the regulations pertaining to this jurisdiction will take effect.

Berlin, 1 December 1933

The Reich Chancellor
ADOLF HITLER

The Reich Minister of the Interior
FRICK

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM THE FIRST LAW FOR THE TRANSFER OF THE ADMINISTRATION OF JUSTICE TO THE REICH, 16 FEBRUARY 1934*

1934 REICHSGESETZBLATT, PART 1, PAGE 91

The Reich government has enacted the following law, which is promulgated herewith:

* Before the reorganization of the German judicial system by the Hitler regime, the administration of justice was largely the function of the separate German states (Laender) making up the Reich.

Article 1

All courts shall pronounce sentence in the name of the German people.

Article 2

The Reich President exercises the right to quash pending proceedings, apart from his clemency prerogative.

Amnesties can only be issued by Reich law.

Article 3

Whoever has obtained the qualification to act as a judge, must be admitted to the bar in each State in pursuance of the existing Reich regulations.

* * * * * * *

Article 5

The Reich Minister of Justice is authorized to issue all regulations which the transfer of the administration of justice to the Reich requires.

Berlin, 16 February 1934

The Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice, at the same time
for the Reich Minister of Food and Agriculture
DR. GUERTNER

The Reich Minister of the Interior
FRICK

The Reich Minister of Finance
COUNT SCHWERIN VON KROSIGK

The Reich Minister of Economics
DR. SCHMITT

The Reich Minister of Labor
FRANZ SELDTE

The Reich Minister of War
VON BLOMBERG

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM THE LAW, 24 APRIL 1934, AMENDING PROVISIONS OF CRIMINAL LAW AND CRIMINAL PROCEDURE

1934 REICHSGESETZBLATT, PART 1, PAGE 341

The Reich government has enacted the following law, which is promulgated herewith:

Part I

In the second part of the criminal code, the first section (articles 80 to 93) is amended as follows):

Section 1

*High treason** [Hochverrat].

Article 80

Whoever undertakes to incorporate, by violence or by threat of violence, the German territory [Reichsgebiet] in its entirety or in part into a foreign state, or to detach from the Reich any territory belonging to the Reich, will be punished by death.

* * * * * * *

Article 81

Whoever undertakes to deprive the Reich President, the Reich Chancellor or any other member of the Reich government of his constitutional power, or to force or prevent such a person by violence or threat of violence or perpetration of a crime or offense, from exercising his constitutional rights altogether or in a certain sense, will be punished by death or hard labor for life or hard labor of not less than 5 years.

Article 82

Whoever conspires with another person in a treasonable act (articles 80, 81) is subject to punishment by death, hard labor for life or hard labor of not less than 5 years.

Whoever contacts a foreign power for the purpose of the preparation of a treasonable act or misuses his official authority or recruits men or trains them in the use of arms will be liable to the same penalty. If the perpetrator contacts a foreign government in a written declaration, the crime is considered accomplished once this declaration has been sent off.

* * * * * * *

* For more extensive evidence from the record concerning treason and related matters, see section V E, below.

Article 83

Whoever publicly solicits, and incites to, an undertaking of high treason shall be punished by hard labor up to 10 years.

Whoever prepares an undertaking in any other way shall be liable to the same penalty.

The death penalty or hard labor for life or hard labor for not less than 2 years will be inflicted—

1. If the act aimed at establishing or maintaining an organized structure for the preparation of high treason; or

2. If the act was directed toward making the armed forces or police unfit for the execution of their duty to protect the stability of the German Reich from internal or external attack; or

3. If the act was directed toward influencing the masses by composing or distributing writings, recordings and pictures, or by the installation of radio, telegraph, or telephone; or

4. If the act was committed abroad or in such a manner that the perpetrator undertook to import writings, recordings or pictures from abroad for the purpose of distribution within the country.

* * * * * * *

Article 87

Undertakings, within the meaning of the criminal code, embrace both completion and attempt.

Section 1 a

Article 88

Treason [Landesverrat]

State secrets in the meaning of the provisions of this section are documents, drawings, other objects, facts or reports thereof, which the welfare of the Reich, especially in the interest of national defense, requires to be held secret from a foreign government.

Whoever passes on or publicizes such a state secret to another person, especially to a foreign government or to a person acting for a foreign government, with the intent of endangering the welfare of the Reich, commits an act of treason in the meaning of the provisions of the section.

Article 89

Whoever undertakes to give away a state secret will be punished by death.

If the perpetrator is a foreigner he may be sentenced to hard labor for life.

If the act could not have constituted a danger for the welfare of the Reich, the verdict may be hard labor for life or for not less than 5 years.

Article 90

Whoever undertakes to procure a state secret in order to give it away will be punished by death or hard labor for life.

If the crime could not have brought about a danger for the welfare of the Reich the verdict may be a term of hard labor.

* * * * * * *

Article 91

Whoever establishes contact with a foreign government or a person acting for a foreign government with the intention of causing a war or forcible measures against the Reich or other serious disadvantages to the Reich, will be punished by death.

Whoever establishes contact of the kind described in paragraph 1 with the intention of causing serious disadvantages for a national of the Reich, will be punished with hard labor for life or for not less than 5 years.

Article 82, paragraph 2, second sentence shall apply.

Article 91 a

A German who, during a war against the Reich, serves in the armed forces of the enemy or carries arms against the Reich or its allies shall be punished by death or hard labor for life or not less than 5 years.

Article 91 b

Whoever, during a war against the Reich, or with regard to an impending war, undertakes within the Reich, or being a German abroad, to either aid and abet the enemy power, or to cause a detriment to the armed forces of the Reich or its allies shall be punished by death or by hard labor for life.

* * * * * * *

Article 92

Whoever conspires with another in a crime of treason under articles 89 through 90a, or 90f through 91b shall be punished by hard labor.

Whoever solicits or volunteers to commit a crime as described in paragraph 1, or accepts such a solicitation or offer will be liable to the same punishment. If the perpetrator declares his solicitation, offer, or acceptance in writing, the crime is accomplished when the declaration is sent off.

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Part III. People's Court[1]

* * * * * * *

Berlin, 24 April 1934

The Reich Chancellor
ADOLPH HITLER

The Reich Minister of Justice at the same time for the Reich Minister of the Interior
DR. GUERTNER

The Reich Defense Minister
VON BLOMBERG

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

EXTRACTS FROM THE SECOND LAW CONCERNING THE TRANSFER OF THE ADMINISTRATION OF JUSTICE TO THE REICH, 5 DECEMBER 1934[2]

1934 REICHSGESETZBLATT, PART 1, PAGE 1214

The Reich government has enacted the following law, which is promulgated herewith:

In the National-Socialist State, the administration of justice is uniform. It is under the jurisdiction of the Reich and requires uniform administration by the Reich. After the Ministries of Justice of the Reich and of Prussia have been combined, the Reich takes over the immediate direction of the administration of justice in the other states [Laender] in accordance with the following provisions:

Article 1

The competencies of the Supreme Justice Authorities of the

[1] This part is reproduced below on page 231.

[2] The full text of this law was submitted in evidence as Schlegelberger Document 26, Schlegelberger Defense Exhibit 66. The parts of the law not reproduced here deal with arrangements for the further transfer of the administration of justice from the individual German states (Laender) to the Reich.

States [Laender] are transferred to the Reich Minister of Justice; he is authorized to delegate them to agencies subordinate to him.

* * * * * * *

Berlin, 5 December 1934

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice
DR. GUERTNER

The Reich Minister of the Interior
FRICK

TRANSLATION OF 1393-PS
PROSECUTION EXHIBIT 508

LAW, 20 DECEMBER 1934, ON INSIDIOUS ACTS AGAINST STATE AND PARTY FOR THE PROTECTION OF PARTY UNIFORMS HEIMTUECKEGESETZ

1934 REICHSGESETZBLATT, PART 1, PAGE 1269

The Reich government has enacted the following law, which is promulgated herewith:

Section I

Article 1

1. Unless heavier punishment is provided for in other provisions, imprisonment up to 2 years shall be imposed upon anybody deliberately making false or grossly distorted statements, which are apt to debase the welfare of the Reich or the prestige of the Reich government, the NSDAP or its affiliated agencies. Whoever makes or disseminates such statements in public, will be imprisoned for not less than 3 months.

2. Anyone committing the offense with gross neglect shall be punished with imprisonment up to 3 months, or with a fine.

3. If the offense is directed solely against the prestige of the NSDAP or its affiliated agencies, the offender shall be prosecuted only with the consent of the Fuehrer's Deputy or of agencies authorized by him.

Article 2

1. Whoever makes statements showing a malicious, inciting or low-minded attitude toward leading personalities of the State or

the NSDAP, or about orders issued by them or about institutions created by them, which are apt to undermine the confidence of the people in its political leadership—shall be punished with imprisonment.

2. Statements of this kind which are not made in public shall be punished equally if the offender reckons or has to reckon that his statements will eventually circulate in public.

3. The offender shall be prosecuted only by order of the Reich Minister of Justice; in case the offense was committed against a leading personality of the NSDAP, the Reich Minister of Justice will issue the order in agreement with the Fuehrer's Deputy.

4. The Reich Minister of Justice in agreement with the Fuehrer's Deputy shall determine who is to be regarded as a leading personality according to paragraph 1.

Article 3

1. Anyone who, when committing or threatening to commit a punishable act, is wearing or is carrying on his person the uniform or an insignia of the NSDAP, without being entitled to do so as a member of the NSDAP or its affiliated agencies, will be punished with hard labor or in minor instances with imprisonment for at least 6 months.

2. Anyone who commits the offense with the intention to bring about disorder or to sow fear or terror among the population, or to create difficulties for the German Reich with a foreign power, shall be punished with hard labor for at least 3 years or with hard labor for life; in particularly grave cases the death penalty may be imposed.

3. According to this law, a German national may be punished also if he committed the offense in a foreign country.

Article 4

1. Anyone who for his material advantage or for political ends poses as a member of the NSDAP or its agencies, shall be punished with imprisonment up to 1 year, plus a fine or both.

2. The offender shall be prosecuted only with the consent of the Fuehrer's deputy or of agencies authorized by him.

Article 5

1. Anyone who manufactures, holds in stock, sells or otherwise brings on the market official Party uniforms, parts of Party uniforms, uniform cloth, or insignia of the NSDAP, its affiliated agencies or organization, without the permission of the Reich

Treasurer of the NSDAP, shall be punished with imprisonment up to 2 years. By a directive to be published in the Reichsgesetzblatt the Reich Treasurer of the NSDAP in agreement with the Reich Minister of Economics will determine for what parts of uniform and uniform cloth a permission is required.

2. Anyone who has in his possession official Party uniforms and insignia without being a member of the NSDAP or its affiliated agencies or organizations, or without being entitled to possess them for any other reason, shall be punished with imprisonment of up to 1 year. Anyone who wears any of the above-mentioned items, shall be punished with imprisonment for at least 1 month.

3. To be put on a par with Party uniforms, parts of uniforms and insignia, are those uniforms, parts of uniforms, and insignia which can easily be taken for them.

4. In addition to the penalty those uniforms, parts of uniforms, uniform cloth, flags, or insignia which are involved in the punishable act shall be confiscated. In case no particular person can be prosecuted or condemned, the confiscation shall take place automatically, provided conditions justify it.

5. The confiscated items shall be turned over to the Reich Treasurer of the NSDAP or to those agencies appointed by him, for future use.

6. The prosecution of the offense and the confiscation (article 4, paragraph 2) can be carried through only in agreement with the Fuehrer's deputy or agencies authorized by him.

Article 6

According to this law, anyone who has obtained membership of the Party through false pretenses, is not a member of the NSDAP, its affiliated agencies or organizations.

Article 7

The Fuehrer's deputy, in agreement with the Reich Minister of Justice and the Reich Minister of the Interior, shall issue the regulations necessary for the application and supplementation of articles 1 to 6.

Section II

Article 8

1. The regulations set forth in this law, with the exception of article 5, paragraph 1, apply accordingly to the Reich League for Air Defense [Reichsluftschutzbund], the League of German Sports

Fliers [Deutscher Luftsportverband], the Voluntary Labor Service [Freiwilliger Arbeitsdienst], and the Technical Emergency Corps [Technische Nothilfe—TeNo].

* * * * * * *

Section III

Article 9

Article 5, paragraph 1, will come into force on 1 February 1935. The other rules set forth in this law will come into force one day after their promulgation; the decree on malicious acts against the Government of the National Revolution, of 21 March 1933 (Reichsgesetzblatt I, page 135) as well as article 4 of the law on the Reich Aviation Administration of 15 December 1933 (Reichsgesetzblatt I, page 1077) are declared invalid.

Berlin, 20 December 1934

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice
DR. GUERTNER

The Fuehrer's Deputy, Reich Minister without Portfolio
R. HESS

The Reich Minister of the Interior
also for the Reich Minister of Aviation
FRICK

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM LAW OF 28 JUNE 1935 AMENDING THE CRIMINAL (PENAL) CODE

1935 REICHSGESETZBLATT, PART 1, PAGE 839

The Reich government has enacted the following law, which is promulgated herewith:

Section I

Creation of law by analogous application of penal laws. Articles 2 and 2a of the penal code are amended as follows:

Article 2*

Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of a penal law or the sound sentiment of the people, shall be punished. If no specific penal law can be directly applied to the act, it shall be punished according to the law whose underlying principle can be most readily applied to the act.

Article 2 a

* * * * * * *

A law issued for a limited time only is to be applied to those criminal acts which were committed during its validity, even after its validity has expired.

* * * * * * *

Berlin, 28 June 1935

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice
DR. GUERTNER

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM THE LAW, 28 JUNE 1935, THE CODE OF CRIMINAL PROCEDURE AND THE JUDICATURE ACT

1935 REICHSGESETZBLATT, PART 1, PAGE 844

The Reich government has enacted the following law, which is promulgated herewith:

Section I

Freer Position of the Judge

1. Creation of law by analogous application of the penal laws.

(a) As articles 170a and 267a, the following stipulations will be inserted in the Code of Criminal Procedure:

* Article 2 of the penal code *prior* to the above amendment was as follows:
"For no act may punishment be imposed unless such punishment is prescribed by statute before the act is committed. In the event of any change in the statute between the time of commission of an act and the time of rendering a decision, the most lenient statute shall apply."

Article 170a

If an act deserves punishment according to the sound sentiment of the people, but is not declared punishable in the law, the prosecution will examine whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by analogous application of that penal law. (Article 2 of the Penal Code).

Article 267a

If the trial shows that the defendant has committed an act which deserves punishment according to the sound sentiment of the people, but is not declared punishable by the law, the court will examine whether the underlying principle of a penal law applies to the act and whether justice can be helped to triumph by analogous application of that penal law (Article 2 of the Penal Code).

Article 265, paragraph 1, applies accordingly.

* * * * * * *

4. Removal of one-sided limitations of the courts deciding on legal appeals. The code of criminal procedure is amended as follows:

(a) Article 331 is amended as follows:

Article 331

Even if the judgment has been contested only by the defendant or his legal representative or by the prosecution in his favor, it can be changed against the interests of the defendant.

(b) Article 358, paragraph 2, is amended as follows:

Even if the judgment has been contested only by the defendant or his legal representative or by the prosecution in his favor, it can be changed against the interests of the defendant.

(c) Article 373, paragraph 2, is amended as follows:

Even if resumption of the proceedings has been applied for only by the defendant or his legal representative or by the prosecution in his favor, the sentence can be changed against the interest of the defendant.

* * * * * * *

Section II

Exemption of the Reich Supreme Court from being bound by precedents.

The Reich Supreme Court as the highest German tribunal must consider it its duty to effect an interpretation of the law which takes into account the change of ideology and of legal concepts which the new state has brought about. In order to enable it to accomplish this task without having to show consideration for the jurisdiction of the past brought about by other ideologies and other legal concepts, it is ruled as follows:

When a decision is made on a legal question, the Reich Supreme Court can deviate from a decision laid down before this law came into force.

* * * * * * *

Section IV

Freer Position of the Prosecution

1. Removal of the necessity of proceedings before the investigating judge; Introduction of assistant judges.

The investigating code of criminal procedure is amended as follows:

(a) Article 178 is amended as follows:

Article 178

In those penal cases, which belong to the competency of the People's Court, the courts of appeal or the courts of assize, a preliminary court investigation is to be held at the request of the prosecution, if the prosecution, according to its own discretion, deems this necessary.

Also, in other penal cases a preliminary court investigation will be held, if the prosecution so requests. The prosecution should make such a request only if extraordinary circumstances require a preliminary court investigation by a judge.

* * * * * * *

2. Discretion with regard to victims of blackmail:

As article 154b, the following stipulation is inserted:

Article 154 b

If duress has been applied, or blackmail has been committed, by threatening to reveal a criminal act, the prosecution can refrain from prosecuting the act whose revelation has been threatened, if it is required as expiation and for protection of the community of the people.

* * * * * * *

Berlin, 28 June 1935

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice
DR. GUERTNER

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

LAW, 15 SEPTEMBER 1935, FOR THE PROTECTION OF GERMAN BLOOD AND HONOR*

1935 REICHSGESETZBLATT, PART 1, PAGE 1146

Imbued with the conviction that the purity of the German blood is the prerequisite for the permanence of the German people, and animated by the inflexible will to safeguard the German nation for all future, the Reichstag has unanimously enacted the following law, which is promulgated herewith:

Article 1

(1) Marriages between Jews and German nationals of German or related blood are prohibited. Marriages concluded despite of this are void, even if concluded abroad in order to circumvent this law.

(2) Only the public prosecutor can file an action for nullification.

Article 2

Sexual intercourse (except in marriage) between Jews and German nationals of German or related blood is forbidden.

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* This law and the Reich citizenship law of the same date constitute the original "Nuernberg Laws," so-called because both were issued in Nuernberg "at the Reich Party Congress for Freedom." The Reich citizenship law (1935 Reichsgesetzblatt, Part I, page 1146), was signed by Hitler and Frick, the Reich Minister of Interior. The text of this law read as follows:

"The Reichstag has unanimously decided on the following law, which is herewith promulgated:

"1. (1) A citizen [Staatsangehoeriger] is one who belongs to the protective association of the German Reich and owes allegiance to it. (2) Citizenship can also be obtained according to regulations of the Reich and State citizenship law.

"2. (1) A Reich citizen [Reichsbuerger] is only a citizen of German or related blood, who proves through this behaviour, that he is willing and fit to serve the German people and Reich faithfully. (2) Reich citizenship [Reichsbuergerrecht] will be obtained through the award of a Reich citizenship letter. (3) The Reich citizen is the sole bearer of full political rights to the extent of the law.

"3. The Reich Minister of the Interior decrees in collaboration with the deputy of the Fuehrer those legal and administrative regulations necessary for the execution and supplementation of this law."

Article 3

Jews may not employ female German nationals of German or related blood below 45 years of age in their households.

Article 4

(1) Jews are forbidden to show the Reich and national flag or the colors of the Reich.

(2) They are, however, allowed to show the Jewish colors. The exercise of this right will be protected by the State.

Article 5

(1) Whoever violates the prohibition of article 1 will be punished with hard labor.

(2) Any man violating the prohibition of article 2 will be punished with imprisonment or hard labor.

(3) Whoever violates the regulations under articles 3 or 4, will be punished with imprisonment up to 1 year or with a fine, or with both of these penalties.

Article 6

The Reich Minister of the Interior, in agreement with the deputy of the Fuehrer and the Reich Minister of Justice, will issue the legal and administrative regulations required for carrying out and supplementing this law.

Article 7

This law comes into force on the day following its promulgation; article 3, however, not until 1 January 1936.

Nuernberg, 15 September 1935, at the Reich Party Congress for Freedom.*

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of the Interior
FRICK

The Reich Minister of Justice
DR. GUERTNER

The Deputy of the Fuehrer
Reich Minister without Portfolio
R. HESS

* A number of further decrees as well as other materials concerning the application of the "Nuernberg Laws" in the Incorporated Eastern Territories (Poland), are reproduced below in section V D 2.

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PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM THE LAW AGAINST ECONOMIC SABOTAGE, 1 DECEMBER 1936

1936 REICHSGESETZBLATT, PART 1, PAGE 999

The Reich government has enacted the following law, which is promulgated herewith:

Article 1

(1) A German citizen who deliberately and unscrupulously, for his own gain or for other low motives, contrary to legal provisions smuggles property abroad or leaves property abroad and thus inflicts serious damage to German economy is to be punished by death. His property will be confiscated. The perpetrator is also punishable, if he commits the act abroad.

(2) This crime is subject to the jurisdiction of the People's Court.

Article 2

The law becomes effective on the day of its promulgation.

Berlin, 1 December 1936

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Plenipotentiary for the Four Year Plan
GOERING
Minister President

The Reich Minister of Economics as Deputy
POSSE

The Reich Minister of Justice
DR. GUERTNER

TRANSLATION OF ALTSTOETTER DOCUMENT 10
ALTSTOETTER DEFENSE EXHIBIT 1 (1)

EXTRACT FROM THE GERMAN CIVIL SERVICE LAW (DEUTSCHES BEAMTENGESETZ, OR "DBG"), 26 JANUARY 1937*

4. Obligation to render obedience

Article 7

(1) The civil servant is responsible for the lawfulness of his official acts.

* This extract is taken from Prof. Arthur Brand's book, *The German Civil Service Law*, Berlin, 1937, p. 123. The book contains the law with extensive annotations and commentaries, as well as further regulations on the law.

(2) Insofar as nothing else has been legally provided, he has to comply with the official directives given by his superiors or by persons authorized to give him directives by virtue of a special order; the responsibility then rests with him who gave the directive. The civil servant must not comply with an order the execution of which would obviously contravene the criminal laws.

(3) The civil servant may accept directives for his official acts only from his superior or from persons authorized by virtue of a special order to give him directives; his obligation to comply with the law and with such regulations has the precedence of any other obligations to render obedience.

(4) The Fuehrer and Reich Chancellor decides whether and to what extent it is admissible to call a civil servant who is a member of the National Socialist German Workers' Party to account before a Party court.

TRANSLATION OF SCHLEGELBERGER DOCUMENT 127
SCHLEGELBERGER DEFENSE EXHIBIT 123

DECREE, 10 JULY 1937, OF THE FUEHRER AND REICH CHANCELLOR CONCERNING APPOINTMENT OF CIVIL SERVANTS AND TERMINATION OF CIVIL SERVICE STATUS

1937 REICHSGESETZBLATT, PART 1, PAGE 769

On the basis of Articles 24, 31, 66, and 78 of the German Civil Service Law of 26 January 1937 (Reichsgesetzblatt I, page 39) I hereby order under concurrent suspension of my decree on the appointment and termination of Reich and Land [State] civil servants of 1 February 1935 (Reichsgesetzblatt I, pages 74, 73) and on the participation of the deputy of the Fuehrer in the appointment of civil servants of 24 September 1935 (Reichsgesetzblatt I, page 1203) as follows:

I

(1) I reserve to myself the power to appoint and retire civil servants of permanent status [Planstellen] of the civil service pay groups A 2 c 2 and upward and in the equivalent Land civil service pay groups, if not otherwise directed by special regulations. These civil servants will be dismissed by me in accordance with articles 60, 61, 63 of the German Civil Service Law, but according to article 61 only in as far as they can be placed in inactive status [Wartestand]. Civil servants whom I have placed in inactive status, and who are to be returned to active duty in permanent positions which do not require a formal appointment on my part can only be returned to active duty with my concurrence. I reserve to myself the power to retire the following civil servants

in inactive status: under secretaries, ambassadors, ministerial directors, ministers first class, and Oberreichsanwaelte.

(2) Suggestions will be submitted by the appropriate Reich Minister, for Prussia by the Minister President.

(3) Before suggestions for appointment of civil servants and the employment in accordance with sentence 3, Article I, is made, the advice from the deputy of the Fuehrer [Hess] is to be sought, except in cases where they are civil servants of the armed forces.

II

(1) I delegate the implementation of the powers reserved to myself on appointment, retirement, and dismissal of the other civil servants, in as far as I have not made reservations in article I, to the Reich Ministers, for Prussia to the Minister President, who can further delegate their authority with concurrence of the Reich Minister of Interior and the Reich Minister of Finance.

(2) In special cases I reserve to myself the right of personal decision also in cases of these civil servants.

III

The necessary regulations for the implementation of this decree will be published by the Reich Minister of the Interior and the Reich Finance Minister.

Berchtesgaden, 10 July 1937

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of Interior
FRICK

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM DECREE, 17 AUGUST 1938, FOR SPECIAL CRIMINAL LAW IN TIME OF WAR AND SPECIAL EMERGENCY[1]

1939 REICHSGESETZBLATT, PART 1, PAGE 1455

* * * * * * *

Article 5. Undermining of Military Efficiency[2]

(1) The following shall be guilty of undermining German defensive strength, and shall be punished by death:

[1] Note that the decree is dated 17 August 1938, at which time it was signed by Hitler and Keitel. It was not promulgated in the Reichsgesetzblatt, however, until 26 August 1939. The decree had no general preamble. The earlier articles are entitled: "1. Substantive law;" "2. Espionage;" "3. Guerrilla warfare;" and "4. Acts contrary to decrees issued by the commanders in occupied foreign territory."

[2] Materials concerning the application of the law of "undermining of military efficiency" are reproduced below in section V-E.

1. Whoever publicly solicits or incites others to evade the fulfillment of compulsory military service in the German or an allied armed force, or publicly otherwise seeks to paralyze or undermine the will of the German or allied people to assert itself by force of arms.

2. Whoever undertakes to induce a soldier or conscript in the reserves to disobedience, opposition, or violence against a superior, or to desertion or illegal absence, or otherwise to undermine the discipline of the German or an allied armed force.

3. Whoever undertakes to avoid or cause another person to avoid the fulfillment of military service entirely, partly, or temporarily by means of self-mutilation, by means designated to deceive, or by other methods.

* * * * * * *

Berlin, 17 August 1938

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Chief of the High Command of the Armed Forces
KEITEL

PARTIAL TRANSLATION OF DOCUMENT NG–715
PROSECUTION EXHIBIT 112

DECREE, 1 SEPTEMBER 1939, CONCERNING EXTRAORDINARY MEASURES WITH REGARD TO FOREIGN RADIO BROADCASTS

1939 REICHSGESETZBLATT, PART 1, PAGE 1683

* * * * * * *

Article 1

Deliberate listening to foreign radio stations is prohibited. Violations are punishable by hard labor. In less severe cases a sentence of imprisonment may be passed. The radio receivers used will be confiscated.

Article 2

Whoever deliberately spreads news from foreign radio stations which is apt to undermine the defensive strength of the German people will be punished by hard labor, in particularly severe cases by death.

Article 3

The provisions of this decree do not apply to actions taken in execution of official duty.

Article 4

The Special Courts have jurisdiction to try and decide on violations of this decree.

Article 5

Criminal prosecution under articles 1 and 2 takes place only on request of the State Police authorities.

* * * * * * *

Berlin, 1 September 1939

The Chairman of the Ministerial Council
for the Defense of the Reich
FIELD MARSHAL GOERING

The Deputy of the Fuehrer
R. HESS

The Plenipotentiary for the Administration of the Reich
FRICK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG-700
PROSECUTION EXHIBIT 625

Copy

DECREE, 3 SEPTEMBER 1939, OF THE FUEHRER AND REICH CHANCELLOR CONCERNING EXECUTION OF THE RIGHT OF PARDON*

During my absence from Berlin I delegate to the Reich Minister of Justice the execution of the right of cancellation [Niederschlagungsrecht] as well as the power to grant pardon and to dismiss petitions for pardon, in cases which come under the jurisdiction of the ordinary courts insofar as I have reserved these decisions to myself in the decree of 1 February 1935 (Reichsgesetzblatt I, page 74).

The same applies to revocation of decisions based on the decree of 23 November 1938 (Reichsgesetzblatt I, page 729).

I reserve to myself the right to decide personally in individual cases.

* This decree was not published in the Reichsgesetzblatt. It was taken from a letter of 9 September 1939 from Meissner, chief of the Presidential Chancellery, transmitting this decree to the chief of the Reich Chancellery and to the chief of the Chancellery of the Fuehrer of the Nazi Party.

Berlin, 3 September 1939

The Fuehrer and Reich Chancellor
[Signed] ADOLF HITLER

[Great Reich Seal] The Reich Minister of Justice
[Signed] DR. GUERTNER

Minister of State and Chief of the Presidential Chancellery
[Signed] DR. MEISSNER

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM THE WAR ECONOMY DECREE OF 4 SEPTEMBER 1939

1939 REICHSGESETZBLATT, PART I, PAGE 1609

To protect the borders of our Fatherland, supreme sacrifices are demanded from each of the members of the people's community [Volksgenossen]. The soldier protects the Fatherland with a weapon, risking his life. In view of the greatness of this commitment, it is the obvious duty of every member of the people's community in the Fatherland to put all their strength and wealth at the disposal of the people and the Reich, in order to guarantee the continuation of an orderly economic life. This also means that every member of the people's community restricts himself in his way of living and his standards.

* * * * * * *

Section 1

Conduct Detrimental to War

Article 1

(1) Whoever destroys, removes, or conceals raw materials or products belonging to the vital requirements of the population and thereby malevolently endangers the supply of such requirements will be punished with hard labor or imprisonment, and in particularly serious cases by death.

(2) Whoever conceals payment certificates without any justified reason, will be punished with imprisonment and, in particularly serious cases, with hard labor.

* * * * * * *

Berlin, 4 September 1939

The Chairman of the Ministerial Council
for Defense of the Reich
FIELD MARSHAL GOERING

The Deputy of the Fuehrer
R. HESS

The General Plenipotentiary for the
Administration of the Reich
FRICK

The General Plenipotentiary for the Economy
WALTHER FUNK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

The Chief of the High Command of the Armed Forces
KEITEL

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

DECREE, 5 SEPTEMBER 1939, AGAINST PUBLIC ENEMIES[1]

1939 REICHSGESETZBLATT, PART I, PAGE 1679

The Ministerial Council for the Defense of the Reich decrees with the force of Law:

Article 1

Looting in Liberated Territory

(1) Whoever is found looting in liberated territory or in buildings or rooms voluntarily vacated will be punished by death.

(2) This crime is subject to the jurisdiction of the Special Courts,[2] insofar as field military courts have no jurisdiction.

(3) The death penalty may be executed by hanging.

Article 2

Crimes During Air Raids

Whoever commits a crime or offense against the body, life, property, taking advantage of air raid protection measures, is

[1] Material concerning the application of laws on "public enemies" is reproduced below in section V E.

[2] For other decrees concerning the establishment and jurisdiction of "Special Courts," see section C 3 below.

punishable by hard labor of up to 15 years or for life, and in particularly severe cases by death.

Article 3

Crimes of Public Danger

Whoever commits arson or any other crime of public danger, thereby undermining German defensive strength, will be punished by death.

Article 4

Exploitation of the State of War as a Reason for more severe Punishment

Whoever commits any other criminal act by exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to 15 years or for life, or by death if the sound sentiment of the people requires it because of the particular wickedness of the act.

Article 5

Speeding up of Special Court Proceedings

In all trials by Special Courts the verdict must be pronounced at once without observation of time limits if the perpetrator is caught redhanded or if his guilt is otherwise obvious.

Article 6

Sphere of Jurisdiction

The provisions of this Law are also applicable in the Protectorate of Bohemia and Moravia, also for those persons who are not German nationals.

Article 7

Final Regulations

The Reich Minister of Justice will issue the legal and administrative regulations required to carry out and supplement this decree.

Berlin, 55 September 1939

The Chairman of the Ministerial Council
for the Defense of the Reich
FIELD MARSHAL GOERING

The Plenipotentiary for the Administration of the Reich
FRICK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

TRANSLATION OF DOCUMENT KLEMM 29
KLEMM DEFENSE EXHIBIT 29

DECREE OF 17 OCTOBER 1939, ESTABLISHING SPECIAL JURISDICTION AND PROVIDING FOR JUDGES APPOINTED BY HIMMLER, FOR CRIMINAL PROCEEDINGS AGAINST MEMBERS OF THE SS AND POLICE FORMATIONS ON SPECIAL TASKS

1939 REICHSGESETZBLATT, PART I, PAGE 2107

Decree on special jurisdiction in criminal proceedings against members of the SS and members of police formations on special tasks, dated 17 October 1939.

The council of ministers for the defense of the Reich decrees that the following become law in the territory of the Greater German Reich:

Article 1[1]

Special jurisdiction is established for the prosecution of—

1. Professional members of the Reich leadership of the SS,

2. Professional members of the staffs of those Higher SS and Police Leaders who command organizations listed under numbers 3 to 6,

3. Members of the SS Special Duty Troops,

4. Members of the SS Death Head units[2] including their replacement units,

5. Members of the SS Junkers' Schools,

6. Members of the police formations on special tasks.

Article 2

(1) The persons specified under article 1, numbers 1 to 5, come under special jurisdiction in all cases of unlawful actions for which army courts are competent. The persons specified under article 1, number 6, come under special jurisdiction only if these unlawful actions have been committed while on special duty.

(2) The competence of the army courts remains unchanged.

Article 3

(1) If not ordered otherwise, the regulations of the military penal code, the regulations of the criminal procedure of courts

[1] Article 1 of this decree was also introduced as a part of Document NG–715, Prosecution Exhibit 112. This decree and a decree of 15 July 1942 extending the jurisdiction of SS courts into Bohemia and Moravia (reproduced later in this section as another part of Document NG–715, Prosecution Exhibit 112) were the subject of questions put to the defendant Schlegelberger by Judge Harding. This testimony is reproduced below in section V D 3.

[2] The SS Death Head units were in charge of the concentration camps.

martial as well as their introductory laws will be applied correspondingly under this special jurisdiction. As far as nonmilitary offenses are concerned, general criminal law applicable to members of the armed forces will be applied.

(2) The place of the Reich Minister for War or of the Chief of the High Command of the Wehrmacht is taken by the Reich Leader of the SS and Chief of the German Police. He appoints the judges and specifies the regional sphere of their jurisdiction.

Article 4

(1) Courts martial will be replaced by SS courts and, wherever cases against members of police units are concerned, by SS and police courts. The army appeal courts will be replaced by an SS and police appeal court.

(2) A special decree will be issued as to which court will take over the tasks of the Supreme Army Court in Wehrmacht affairs.

Article 5

(1) Civilian army judges will be replaced by SS judicial officers [Justizfuehrer] who are qualified to be judges. They will be appointed by the Fuehrer and Reich Chancellor, and in disciplinary matters, are directly subordinate to the Reich Leader SS.

(2) If the proceedings involve a member of the SS, SS members will be appointed as associate judges, otherwise the associate judge will be appointed from the ranks of the police.

(3) The registrars of the office will be replaced by SS Beurkundungsfuehrer [SS officers having registrar's functions].

(4) Further regulations as to the legal status of SS judicial officers and SS Beurkundungsbeamte [SS officials having registrar's functions] remain reserved.

Article 6

The regulations of the military penal code concerning special honor penalties [Ehrenstrafen] against soldiers are not to be applied. They are superseded by regulations concerning the penalties of dishonorable discharge and dismissal from the SS.

Article 7

The Reich Minister for the Interior and the Reich Leader SS, in agreement with the Reich Ministers of Justice and of Finance, are authorized to decree in their own field of activities the regulations necessary for articles 4 and 5 as well as the regulations for the carrying out of this ordinance.

Article 8

This ordinance becomes effective on the day of its proclamation.

Berlin, 17 October 1939

The Chairman of the Council of Ministers
for the Defense of the Reich
FIELD MARSHAL GOERING

The Plenipotentiary General for the
Administration of the Reich
FRICK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

EXTRACTS FROM DECREE, 25 NOVEMBER 1939, SUPPLEMENTING PENAL PROVISIONS FOR PROTECTION OF THE MILITARY STRENGTH OF THE GERMAN PEOPLE*

1939 REICHSGESETZBLATT, PART I, PAGE 2319

The Ministerial Council for the Defense of the Reich decrees with the force of law:

Article 1

Damage to Military Equipment

(1) Whoever intentionally destroys, renders unserviceable, damages, abandons or removes military equipment of an installation intended for the German defense, and thereby intentionally, or through negligence, endangers the fighting power of the German armed forces, will be punished with imprisonment of not less than 6 months. In serious cases the death penalty, or hard labor for life, or a term of hard labor will be imposed.

(2) The same punishment will be inflicted upon a person who intentionally builds, manufactures or delivers in a defective manner military equipment or installations of the kind described above, and thereby intentionally or through negligence endangers the fighting power of the German armed forces.

(3) The attempt is also punishable.

(4) Whoever acts carelessly and thereby negligently endangers the fighting power of the German armed forces will be punished with imprisonment.

(5) This regulation replaces article 143 a of the penal code.

* Material concerning the application of the laws on "public enemies" are reproduced below in section V E.

Article 2

Disturbance of an Essential Enterprise

(1) Whoever disturbs or endangers the orderly function of an enterprise essential to the defense of the Reich or to the supply of the population by making any object serving the enterprise completely or partially unusable or by putting it out of commission will be punished with hard labor or in especially serious cases with death.

(2) In less serious cases the penalty will be imprisonment.

* * * * * * *

Article 5

Endangering of the Armed Forces of Friendly States

(1) Whoever in Germany gathers or forwards information concerning military matters for a foreign military intelligence service to the prejudice of another state, or forms, maintains, or supports an information service concerning such matters will be punished with hard labor or in less serious cases with imprisonment.

(2) The act shall be prosecuted only upon order of the Reich Minister of Justice.

Article 6

In the Protectorate of Bohemia and Moravia the provisions of articles 1, 2, 4, and 5 of this decree apply also to persons who are not German nationals.

Berlin, 25 November 1939

The Chairman of the Ministerial Council
for the Defense of the Reich
FIELD MARSHAL GOERING

The Plenipotentiary for the Administration of the Reich
As Deputy, HIMMLER

The Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

DECREE OF 5 DECEMBER 1939 AGAINST VIOLENT CRIMINALS

1939 REICHSGESETZBLATT, PART I, PAGE 2378

The Ministerial Council for the Defense of the Reich decrees the following with the force of law for the area of the Greater German Reich:

Article 1

Armed Violence

(1) Whoever uses a firearm, a cutting or stabbing weapon, or any other equally dangerous object while committing rape, street robbery, bank robbery or any other serious act of violence, or whoever threatens another person's body or life with such a weapon will be punished by death.

(2) The criminal who attacks his pursuers or defends himself against them with the use of arms will be subject to the same penalty.

Article 2

Protection for People Assisting in the Pursuit of the Criminals

Whoever takes part personally in the pursuit of a criminal for the purpose of his apprehension has the same privileges under criminal law as policemen and officers of the law.

Article 3

Competence of the Special Court

In cases of crimes which fall under the provisions of articles 1 or 2 of this decree, the indictment will be filed with the Special Court.

Article 4

More Severe Punishment for Attempted Crimes and Aiding and Abetting

Where an attempted crime or offense or the aiding and abetting in such a crime or offense are punishable, the same punishment is generally admissible as is provided for the accomplished crime.

Article 5

Retroactive Force

This decree is also applicable to punishable acts committed before it came into force.

Article 6

Final Regulations

The Reich Minister of Justice will issue the legal and administrative provisions required to carry out and supplement this

decree, and the special provisions concerning the application of this decree in the Protectorate of Bohemia and Moravia.

Berlin, 5 December 1939

The Chairman of the Ministerial Council
for the Defense of the Reich
FIELD MARSHAL GOERING

The Plenipotentiary for the Administration of the Reich
FRICK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

DECREE OF 6 MAY 1940 ON THE EXTENSION OF THE APPLICATION OF GERMAN CRIMINAL LAW

1940 REICHSGESETZBLATT, PART I, PAGE 754

The Ministerial Council for the Defense of the Reich decrees, for the territory of the greater German Reich, with the force of law:

Section I

Extent of the Application of Criminal Law

Articles 3 through 5, 8 and 37 of the Reich Penal Code will be replaced by the following regulations:

Article 3

German criminal law will be applied to the crime of a German national, no matter whether it is committed in Germany or abroad.

For a crime committed abroad, which according to the laws of the place of commitment is not punishable, German criminal law will not be applied, if such an act according to the sound sentiment of the German people—on account of the particular conditions prevailing at the place of commitment—is not considered to be deserving punishment.

An act shall be deemed to have been committed in any place where the perpetrator has acted, or, in case the act consists in an omission, where he ought to have acted, or where the results of the act came about or were intended to come about.

Article 4

German criminal law will be applied also in case of acts committed by a foreigner in Germany.

German criminal law will be applied to a crime committed by a foreigner abroad, if it is punishable according to the penal code of the territory where it is committed, or if such territory is not subject to any punitive authority [Strafgewalt] and if—

1. The perpetrator obtained German nationality after the act, or

2. The act is directed against the German people or a German national, or

3. The perpetrator is apprehended in Germany and is not extradited, although the nature of his act would permit extradition.

German criminal law will be applied to the following acts committed by a foreigner abroad, independently of the laws of the place of commitment:

1. Acts committed while holding a German government office, as a German soldier, or as member of the Reich Labor Service, or committed against a holder of an office of the German State or the Party, against a German soldier, or a member of the Reich Labor Service, while on duty, or relating to his duty;

2. Acts constituting treason or high treason against the German Reich;

3. Crimes committed with explosives;

4. Traffic in children and women;

5. Disclosure of a manufacturing or commercial secret of a German enterprise;

6. Perjury committed in the course of proceedings of a German court or some other German agency authorized to take oaths;

7. Crimes and offenses of counterfeiting;

8. Unauthorized sale of narcotics;

9. Trade with pornographic publications.

Article 5

German criminal law will be applied, independently of the laws of the place of commitment, to crimes committed on a German vessel or a German airplane.

Section II

Regulations Amending the Rules of Criminal Procedure:

1. As article 8 a of the Code of Criminal Procedure the following regulation is being inserted:

Article 8 a

Jurisdiction shall also be established at the court in the district of which the defendant is being detained by order of an authority at the time the indictment is filed.

2. As article 153 a of the Code of Criminal Procedure, the following regulation is being inserted:

Article 153 a

* * * * * * *

An act committed by a foreigner abroad will be prosecuted by the public prosecutor only if so demanded by the Reich Minister of Justice.

The public prosecutor may abstain from the prosecution of a punishable act if for the same act punishment has already been carried out abroad and the sentence to be expected in Germany, after deducting the time served abroad, would not be heavy.

* * * * * * *

Berlin, 6 May 1940

The Chairman of the Ministerial Council for National Defense
FIELD MARSHAL GOERING

The Plenipotentiary General for the Administration of the Reich
FRICK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

TRANSLATION OF DOCUMENT NG–1807
PROSECUTION EXHIBIT 626

DECREE OF 11 JUNE 1940 CONCERNING EXECUTION OF PRISON SENTENCES FOR CRIMES COMMITTED IN TIME OF WAR

1940 REICHSGESETZBLATT, PART I, PAGE 877

The Ministerial Council for National Defense decrees the following with legal force for the territory of Greater Germany:

Article 1

(1) If a court martial or an SS and police court sentences a person to hard labor for crimes committed in time of war, or,

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sentences him, in addition to imprisonment, to loss of the right to bear arms, or loss of civil rights, and if the sentence is to be carried out within the scope of the Reich Administration of Justice, the period spent in prison during the war will not be included in the time of imprisonment. In special cases the judiciary can decide differently.

(2) If a person has within the scope of the Reich Administration of Justice been sentenced to hard labor for a crime committed in time of war, the executing authority should give an order which complies with the legal consequence of article 1, paragraph 1.

(3) The provisions of articles 1 and 2 apply also to prison sentences which have been passed before the effective date of this decree.

(4) Prison sentences which are covered by the provisions of article 1, paragraph 1, or for the execution of which an order according to article 2 is given, will be executed under more strict conditions.

Article 2

The Reich Minister of Justice is authorized to issue the necessary legal and administrative provisions for the carrying out or supplementation of this decree. He may determine that article 1, paragraph 2, should be applied accordingly if imprisonment is to be imposed.

Article 3

This decree applies also in the Incorporated Eastern Territories.

Berlin, 11 June 1940

The Chairman of the Ministerial Council
for National Defense
FIELD MARSHAL GOERING

The Plenipotentiary for the Administration of the Reich
FRICK

The Chief of the High Command of the Armed Forces
KEITEL

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM LAW OF 4 SEPTEMBER 1941 AMENDING THE CRIMINAL (PENAL) CODE

1941 REICHSGESETZBLATT, PART I, PAGE 549

The Reich government has enacted the following law, which is promulgated herewith:

Article 1

The dangerous habitual criminal (article 20a of the penal code) and the sex criminal (articles 176 through 178 of the penal code) are subject to the death penalty if the protection of the national community or the need of just expiation require it.

* * * * * * *

Article 3

The usurer (articles 302d and 302e of the penal code) will be punished with hard labor in especially serious cases. Moreover, a fine of an unlimited amount can be imposed.

* * * * * * *

Fuehrer Headquarters, 4 September 1941

The Fuehrer and Reich Chancellor
ADOLF HITLER

The President of the Ministerial Council
for the Defense of the Reich
REICH MARSHAL GOERING

The Acting Reich Minister of Justice
DR. SCHLEGELBERGER

The Reich Minister of the Interior
FRICK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG–715
PROSECUTION EXHIBIT 112

EXTRACTS FROM THE ELEVENTH REGULATION ON THE REICH CITIZENSHIP LAW, 25 NOVEMBER 1941*

1941 REICHGESETZBLATT, PART I, PAGE 722

The Reich government has enacted the following law, which is promulgated herewith:

Article 1

A Jew, having his regular abode abroad, cannot be a German national. Regular abode abroad shall be presumed if a Jew is abiding abroad under circumstances indicating that he abides there not only temporarily.

Article 2

A Jew loses German nationality—

a. If at the date this amendment becomes effective, he has his regular residence abroad, with that same date.

b. If he takes up his regular residence abroad later on, at the same time replacing his regular domestic residence by a residence abroad.

Article 3

(1) The property of the Jew who is losing his German nationality under this amendment shall be forfeited for the benefit of the Reich at the moment he loses his nationality. For the benefit of the Reich shall further be forfeited the property of Jews who are stateless at the moment this amendment becomes effective, and who were of German nationality, prior to this amendment coming into effect, if they have taken up or take up their regular residence abroad.

(2) The property thus forfeited shall serve the furthering of all purposes in connection with the solution of the Jewish question.

Article 4

(1) Persons whose property is forfeited for the benefit of the Reich under article 3, shall not be able to inherit anything from a German national.

* * * * * * *

* The Reich Citizenship Law and the Law for the Protection of German Blood and Honor, both announced in Nuernberg on 15 September 1939, were the basic parts of the so-called "Nuernberg Laws." See the Law for the Protection of German Blood and Honor, reproduced earlier in this section also as a part of Document NG–715, Prosecution Exhibit 112. Further decrees and other materials concerning Jews are reproduced below in section V D 2.

Article 8

(1) It is for the chief of the Security Police and the SD to decide whether the conditions for a forfeiture of property are given.

(2) The administration and liquidation of the forfeited property is up to the chief of the Regional Finance Office, Berlin.

* * * * * * *

Article 10

(1) Claims for pensions of Jews who lose German nationality under article 2 expire with the end of the month during which the loss of nationality occurs.

* * * * * * *

Article 12

This amendment is also valid for the Protectorate of Bohemia and Moravia and the Incorporated Eastern Territories.

Berlin, 25 November 1941

The Reich Minister of the Interior
FRICK

The Chief of the Party Chancellery
M. BORMANN

The Reich Minister of Finance
As Deputy, REINHARDT

The Acting Reich Minister of Justice
DR. SCHLEGELBERGER

TRANSLATION OF SCHLEGELBERGER DOCUMENT 23
SCHLEGELBERGER DEFENSE EXHIBIT 63

ORDER OF 16 JANUARY 1942 FOR EXECUTION OF THE FUEHRER DECREE CONCERNING THE POSITION OF CHIEF OF THE PARTY CHANCELLERY

1942 REICHSGESETZBLATT, PART I, PAGE 35

Pursuant to the Fuehrer decree of 29 May 1941 (Reichsgesetzblatt I, p. 295) defining the position of the chief of the Party Chancellery, the following is hereby directed:

Article 1

(1) Any Party contribution toward national legislation is the exclusive responsibility of the chief of the Party Chancellery

unless otherwise directed by the Fuehrer. Legislative proposals or suggestions emanating from the Party, its formations or affiliated organizations are to be submitted exclusively by the chief of the Party Chancellery to the top-level Reich authorities concerned.

(2) Likewise, all assistance of the Party in dealings with personnel matters of civil servants is the exclusive responsibility of the chief of the Party Chancellery.

Article 2

In all matters of national legislation the chief of the Party Chancellery occupies the same position as that of any Reich minister concerned. Therefore he is to be consulted by the highest Reich authorities with regard to the drafting of Reich laws, decrees, and directives of the Fuehrer, directives of the Ministerial Council for National Defense, as well as directives issued by the highest Reich authorities, and regulations and provisions for the execution of these directives. The same applies to the endorsement of laws and directives issued within the jurisdiction of the German States [Laender] or of directives of Reich governors.

Article 3

In all matters of general principle and national policy, particularly in matters pertaining to the drafting, amendment, or execution of laws, decrees, or directives, all communications between the highest Reich authorities and the highest authority of the German States including several political districts on one hand, and the agencies of the Party, its formations and affiliated organizations on the other hand, are to be channeled exclusively through the chief of the Party Chancellery. In such cases there shall exist no direct correspondence between either the highest Reich authorities or the highest authorities of the German States, and any agencies of the Party other than the chief of the Party Chancellery. The same applies to personnel matters of civil servants, unless such matters are otherwise regulated by special provisions.

Fuehrer Headquarters, 16 January 1942

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

The Chief of the Party Chancellery
M. BORMANN

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

FUEHRER DECREE, 21 MARCH 1942, CONCERNING SIMPLIFICATION OF THE ADMINISTRATION OF JUSTICE

1942 REICHSGESETZBLATT, PART I, PAGE 139

The defense of people and Reich necessitates smooth and quick work in the administration of justice. In order to enable the courts and the public prosecutors to continue the fulfilling of their tasks under the extraordinary conditions, I decree the following:

I

The procedure in penal cases including the administration of punishment, in civil cases and in matters of voluntary jurisdiction, is to be simplified and expedited, by eliminating all dispensable measures and by utilizing all available manpower, as far as it is compatible with the purpose of the procedure. In particular, in penal cases the enforcement of the indictment by the offended party, and the formal decree of the court opening, the trial will be eliminated; the authority of the local court in penal matters is to be enlarged, and the admissibility of writs of punishment to be extended.

II

Indictments and judicial decisions will be written in concise style and cut down to the absolutely necessary.

III

The participation of professional associate judges in judicial decisions is to be restricted.

IV

Appeals against judicial decisions will be adapted to war conditions; they can be made subject to special admission. In civil cases of appeal the introduction of new factual material is to be further restricted.

V

(1) The term of office of the members of the Special Senates of the Reich Supreme Court and of the People's Court, as well as the honorary members of the People's Court, is extended to the termination of the war.

(2) The units and members of units of the Reich chamber of attorneys, the Reich chamber of notaries public and the notaries'

finance office will remain in office until the termination of the war; their appointment can be revoked at any time.

VI

I commission the Reich Minister of Justice, in agreement with the Reich Minister and chief of the Reich Chancellery, and the chief of the Party Chancellery, to issue the legal provisions necessary for the execution of this decree. I empower the Reich Minister of Justice to make the necessary administrative provisions and to decide any doubtful questions by administrative means under due observation of article 2 of the decree of 16 January 1942 (Reichsgesetzblatt Part I, page 35).

Fuehrer Headquarters, 21 March 1942

The Fuehrer
ADOLF HITLER

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG–715 PROSECUTION EXHIBIT 112

UNANIMOUS DECISION OF THE GREATER GERMAN REICHSTAG, 26 APRIL 1942, CONCERNING UNRESTRICTED POWERS OF ADOLF HITLER

1942 REICHSGESETZBLATT, PART I, PAGE 247

Decision of the Greater German Reichstag, 26 April 1942

At the proposal of the president of the Reichstag, in its session of 26 April 1942, the greater German Reichstag has unanimously approved of the rights which the Fuehrer has postulated in his speech*, with the following decision:

"There can be no doubt that in the present war, in which the German people is faced with a struggle for its existence or annihilation, the Fuehrer must have all the rights postulated by him which serve to further or achieve victory. Therefore—without being bound by existing legal regulations—the Fuehrer in his capacity as leader of the nation, supreme commander of the armed forces, chief of the government, and supreme holder of executive power, as holder of the supreme judicial power [Oberster Gerichtsherr] and leader of the Party must be in a position to force with all means at his disposal every German, if necessary, whether he be common soldier or officer, low or

* The reference is to Hitler's speech to the Reichstag on the same day, 26 April 1942. Extracts from this speech (Doc. NG–752, Pros. Ex. 24) are reproduced below in section V C 2a.

high official or judge, leading or subordinate official of the Party, worker or employee, to fulfill his duties. In case of violation of these duties, the Fuehrer is entitled, after conscientious examination, regardless of so-called well established rights, to impose due punishment, and to remove the offender from his post, rank and position, without using prescribed procedures."

At the order of the Fuehrer this decision is hereby promulgated.

Berlin, 26 April 1942

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

DECREE, 15 JULY 1942, SIGNED BY KEITEL, STUCKART AND DEFENDANT SCHLEGELBERGER, EXTENDING SPECIAL JURISDICTION OF SS AND POLICE OR MILITARY COURTS TO THE PROTECTORATE OF BOHEMIA AND MORAVIA

1942 REICHSGESETZBLATT I, PAGE 475

Order Concerning the Jurisdiction of SS Courts and Police Courts in the Protectorate Bohemia and Moravia, 15 July 1942

In pursuance of the decree of the Fuehrer and Reich Chancellor concerning the Protectorate Bohemia and Moravia, dated 16 March, 1939 (RGB1.I, p. 485) and in agreement with the Reich Protector of Bohemia and Moravia, the following order is issued:

Article 1

In case of direct attack by a non-German citizen against the SS or the German police or against any of their members, the Reich Leader of the SS and chief of the German police in the Reich Ministry of the Interior may establish the jurisdiction of a combined SS court and police court, by declaring that special interests of parts of the SS or of the police require that judgment be given by an SS and police court.*

This declaration shall be sent to the Reich Protector of Bohemia and Moravia. The SS and police court, which shall have jurisdiction in individual cases, shall be specified by the Reich leader of the SS and chief of the German police in the Reich Ministry of the Interior.

* The decree of 17 October 1939 establishing special jurisdiction in criminal proceedings against members of the SS and members of police formations on special tasks, (Klemm Doc. 29, Klemm Ex. 29), is reproduced earlier in this section.

Article 2

If the offense directly injures the interests of the armed forces the Reich Leader of the SS and chief of the German police in the Reich Ministry of the Interior, and the chief of the High Command of the Armed Forces shall reach an agreement as to whether the case shall be prosecuted by an SS and police court or by a military court.

Article 3

This order shall become effective 1 week after its publication.

Berlin, 15 July 1942

The Reich Minister of the Interior
As deputy, DR. STUCKART

The Chief of the High Command of the Armed Forces
KEITEL

The Acting Reich Minister of Justice
DR. SCHLEGELBERGER

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM DECREE OF 13 AUGUST 1942 FOR THE FURTHER SIMPLIFICATION OF THE ADMINISTRATION OF JUSTICE IN CRIMINAL CASES

1942 REICHSGESETZBLATT, PART I, PAGE 508

* * * * * * *

Article II

Extended penal authority of the Local Court

The local court may pass sentence of hard labor up to 5 years.

Article III

Extension of the Admissibility of the Writ of Punishment

A writ of punishment of up to 6 months' imprisonment is admissible for crimes, too.

Article IV

Economizing on Manpower in the Composition of Penal Court

Decisions by the penal chamber of the district court, the Special Court and the penal senate of the courts of appeal may be made

by the president or his regular deputy alone, if he considers the cooperation of his associates dispensable in view of the factual and legal simplicity of the case, and if the public prosecutor agrees.

Article V

Trial without Public Prosecutor

In proceedings before the local court the public prosecutor may abstain from participation in the trial.

* * * * * * *

Article VII

Reorganization of the System of Legal Remedies

Article 1

Restriction of Legal Remedies

Appeal and complaint by the defendant or the plaintiff in penal cases, prosecuting on his own or beside the public prosecutor, against a decision issued after this decree comes into force, are subject to special admission. This will be granted in cases where a refusal would be unfair.

Berlin, 13 August 1942

The Acting Reich Minister of Justice
DR. SCHLEGELBERGER

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

HITLER DECREE, 20 AUGUST 1942, CONCERNING SPECIAL POWERS AUTHORIZING THE REICH MINISTER OF JUSTICE TO DEVIATE FROM ANY EXISTING LAW IN ESTABLISHING A NATIONAL SOCIALIST ADMINISTRATION OF JUSTICE

1942 REICHSGESETZBLATT, PART I, PAGE 535

Decree of the Fuehrer concerning Special Powers of the Reich Minister of Justice

To fulfill the tasks of the Greater German Reich, a strong administration of justice is necessary. Therefore, I commission and empower the Reich Minister of Justice* to establish a national socialist administration of justice and to take all necessary

* Thierack at this time had just been appointed Reich Minister of Justice. From late January 1941 until the middle of August 1942, the defendant Schlegelberger had been acting Reich Minister of Justice. Evidence concerning developments in the administration of justice while Thierack was Reich Minister are reproduced below in section V C3.

measures in accordance with my directives and instructions and in agreement with the Reich Minister and chief of the Reich Chancellery and the chief of the Party Chancellery* In doing so, he can deviate from any existing law.

Fuehrer Headquarters, 20 August 1942

The Fuehrer
ADOLF HITLER

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

EXTRACTS FROM THE REICH JUVENILE COURT LAW OF 10 NOVEMBER 1943

1943 REICHSGESETZBLATT, PART I, PAGE 639

First Part

Juvenile Delinquencies and their Consequences

First Section

General Rules

Article 1

Sphere of Application

(1) This law applies whenever a juvenile commits a delinquency subject to punishment. A juvenile is one who, at the time of the deed, is 14 but not yet 18 years old.

(2) This law applies to Germans. It shall be applied accordingly to members of other nationalities, as far as not otherwise provided.

* * * * * * *

Seventh Section

Application of the General Criminal Law

Article 20

Juvenile Major Criminals

(1) If at the time of the deed the juvenile was morally and mentally developed to such an extent that he can be considered

* Martin Bormann, tried *in absentia* and sentenced to death by the International Military Tribunal. See Trial of the Major War Criminals, *op. cit.*, volume I, page 367.

like a perpetrator over 18 years old, the judge will apply the general criminal law, if the sound sentiment of the people requires it because of the particularly wicked character of the perpetrator and because of the seriousness of his deed.

(2) The same applies, if the juvenile at the time of the deed, according to his moral and mental development, cannot be considered like an adult, but if the over-all appreciation of his personality and his deed shows that he is a major criminal of a degenerate character and the protection of the people demands such treatment.

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PARTIAL TRANSLATION OF DOCUMENT NG–715 PROSECUTION EXHIBIT 112

FIFTH DECREE, 5 MAY 1944, AMENDING THE DECREE CONCERNING SPECIAL CRIMINAL LAW IN TIME OF WAR AND SPECIAL EMERGENCY

1944 REICHSGESETZBLATT, PART I, PAGE 115

Pursuant to Article 10 of the Decree concerning Special Criminal Law in Time of War and Special Emergency* (Special Penal Decree for Wartime) of 17 August 1938 (Reichsgesetzblatt 1939, I, p. 1455) the following is ordered:

Article I

Article 5a of the Special Penal Decree for Wartime is amended as follows:

Article 5a

Excess of the Regular Penalty Limits

(1) With regard to all offenders who through an intentional, punishable act have become guilty of causing a serious detriment or danger to the conduct of the war or the security of the Reich, the penalty can be increased in excess of the regular penalty limits, up to the statutory maximum of a given type of penalty, or to a term of hard labor, or to hard labor for life, or to death, if the regular penalty limits are an insufficient expiation according to the sound sentiment of the people. The same applies to all punishable acts committed by negligence, if they have caused a particularly serious detriment or danger to the conduct of the war or the security of the Reich.

* Reproduced on page 184 as a part of Document NG–715, Prosecution Exhibit 112.

(2) In the case of punishable acts committed against the discipline and courage required of a soldier, the regular penalty limits may be likewise exceeded, if the maintenance of discipline and the security of the military unit require it.

Article II

Article I applies also to acts committed before this decree becomes effective.

Fuehrer Headquarters, 5 May 1944

The Chief of the High Command of the Armed Forces
KEITEL

TRANSLATION OF DOCUMENT NG-1918
PROSECUTION EXHIBIT 531

DECREE OF 25 AUGUST 1944, FOR THE PROTECTION OF THE TOTAL WAR EFFORT

1944 REICHSGESETZBLATT, PART I, PAGE 184

Pursuant to the decree of the Fuehrer concerning special powers of the Reich Minister of Justice,* of 20 August 1942 (Reichsgesetzblatt I, p. 535), in connection with the decree of the Fuehrer concerning total war effort of 25 July 1944 (Reichsgesetzblatt I, p. 161) the following is ordered in agreement with the Reich Minister and chief of the Reich chancellery, the chief of the Party Chancellery, and the Plenipotentiary for the Administration of the Reich.

Article I

(1) He who willfully or negligently violates an order or prohibition contained in a legal decree or a duly promulgated administrative order of the Reich government, any Supreme Reich Authority or any other authority on the same level with it concerning measures for implementing total war effort, will be punished with imprisonment and/or a fine.

(2) If the perpetrator is guilty of causing, by a willful violation, a serious disadvantage or a serious danger or, by a negligent violation, a specially serious advantage or a specially serious danger to the war effort or the security of the Reich, he may be punished with hard labor for a limited period, or for life, or with death.

Article II

This decree is also applicable if the legal decree or administra-

* Reproduced on page 207 as a part of Document NG-715, Prosecution Exhibit 112.

tive order has been promulgated before this decree comes into force, but after 25 July 1944.

Berlin, 25 August 1944

The Reich Minister of Justice
As deputy, KLEMM [1]

TRANSLATION OF KLEMM DOCUMENT 57
KLEMM DEFENSE EXHIBIT 57

EXTRACTS FROM DECREE, 13 DECEMBER 1944, FOR THE FURTHER ADAPTATION OF CRIMINAL PROCEDURE TO THE REQUIREMENTS OF TOTAL WAR (FOURTH DECREE FOR THE SIMPLIFICATION OF CRIMINAL PROCEDURE)

1944 REICHSGESETZBLATT, PART I, PAGE 339

In pursuance of the decree of the Fuehrer concerning special powers of the Reich Minister of Justice, dated 20 August 1942,[2] (Reichsgesetzblatt I, p. 535), in connection with the decree of the Fuehrer concerning total war, dated 25 July 1944 (Reichsgesetzblatt I, p. 161), and in agreement with the Reich Minister and chief of the Reich Chancellery, the chief of the Party Chancellery, and the Plenipotentiary for the Administration of the Reich, the following is ordered:

* * * * * * *

Part II

* * * * * * *

Article 12

Limited Admittance of Defense Counsel

(1) In one criminal case, several lawyers or professional representatives may not act side by side as chosen counsel for one defendant.

(2) The rules about obligatory representation by defense counsel do not apply. The presiding judge appoints a defense counsel for the whole or part of the proceedings if the difficulty of the factual or legal problems makes assistance by a defense counsel necessary, or if the defendant, in due consideration of his personality, is unable to defend himself personally.

* * * * * * *

Berlin, 13 December 1944

The Reich Minister of Justice
DR. THIERACK

[1] At this time the defendant Klemm was one of several Under Secretaries (Staatssekretaere) in the Reich Ministry of Justice.

[2] Reproduced on page 207 as a part of Doc. NG–715, Pros. Ex. 112.

C. Organization and Structure of the German Judicial System and the Reich Ministry of Justice

I. THE POSITION AND RESPONSIBILITY OF LEADING OFFICIALS IN THE REICH MINISTRY OF JUSTICE

EXTRACT FROM THE TESTIMONY OF DEFENDANT METTGENBERG[1]

DIRECT EXAMINATION

* * * * * * *

DR. SCHILF (counsel for defendant Mettgenberg): Dr. Mettgenberg, at the Reich Ministry of Justice you last held the position of a subdepartment chief. In the course of this trial a great many things have been said about that subdepartment chief,[2] but you are the only defendant who last held that position. Therefore, would you please give the court an outline of that last position you held?

DEFENDANT METTGENBERG: Perhaps I may somewhat exceed the scope of the question and say a few words about the structure of the Reich Ministry of Justice as a whole, of which so far nothing has been said here. The entire personnel of the Reich Ministry of Justice amounted to approximately 800. Those 800 people composed three groups, the workers, the employees, and the officials. As an example for the workmen may I perhaps mention the cleaning women and the boilermen. As an example for the employees, the majority of the secretaries and typists. Officials were those who held the posts of civil servants. Conditions to fulfill the status of a civil servant were mainly of a formal nature. Within the body of civil servants there were three groups which must be distinguished—the lower grade, the intermediate grade, and the higher grade. Lower officials were, for example, those who carried the files, the chief messengers, etc. Officials of the intermediate grade were the men whose task it was to keep the registers and to draft documents which were made by the dozen. The higher grade of officials were those beginning with assessor [junior judge or prosecutor] up to the Minister himself. The scope of work for the higher grade civil servants was distributed in such a way that the younger of these civil servants were employed as so-called coworkers [Mitarbeiter] or assistants.

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[1] Complete testimony is recorded in the mimeographed transcript, (31 July, 1 Aug. 1947), pages 6235–6271; 6274–6362.

[2] Defendant Mettgenberg later testified that in department III of the Ministry of Justice he held the position of "Referent for legislation in the field of international penal law" and that in department IV he was "a subdepartment chief in charge of a sphere of work which, above all, also concerned affairs of international penal law" (Tr. p. 6251).

Above the co-workers there were the Referents.* They were older officials who held the rank of Oberregierungsrat or ministerial counsellor [Ministerialrat].* Above them the next category was the subdepartment chiefs [Unterabteilungsleiter]. These subdepartment chiefs were either senior ministerial counsellors [Ministerialraete] or Ministerialdirigenten.* Above them there were the department chiefs [Abteilungsleiter], as a rule a ministerial director.* Sometimes it was a Ministerialdirigent. Above them, but only temporarily, there was an assistant under secretary [Unterstaatssekretaer]. Above him there was one or several under secretaries [Staatssekretaeren].* At the very top there was the Reich Minister.* When one keeps that survey in mind, the answer to the question which counsel put to me becomes fairly clear. The subdepartment chief was between the Referent and the department chief. His task was to take reports from the Referent on matters which were of a somewhat supernormal importance; matters which were altogether normal and clear and unambiguous, where there were no misgivings, no doubts, there the Referent made the decision. But as soon as a matter, from any point of view, assumed somewhat greater significance, he had to report on it to the chief who, in turn, had to consider as to whether he himself was competent to decide on the question. If it was of real significance, a report had to be made to a higher authority, to the department chief, to the State Secretary, and possibly to the Minister. In the absence of the department chief, the subdepartment chief had to deputize for him in his business as department chief. And the organization with us was such that every subdepartment chief for his sphere of work had to undertake that work as a deputy. In the big department IV, which has been discussed here such a great deal, there were in the end six subdepartment chiefs, each of whom had his own sphere of work. When the department chief was absent, each one of the six subdepartment chiefs had to deputize for the department chief within and for his own sphere of work. In the main, my defense counsel has already explained the matter in his opening statement, and I may therefore refer to it. As concerns myself as a subdepartment chief, I too had to deputize for the department chief when matters were concerned which belonged within my sphere of work as a subdepartment chief.

* For various periods of time under the Hitler regime, over half of the defendants held one or more of the various titles and positions which the defendant Mettgenberg here proceeds to describe. For example, the defendant Joel was a Referent and later a ministerial counsellor; the defendants von Ammon and Westphal were ministerial counsellors; the defendant Mettgenberg himself was a Ministerialdirigent; the defendants Altstoetter and Engert were ministerial directors; and the defendants Schlegelberger, Klemm and Rothenberger were Under Secretaries. Only two persons held the position of Reich Minister of Justice during the Hitler regime, Guertner and Thierack, both of whom were dead by the time of the trial. The defendant Schlegelberger was acting Reich Minister of Justice between the death of Guertner in January 1941 and Thierack's appointment as Minister in August 1942.

907802—51——16

2. EXTRACTS FROM THE "BASIC INFORMATION"

A BRIEF SUMMARY OF THE COURT SYSTEM*

Following the practice of most continental nations, German law (based primarily on Roman law principles) is largely enacted into codes. The criminal code dates from 1871, and the code of criminal procedure from 1877.

Before Hitler's seizure of power, the individual German states (Laender) retained their sovereignty in the administration of justice and the establishment of courts. There was, however, a Supreme Court of the entire German Reich (Reichsgericht), which sat at Leipzig.

Under the Supreme Court, there were 34 district courts of appeal (Oberlandesgerichte), established in the several states and provinces. Under the district courts of appeal were some 180 district courts (Landgerichte) and about 2,200 local courts (Amtsgerichte).

Both the Judicature Act of 1877 and the Weimar constitution (article 102) provided that the courts and judges should be independent. The general administration of the courts, however, was controlled by the Justice Ministries—the Reich Supreme Court by the Reich Ministry of Justice and the intermediate and lower courts by the Justice Ministries of the individual states. The Reich and state prosecutors were appointed and controlled by the respective Reich and state ministries.

* * * * * * *

The regular courts. Original jurisdiction, both in civil and criminal matters, was divided between the local courts and the district courts. The local courts served for civil cases where the claim did not exceed 1500 reichsmarks, and criminal cases where the crime was punishable with penal servitude up to 5 years. Cases where these limits were exceeded were brought originally in the district courts.

The appellate procedure was much simplified as a war measure in 1939. Criminal cases heard in the local courts could thereafter be appealed to the district courts, and criminal cases heard originally in the district courts could be appealed directly to the Reich Supreme Court. Civil cases from the local courts could be taken on appeal directly to the district courts of appeal; civil cases from the district courts could be appealed to the district courts of appeal and thereafter to the Reich Supreme Court.

* This summary and the following two charts are part of the "Basic Information" submitted by the prosecution at the beginning of the case as an aid to the understanding of the evidence to be later submitted.

Under the impact of the war and the resulting shortage of judges and judicial personnel, a decree in September 1944 further curtailed the right of appeal and entirely eliminated the judicial functions of the district courts of appeal.

The Reich Supreme Court was the court of first and last instance for cases of treason against the Reich but, as set forth below, in 1934 this function was absorbed by the People's Court.

Extraordinary courts. Immediately after the seizure of power, by a decree of 21 March 1933,[1] Special Courts (Sondergerichte) were established in order to combat the activities of opponents of the new regime. One Special Court was established within the area of each district court of appeal. Each court was composed of a president and two associates, drawn from the professional judges of the district. The Special Courts were given jurisdiction over various crimes, including inciting to disobedience of governmental orders, crimes in the nature of sabotage, and acts "contrary to the public welfare." There was no appeal from decisions of the Special Courts.

The following year, the People's Court (Volksgerichtshof) was established by the law of 24 April 1934.[2] The People's Court tried cases of treason, which were withdrawn from the jurisdiction of the Reich Supreme Court. During the following years, the jurisdiction of the People's Court was vastly increased by the expanded concept of treason.

The People's Court sat in six divisions, or "senates"; later on, a "special senate" was created to re-try cases where, in the judgment of the Chief Public Prosecutor of the Reich, an insufficient punishment had been imposed. Ordinarily a senate of the People's Court was composed of five judges, of whom two were professional judges and the other three were laymen specially appointed from the SS, the armed forces, and the Nazi Party hierarchy. There was no appeal from decisions of the People's Court.

* * * * * * *

Other special tribunals established under the third Reich included the "hereditary health courts" [3] (Erbgesundheitsgerichte) and in 1945, emergency civilian "courts martial" [4] (Standgerichte) in those parts of Germany which were near the front lines.

* * * * * * *

[1] This decree is reproduced on p. 218.
[2] This decree is reproduced on p. 231.
[3] For further information on this subject, see contemporaneous documents below in section C5.
[4] The decree on court martial procedure is reproduced below in section C6.

REGULAR AND EXTRAORDINARY COURTS OF THE THIRD REICH

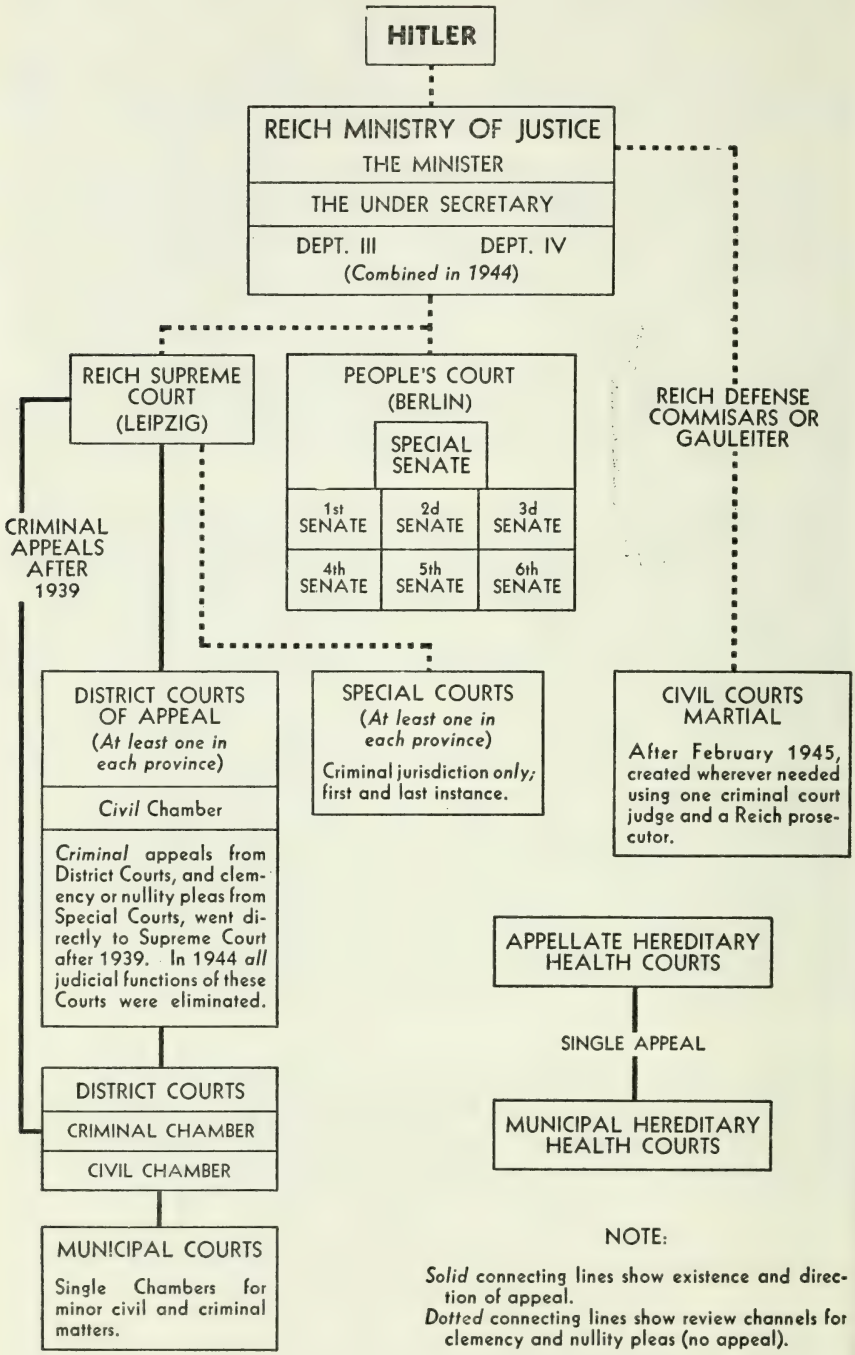
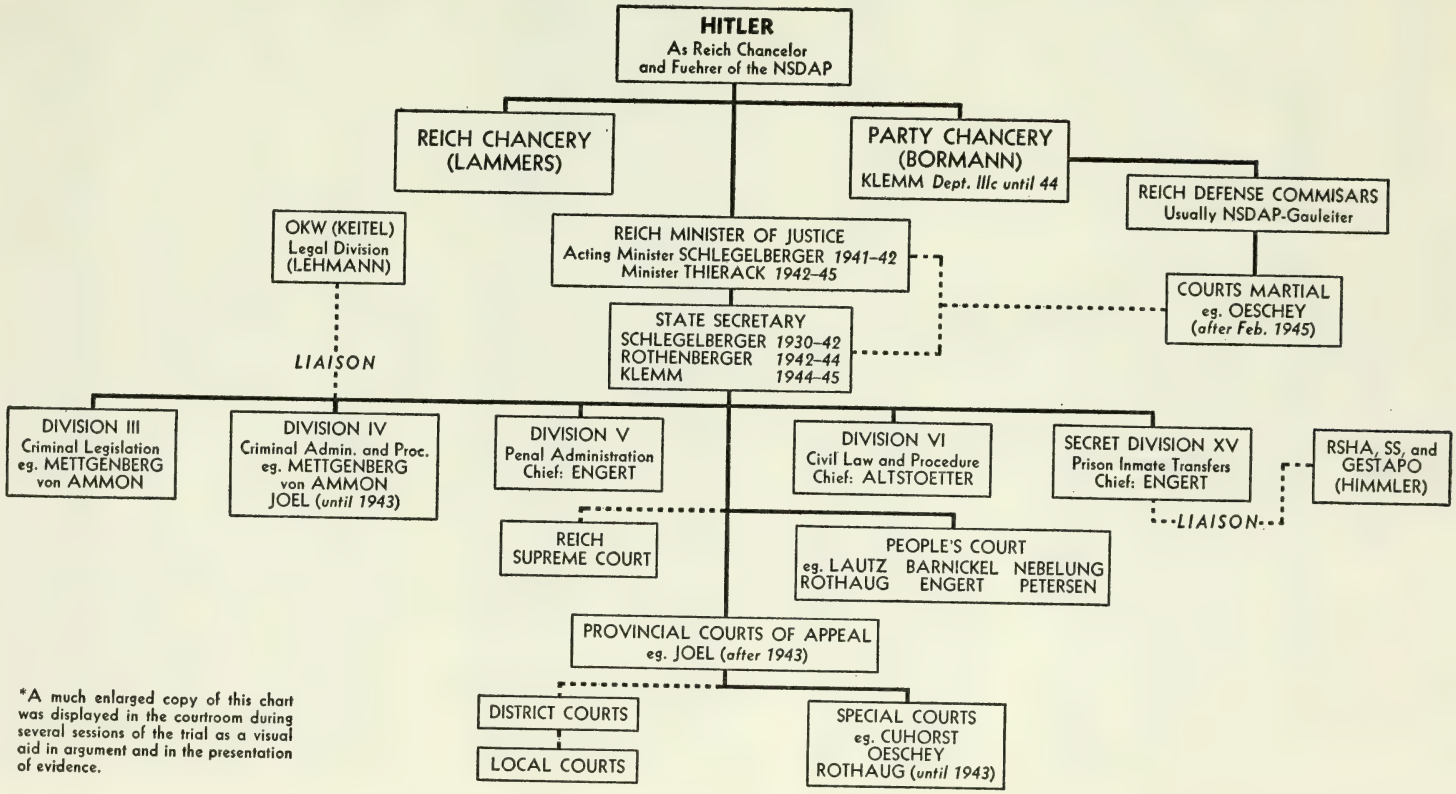


CHART SHOWING POSITIONS OF THE DEFENDANTS AND OTHERS IN THE MINISTRY OF JUSTICE

CHART SHOWING POSITIONS OF THE DEFENDANTS AND OTHERS IN THE REICH MINISTRY OF JUSTICE AND THE GERMAN JUDICIAL SYSTEM UNDER HITLER*



*A much enlarged copy of this chart was displayed in the courtroom during several sessions of the trial as a visual aid in argument and in the presentation of evidence.

3. SPECIAL COURTS*

PARTIAL TRANSLATION OF DOCUMENT NG–715 PROSECUTION EXHIBIT 112

DECREE OF THE REICH GOVERNMENT, 21 MARCH 1933, ON THE FORMATION OF SPECIAL COURTS

1933 REICHSGESETZBLATT, PART I, PAGE 136

Pursuant to chapter II of part six of the third decree of the Reich President to safeguard economy and finances and to combat political excesses, of 6 October 1931, (Reichsgesetzblatt I, pp. 537, 565) the following is decreed:

Article 1

(1) A Special Court will be created for the district of each court of appeal.

(2) The Special Courts are courts of the States.

(3) The Legal Administration of the respective States determines the seats of the Special Courts.

Article 2

The Special Courts have jurisdiction over crimes and offenses enumerated in the decree of the Reich President for the protection of people and State of 28 February 1933 (Reichsgesetzblatt I, p. 83) and in the decree concerning the defense against insidious attacks against the government of the national revolution of 21 March 1933 (Reichsgesetzblatt I, p. 135), provided that such crimes and offenses are not within the jurisdiction of the Reich Supreme Court or the courts of appeal.

Article 3

(1) The Special Courts shall also be competent if a crime or offense within their jurisdiction constitutes at the same time another punishable act.

(2) If another punishable act is factually connected with a crime or offense within the jurisdiction of the Special Courts, the proceedings against the perpetrators and participants of the other punishable act may be brought before the Special Court by way of combination.

* A number of the contemporaneous documents reproduced later in this volume deal with trials held before Special Courts. Among the specific cases treated herein are the Katzenberger case (Doc. NG–270, Pros. Ex. 155, and Doc. NG–154, Pros. Ex. 152), reproduced in part below in section V D2; the Kaminska-Wdowen case (Doc. NG–457, Pros. Ex. 201) reproduced in part below in section V D2; and the Father Schosser case (Doc. NG–1808, Pros. Ex. 557) reproduced in part below in section V F.

(3) The extension of jurisdiction according to paragraphs 1 and 2 does not apply to matters within the jurisdiction of the Reich Supreme Court or the courts of appeal.

Article 4

(1) The Special Courts are composed of a president and two associate judges. A deputy has to be appointed for each member in case of his absence.

(2) The members and their deputies must be permanently appointed judges of the district for which the Special Court is established.

(3) The members will be appointed and the distribution of their tasks undertaken by the presidency of the district court in the district in which the Special Court is located.

Article 5

The prosecutors will be appointed by the legal administration of the States from those prosecution officials who are legally qualified for the office of a judge.

Article 6

The regulations of the code of criminal procedure and of the judicature act will apply correspondingly to the proceedings, provided nothing else has been determined.

Article 7

Proceedings may be instituted also before the Special Court in the district in which the defendant was caught or where he is in custody. The release of the defendant does not affect this jurisdiction once it has been established.

Article 8

Applications for disqualification of a judge will be decided upon by the Special Court to which the respective judge is assigned. For this decision the respective judge is replaced by his deputy. The deputy cannot be disqualified.

Article 9

(1) No hearings relating to the warrant of arrest will be held.

(2) The decisions concerning arrest pending trial are made by the president of the Special Court. The president of the Special Court is, apart from the local court, also competent for those decisions, which, according to articles 125, 128 of the code of

criminal procedure, fall under the jurisdiction of the local court. Complaints against the decisions of the president and the local court will be decided upon by the Special Court.

(3) The president of the Special Court can delegate the interrogation of the defendant and the decision about the warrant of arrest to an associate judge. The same applies to the decisions which are to be made according to articles 116 and 148 of the code of criminal procedure.

Article 10

For the defendant who has not yet chosen counsel, counsel has to be appointed at the time when the date for the trial is fixed.

Article 11

A preliminary court investigation will not be held. If a preliminary court investigation is pending at the time this decree becomes effective, the records are to be transferred in due time to the prosecutor of the Special Court.

Article 12

(1) The indictment must contain a summary of the results of the investigations.

(2) The order of the court to open the trial can be dispensed with. Instead of the request of the prosecution for the order to open the trial, there will be the request of the prosecution to fix a date for the trial. After receiving the indictment the president will set a date for the trial, if in his opinion the legal prerequisites for it are fulfilled. Otherwise he will put the decision to the court. When setting the date for the trial, the president will also decide upon the warrant of arrest or the continuation of the arrest pending trial.

(3) The legal administration of the State can decree that the clerk of the Special Court will issue the summons for the trial and produce those objects which are to serve as evidence (art. 214, par. 1 of the code of criminal procedure). The legal administration of the State can delegate this power.

(4) The term of the summons (art. 217 of the code of criminal procedure) is 3 days. It can be shortened to 24 hours.

(5) The effects which the code of criminal procedure connects with the opening of the trial take place with the filing of the indictment. The effects, which the code of criminal procedure connects with the reading of the order of the court to open the trial,

take place at the moment when the interrogation of the defendant as to the facts of the case begins.

Article 13

The Special Court can refuse any offer of evidence, if the court has come to the conviction that the evidence is not necessary for clearing up the case.

Article 14

The Special Court has to pass sentence even if the trial results in showing the act, of which the defendant is accused, as not being under the jurisdiction of the Special Court. This does not apply if the act constitutes a crime or offense under the jurisdiction of the Reich Supreme Court or the courts of appeal; in this case the Special Court has to proceed according to article 270, paragraphs 1 and 2 of the code of criminal procedure.

Article 15

The results of the interrogations (art 273, par. 2 of the code of criminal procedure) need not be incorporated in the record of the trial.

Article 16

(1) There is no legal appeal against decisions of the Special Courts.

(2) Applications for a reopening of the case are to be decided upon by the penal chamber of the district court. The reopening of the case in favor of the defendant will also take place if there are circumstances which point to the necessity of reexamining the case in the ordinary procedure. The stipulation of article 363 of the code of criminal procedure remains unaffected. If the application for the reopening of the case is justified, the trial will be ordered to take place before the competent ordinary court.

Article 17

Proceedings initiated on a punishable act within the jurisdiction of the Special Courts and pending at the date this decree becomes effective, will be continued according to the general rules if the trial has already started. Otherwise they will be transferred to the procedure regulated in this decree.

Article 18

(1) When the activities of the Special Courts end, the pending cases will be transferred to the ordinary procedure; the indictment

filed according to the stipulations of this decree will become ineffective.

(2) If the trial has once started before the Special Court, it will be carried on according to the stipulations of this decree.

(3) The administration of punishment will be transferred to the authority for the administration of punishment in whose district the Special Court had its seat; the court decisions occurring in the course of the administration of punishment will be made by the penal chamber of the district court without hearings being held.

Article 19

This decree becomes effective on the second day after its promulgation.

Berlin, 21 March 1933

The Reich Chancellor
ADOLF HITLER

For the Reich Minister of Justice
The Vice Chancellor
VON PAPEN

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

DECREE OF 21 FEBRUARY 1940 CONCERNING JURISDICTION OF CRIMINAL COURTS, SPECIAL COURTS, AND ADDITIONAL PROVISIONS OF CRIMINAL PROCEDURE

1940 REICHSGESETZBLATT, PART I, PAGE 405

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PART II

SPECIAL COURTS

Section 1

Organization and Jurisdiction of the Special Courts

Article 10

Organization

(1) A Special Court will be established with one or several district courts within the district of each court of appeal.

(2) Location and district of the Special Courts are determined by the Reich Minister of Justice.

Article 11

Composition

1. Decisions of the Special Court are to be rendered by three professional judges.

* * * * * * *

Article 13

Exclusive Jurisdiction

The Special Court has jurisdiction for:

1. Crimes and offenses committed under the law concerning insidious attacks against State and Party, and the protection of Party uniforms, of 20 December 1934.[1] (Reichsgesetzblatt I, p. 1269, and under articles 134a and 134b of the criminal (penal) code.)

2. Crimes under article 239a of the criminal (penal) code and under the law against highway robbery by means of highway traps, of 22 June 1938 (Reichsgesetzblatt I, p. 651).

3. Crimes under the decree concerning extraordinary measures with regard to radio, 1 September 1939[2] (Reichsgesetzblatt I, p. 1683).

4. Crimes and offenses under article 1 of the war economy decree, 4 September 1939[3] (Reichsgesetzblatt I, p. 1609).

5. Crimes under article 1 of the decree against public enemies, 5 September 1939[4] (Reichsgesetzblatt I, p. 1679).

6. Crimes under articles 1 and 2 of the decree against violent criminals, 5 December 1939, (Reichsgesetzblatt I, p. 2378).

Article 14

Establishment of jurisdiction of the court by the prosecution.

(1) The Special Court also has jurisdiction over other crimes and offenses, if the prosecution is of the opinion that immediate sentencing by the Special Court is indicated by the gravity or the wickedness of the act, by the public excitement aroused or in consideration of a serious threat to public order or security.

Article 15

Extension of Jurisdiction

(1) The Special Court is also competent if a crime or offense

[1] This law is reproduced on p. 173.
[2] This decree is reproduced on p. 185.
[3] This decree is reproduced on p. 187.
[4] This decree is reproduced on p. 188.

belonging to its jurisdiction at the same time constitutes another punishable act.

(2) If there is a factual connection between a crime or offense belonging to the jurisdiction of the Special Court and another punishable act, the latter can be brought before the Special Court by way of combination.

Article 16

Limitations of Jurisdiction

The Special Court is not competent for offenses indicated in articles 13 through 15, in as far as the competency of the People's Court or of the court of appeal is established.

Section 2

Proceedings before Special Courts

Article 17

Application of General Rules of Procedure

(1) For the proceedings before the Special Courts, the code of criminal procedure, the judicature act, and their amendments apply, unless otherwise specified.

(2) The rules of the second chapter of the juvenile court law are not applicable.

Article 18

Local Competency of the Court

The Special Court shall also be competent for those defendants who are seized or kept in confinement in its district. The jurisdiction, once established, will not be affected by the release of the defendant.

* * * * * * *

Article 23

Speeding up of the Proceedings

(1) In all proceedings before a Special Court the sentence must be passed immediately without observation of any time limits, if the delinquent was caught in the very act or if his guilt is otherwise obvious.

(2) In all other cases the term of summons (arts. 217 and 218 of the code of criminal procedure) shall be 24 hours.

* * * * * * *

Article 25

Relationship between the Special Courts and the regular courts

(1) The Special Court must hand down a decision in a case, even if the trial shows that the act with which the defendant is charged is of such a nature that the Special Court is not competent to deal with it. If, however, the trial shows that the act comes under the jurisdiction of the People's Court, the Special Court will refer the case to the latter court; article 270, paragraph 2, of the code of criminal procedure applies accordingly.

(2) If the trial of a case before the People's Court or the court of appeal, after the filing of the indictment, shows that the Special Court has exclusive jurisdiction over the act with which the defendant is charged, the People's Court or the court of appeal can either decide the case themselves or direct the trial to take place before the Special Court. In the latter case the act with which the defendant is charged has to be described, with emphasis on its legal characteristics and on the penal law.

Article 26

Incontestability

(1) There is no legal appeal against a decision of the Special Court.

(2) Applications for a reopening of the proceedings will be decided on by the penal chamber of the district court at the seat of the Special Court. The reopening of the case in favor of the defendant will take place also if circumstances should make it necessary to re-examine the case in ordinary proceedings. Article 363 of the code of criminal procedure shall remain unaffected. If the application for reopening is justified, the trial shall be directed to take place before the competent ordinary court.

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Part VI

Final Regulations

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Article 40

Validity in the Protectorate

This decree is also valid for the German courts in the Protectorate of Bohemia and Moravia.

* * * * * * *

Berlin, 21 February 1940

The Plenipotentiary for the Administration of the Reich

FRICK

PARTIAL TRANSLATION OF DOCUMENT NG–715
PROSECUTION EXHIBIT 112

LETTER FROM UNDER SECRETARY FREISLER TO PRESIDENTS AND PUBLIC PROSECUTORS AT COURTS OF APPEAL, 26 SEPTEMBER 1941, CONCERNING HANDLING OF CERTAIN WARTIME CRIMES BY SPECIAL COURTS TO SPEED UP PROCEEDINGS

The Reich Minister of Justice
3234–III a4 1187

Berlin W 8, 26 September 1941
Wilhelmstrasse 65
Telephone: 11 00 44,
long distance: 11 65 16

To the Presidents and Public Prosecutors at the Courts of Appeal and for the information of—

a. The President of the Reich Supreme Court

b. The Chief Reich Prosecutor of the Reich Supreme Court concerning prosecution of wartime criminality—

Wartime crimes, particularly those involving the decree against public enemies, the war economy decree, the decree against violent criminals, and the decree against "Black Listening" [Listening to prohibited broadcasts]*, should, as a matter of principle, be indicted before Special Courts, in order to speed up proceedings as much as possible.

In the event that, because of the great number of proceedings, the necessary rapid handling of such cases should not prove possible, I wish to be informed promptly, in order that I may have new Special Courts established or new senates added to already existing Special Courts. The overload of work on a Special Court should never result in the handing over of cases to other courts.

A Special Court is, as a rule, to be considered overloaded if a monthly average of more than 40 new indictments has been filed with it.

Acting for the Minister
[Signed] DR. FREISLER

Certified:

[Signed] BENICKE
Chief Clerk, Ministry of Justice Executive Office

* These decrees, dated 5 September, 4 September, 5 December, and 1 September 1939, respectively, are reproduced in section B, above.

TRANSLATION OF DOCUMENT NG–478
PROSECUTION EXHIBIT 61

LETTER FROM THIERACK, REICH MINISTER OF JUSTICE, TO PRESIDENTS OF COURTS OF APPEAL, 5 JULY 1943, DISCUSSING DEVELOPMENT AND EFFECTIVENESS OF SPECIAL COURTS AND PROPOSING LIMITATIONS ON THEIR JURISDICTION

The Reich Minister of Justice
3234–IVa 4 877/43

Berlin W 8, 5 July 1943
Wilhelmstrasse 65
Telephone:
Local calls 11 00 44
Long distance 11 65 16

[Stamp] Court of Appeal Cologne 26 July 1943

To: The Presidents of Courts of Appeal and the Generalstaatsanwaelte

Subject: Relief of the Special Courts

The following has been discussed here:

Special Courts were established by the decree of 21 March 1933[1] as a keen weapon for the conviction of political criminals. Their jurisdiction was initially limited to crimes and delicts as defined by the decree of the Reich President concerning the protection of people and State[2] as well as in the Heimtueckegesetz.[3] By the decree on the extended jurisdiction of the Special Courts as of December 1934 and through a series of subsequent laws the functions of the Special Courts were steadily increased. The decree of 20 November 1938 then made it possible to bring before the Special Court such cases in which immediate action by this court seemed necessary in view of the gravity and the wickedness of the act or of the excitement aroused in public. After the outbreak of the war, by the decree of 21 February 1940 concerning court jurisdiction there was established exclusive jurisdiction of the Special Court for a series of offenses, in particular for crimes and transgressions covered by the war economy decree. *Thus, the amount of work accruing to the Special Courts increased extraordinarily during the last years, especially during the war. Practically all somewhat important criminal cases are now under the jurisdiction of the Special Court.*

[1] This decree is reproduced on p. 218.

[2] This decree, dated 28 February 1933, is reproduced on p. 160.

[3] This decree, dated 20 December 1934, is reproduced on p. 173 under the title, *Law on Insidious Acts against State and for the Protection of Party Uniforms.*

This increase in work caused the establishment of a great number of new Special Courts, the enlargement of existing Special Courts and the formation of new Special Court sections.

I

This development is commented upon as follows:

1. Sentences by the Special Court in the first years after its establishment had a strongly intimidating effect. Prompt and severe punishment by the Special Court was dreaded. Moreover it was considered particularly shameful to have been sentenced by the Special Court. Since the focus of the entire system of criminal justice shifted in the meantime from the ordinary courts (local courts, criminal sections of district courts) to the Special Courts, a certain watering down of the original conception of the Special Courts could not be entirely avoided. Today the Special Courts basically are to be considered merely as special divisions of the criminal courts, their verdicts no longer having that full intimidating effect they had before. The only essential difference from ordinary criminal jurisdiction is left in the fact that there is no legal appeal remedy against verdicts of Special Courts. The standing of Special Courts suffered from their having to deal with comparatively small offenses such as small scale illegal slaughtering, unauthorized fishing by a Pole, and the like.

2. The concentration of jurisdiction in political and other most important criminal cases led at first to an essentially homogenous and coherent jurisdiction. The establishment of new chambers in the Special Courts and the increase of these courts tends to endanger this homogenousness. Since the verdicts of Special Courts were not regularly but rather casually published in the press, and since equalizing measures were taken only recently, the jurisdiction of the Special Courts, even of the individual chambers of one Special Court, developed partly in a very different manner. The first chamber of one Special Court, for instance, is reported to have punished the theft of some items from a collection of textiles as the deed of a people's enemy with 4 years of penitentiary, while the second chamber of the same Special Court in a very similar case imposed a sentence of only 8 months.

3. The strong increase of the number of Special Courts had brought about that, due to the scarcity of apt candidates, the selection of judges officiating in these courts could no longer be carried through as carefully as it was done in the first years. While, in principle, only professionally and in particular politically highly qualified judges were supposed to work in Special Courts, the increase of positions made it necessary to draft judges fre-

quently from criminal courts and civil sections who hardly were up to the required standards. Quite a number of judges in the Special Court are not even members of the Party.

4. Due to the development of the Special Courts, the ordinary criminal courts, especially the criminal court sections, have undergone an extreme decline in importance. While Special Courts are overburdened with work, some criminal court sections have hardly as much to do as they had in peacetime. Furthermore, the latter now having only to deal with trifling transgressions, they are gradually becoming less familiar with severe cases. It is reported that the prosecution now shows a tendency to bring many cases before the Special Courts which actually do not belong to their jurisdiction. On the one hand this is due to the prosecutors having greater confidence in the Special Courts, on the other to the fact that thus a delay of the execution of the sentence through appeal is made impossible.

5. The permanent overburdening of the Special Courts had led in some districts to a gradual vanishing of their particular advantage, their rapid sentencing. The Special Courts are said to proceed with such delay that at times the prison term imposed by the court is already absorbed by the custody preceding trial.

II

It may be stressed that said development of the Special Court jurisdiction is undesirable. In the interest of a rapid and severe punishment of the really outstanding crimes and transgressions it should be attempted to maintain the character of the Special Courts as "Courts Martial of the Home Front" [Standgerichte der Inneren Front].

1. In regard to organization, the following is pointed out:

a. At some Special Courts several chambers were established. Experiences with several chambers are varying, but in general not favorable. If the chambers are proceeding under different presidency and with different personnel, several chambers are actually equal to several Special Courts. Consequently it is possible that the uniformity of jurisdiction disappears even within one Special Court. Not in all places and instances the ability to preserve a uniform jurisdiction within the Special Court through an exchange of ideas and experiences and through an exchange of associate judges among the different chambers is to be found.

b. Even greater is the danger of a not uniform jurisdiction if new Special Courts with competence in a limited district are established. It is yet considerably harder to bring about an exchange of ideas and experiences and exchange of associate judges

907802—51——17

among different Special Courts than among several divisions of one and the same Special Court. Therefore, no advantage can be seen in the establishment of a whole series of new Special Courts as it has been noticed during the last years.

c. Reinforcement of the existing Special Courts by assigning a number of additional associate judges is considered to be the most suitable method. The uniformity of the direction of the Special Court is being secured by the presiding judge, while the most experienced associate judge should be made his deputy.

This strengthening of the Special Courts will in any case secure the uniformity of jurisdiction and will make possible a more extensive performance than in separated Special Courts. This strengthening of course is limited by the working capacity of the president and by his ability to exert influence. The president has to bear both in the preparation and in the conduct of the trial, the bulk of physical and intellectual work, a circumstance which sets a natural limit to this form of strengthening of the Special Courts.

2. Furthermore it is stressed that the Special Courts' return to their proper task cannot be seen in organizational measures, but that a sensible relief of the Special Courts from inappropriate criminal cases must be accomplished.

a. A means thereto is already at hand now in article 24 of the decree concerning court competence. According to it, Special Courts are entitled to transfer trivial cases to the local or the criminal courts. Apparently practice is not uniform in this respect. While some Special Courts, in view of their excessive pressure of work, have already made an extended use of the opportunity to transfer cases to the regular courts, other Special Courts appear to have entirely renounced such a transfer, carrying through themselves even unimportant criminal cases. In general they base this on the bad experiences they made when they transferred cases to the regular jurisdiction.

In spite of that, transfers according to article 24 ought to be practised to a far greater extent. Through the sentences as suggested by the prosecutions, through judges' letters and through directing of the criminal procedure, care has been taken that local and criminal courts are being integrated into the framework of Special Court jurisdiction. Thus, for instance, minor cases of illegal slaughtering, contact with prisoners of war, etc., could be transferred. If the penal courts were continuously entrusted with these matters, then they would also develop a uniform experience, which as yet is not possible. As a further means of relief, according to the present state of legislation, a directive to the public prosecutors is suggested with the purpose that all minor cases

should be prosecuted before the penal court and not before the Special Court. Only political and really important cases arousing public excitement should be reserved for the Special Courts.

b. Hitherto the possibility of letting the president (one single judge) take decisions in the Special Court has not been sufficiently made use of. In simple typical cases it is not necessary to call in assessors and to mobilize the whole apparatus of the Special Courts.

Kindly let me have your opinion of these arguments before 1 August 1943. Will you kindly especially express your opinion as regards the advantages and the expediency of the three possibilities—criminal chamber system, central Special Court with several deputy presidents, and separate regional Special Courts, as well as about the question of the restriction of competence.

[Seal of Ministry of Justice] DR. THIERACK

Certified:

[Illegible stamped signature]
Clerk

4. PEOPLE'S COURT[1]

PARTIAL TRANSLATION OF DOCUMENT NG–715 PROSECUTION EXHIBIT 112

EXTRACT FROM LAW OF 24 APRIL 1934 AMENDING REGULATIONS OF PENAL LAW AND CRIMINAL PROCEDURE

1934 REICHSGESETZBLATT, PART I, PAGE 341

* * * * * * *

CHAPTER III. PEOPLE'S COURT[2]

Article 1

(1) For the trial of cases of high treason and treason the People's Court is established.

[1] A number of the contemporaneous documents reproduced later in this volume deal with trials held before senates of the People's Court. Among the specific cases treated herein are the Stenfanowicz-Lenczewski case (Doc. NG–351, Pros. Ex. 132), reproduced below in section V D 2; the Bratek case (Doc. NG–595, Pros. Ex. 136), reproduced in part below in section V E; the Beck case (Doc. NG–381, Pros. Ex. 159), reproduced in part below in section V E; and the Paschen case (Doc. NG–546, Pros. Ex. 141), reproduced below in section V E.

[2] The law of 24 April 1934 consists of three chapters or parts (each divided into several articles and sections). Chapter I broadened and redefined the concepts of high treason and treason, according to National Socialist principles by amended articles 80–93 of the Reich criminal code. Chapter I is reproduced in part above in section B, Selected Laws and Decrees. Chapter III of the law, reproduced here, established a special judicial machinery to deal with high treason and treason as newly defined in chapters I and II. Materials on the application and interpretation of these provisions on treason and high treason are reproduced below in section V E.

(2) Decisions of the People's Court are made by five members during the trial, by three members outside the trial. This includes the president. The president and one further member must be qualified judges. Several senates may be established.

(3) The prosecution is represented by the Chief Prosecutor of the Reich.

Article 2

The members of the People's Court and their deputies are appointed for the duration of 5 years by the Reich Chancellor at the recommendation of the Reich Minister of Justice.

Article 3

(1) The People's Court is competent for the investigation and decision in the first and last instance in the cases of high treason according to articles 80 through 84, treason according to articles 89 through 92, assault against the Reich President according to article 94, paragraph 1 of the criminal (penal) code, and the crimes listed in article 5, paragraph 2, No. 1 of the decree of the Reich President for the protection of people and State of 28 February 1933* (Reichsgesetzblatt I, p. 83). In these cases the People's Court also make the decision listed in article 73, paragraph 1 of the judicature act.

(2) The People's Court is also competent in such cases where crimes or offenses subject to its competency constitute at the same time another crime or offense.

(3) If another punishable act is in factual connection with a crime or offense subject to the jurisdiction of the People's Court, the proceedings against the perpetrators and participants of the other punishable act may be brought before the People's Court by way of combination.

Article 4

(1) The Chief Reich Prosecutor can transfer the prosecution of the crimes of preparation of high treason listed in articles 82 and 83 of the penal code and of the treasonable offenses listed in articles 90 b through 90 e of the penal code to the prosecutor at the court of appeal. The Chief Reich Prosecutor can withdraw the transfer before the opening of the investigation.

(2) In the cases mentioned in paragraph 1 the People's Court can transfer the trial and decision to the court of appeal, if the Chief Reich Prosecutor requests this when filing the indictment.

(3) Article 120 of the judicature act applies accordingly.

* This decree is reproduced on p. 160.

Article 5

(1) As far as not otherwise stipulated, the procedure is subject to the provisions of the judicature act and the code of criminal procedure concerning the procedure before the Reich Supreme Court in the first instance.

(2) Against the decisions of the People's Court no legal appeal is permitted.

* * * * * * *

Berlin, 24 April 1934

The Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice, at the same time for the Reich Minister of the Interior
DR. GUERTNER

The Reich Defense Minister
VON BLOMBERG

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

EXTRACTS FROM LAW OF 16 SEPTEMBER 1939 AMENDING REGULATIONS OF GENERAL CRIMINAL PROCEDURE, MILITARY CRIMINAL PROCEDURE AND THE PENAL CODE

1939 REICHSGESETZBLATT, PART I, PAGE 1841

* * * * * * *

Article 5

The Special Senate of the People's Court

(1) The special senate of the People's Courts consists of the president and of four members.

(2) The special senate is presided over by the president of the People's Court* and, if he cannot be present, by the vice president. One of the members must be a president of a senate or a professional associate judge at the People's Court.

(3) The members and their deputies are appointed for the duration of two business years by the Fuehrer and Reich Chancellor upon recommendation of the Reich Minister of Justice.

* * * * * * *

* From 1936 until 1942, Thierack was President of the People's Court. In 1942, Thierack became Reich Minister of Justice, and Freisler, President of the People's Court.

Fuehrer Headquarters, 16 September 1939

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice
DR. GUERTNER

The Chief of the High Command of the Armed Forces
KEITEL

PARTIAL TRANSLATION OF SCHLEGELBERGER DOCUMENT 88 SCHLEGELBERGER DEFENSE EXHIBIT 81

EXTRACTS FROM DECREE, 21 FEBRUARY 1940, CONCERNING THE JURISDICTION OF CRIMINAL COURTS, SPECIAL COURTS, AND ADDITIONAL PROVISIONS OF CRIMINAL PROCEDURE

1940 REICHSGESETZBLATT, PART I, PAGE 405

Upon the basis of legal authority and with the consent of the Plenipotentiary of the Four Year Plan [Goering] and the High Command of the Wehrmacht, the following is ordered:

Chapter I

Jurisdiction of the Criminal Courts

* * * * * * *

Article 5

Jurisdiction of the People's Court

(1) The People's Court has jurisdiction for—

1. High treason (articles 80 through 84 of the Reich criminal code).

2. Treason (articles 89 through 92 of the Reich criminal code).

3. Attacks against the Fuehrer and Reich Chancellor (article 94, paragraph 1 of the Reich criminal (penal) code).

4. Severe cases of damaging military equipment and endangering the armed forces of friendly states (arts. 1–5 of the decree supplementing penal provisions for the protection of the defensive strength of the German people of 25 November 1939, Reichsgesetzblatt I, p. 2319).

5. Failure to report an intended crime (art. 139, par. 2 of the criminal (penal) code), insofar as this crime was intended to be high treason or treason under the jurisdiction of the People's Court, or a severe case of damaging military equipment.

6. Crimes under article 5, paragraph 1 of the decree concerning protection of people and state, of 28 February 1933 (1933 Reichsgesetzblatt I, p. 83).

7. Crimes under article 1, paragraph 1 of the law against economic sabotage, of 1 December 1936* (1936 Reichsgesetzblatt, Part I, page 999).

(2) In cases of acts punishable under articles 82, 83, 90b through 90e, 92 of the criminal (penal) code, the Chief Reich Prosecutor at the People's Court can transfer the prosecution to the attorney general at the court of appeal.

(3) In the cases described in paragraph 2, the People's Court, in agreement with the Chief Reich Prosecutor, can transfer the trial and decision to the court of appeal, as long as the trial has not been directed to take place before the People's Court.

(4) The Chief Reich Prosecutor can withdraw the transfer and his consent to a transfer as long as the trial has not begun before the court of appeal.

* * * * * * *

Final Regulations

Section 40

Validity in the Protectorate

This decree is also valid for the German courts in the Protectorate of Bohemia and Moravia.

Berlin, 21 February 1940

The Plenipotentiary for the Administration of the Reich
FRICK

PARTIAL TRANSLATION OF DOCUMENT NG-938
PROSECUTION EXHIBIT 438

LETTER FROM THE OFFICE OF THE SUPREME CHIEF OF THE SA, SIGNED BY DEFENDANT KLEMM, 4 DECEMBER 1936, PROPOSING FIVE SA LEADERS AS ASSOCIATE JUDGES OF THE PEOPLE'S COURT

Kl/Hz

Supreme Chief of the SA
Adjutant's office of the Chief of Staff
SA Liaison officer in the Reich Ministry of Justice.
Correspondence Record: None

* This law is reproduced in part on p. 182.

Berlin W 8 4 December 1936
Voss-strasse 1

Subject: Members of the SA as members of the People's Court

Enclosures: [Handwritten] Proposal for supplementary appointments of the below-mentioned five nominees. W. 4 December.

To: The Reich Ministry of Justice, Section I, Special attention: Ministerial Counsellor Wanger, Berlin W, Wilhelmstrasse 65.

I understand that more honorary associate judges [ehrenamtliche Beisitzer] of the People's Court are to be appointed. *On behalf of the Chief of Staff* [of SA] the following SA leaders are proposed:

Obergruppenfuehrer Arthur Boeckenhauer, Munich, Barerstrasse 11
Gruppenfuehrer von Hoerauf, Munich
Brigadefuehrer Hanns Bunge, Munich
Brigadefuehrer Daniel Hauer, Stuttgart, Herdweg 72
Oberfuehrer Erich Kaul, Berlin, Wilhelmstrasse 106

I should be grateful if the above-named would be included among the nominees proposed to the Fuehrer and Reich Chancellor.

Chief of the adjutant's office
BY ORDER:
[Signed] KLEMM
Obersturmbannfuehrer

PARTIAL TRANSLATION OF DOCUMENT NG-160 PROSECUTION EXHIBIT 124

LETTER FROM FREISLER, PRESIDENT OF THE PEOPLE'S COURT, TO THE REICH MINISTER OF JUSTICE, 17 JANUARY 1944, TRANSMITTING SUMMARY OF ACTIVITY OF THE PEOPLE'S COURT FROM 1 JANUARY TO 31 DECEMBER 1943

The President of the People's Court
1440 E-1. 123g
[Stamp] 01/3

Berlin W 9, 17 January 1944
Bellevuestrasse 15
Telephone 22 18 23

18 January 1944

[Stamp] Secret

To: the Reich Minister of Justice
Berlin W 8
2 Enclosures

[Stamp] Reich Ministry of Justice
18 January 1943
Dept. IV

My dear Reich Minister! [Initial] Th [Thierack]

Attached please find two enclosures giving you a summary on the activity of the People's Court from 1 January to 31 December 1943. The activity of the special senate is not contained therein as the documents were lost in the terror attack of 24 November 1943.

Heil Hitler!
Obediently yours
[Signed] FREISLER

[Handwritten] taken out 1 copy [signed] KLEMM

1440E–1. 116

SUMMARY ON THE ACTIVITY OF THE PEOPLE'S COURT FROM 1 JANUARY UNTIL 31 DECEMBER 1943

	1st senate	2d senate	3d senate	4th senate	5th senate	6th senate	Total
1. Number of sentences	505	177	114	186	140	190	1,312
2. Number of decrees	232	54	85	122	97	127	717
3. Number of persons sentenced	1,332	610	141	259	384	612	3,338
thereof those under 18 years of age.	------	6	------	5	------	1	12
4. Number of days of session	550	164	115	131	162	148	1,270
thereof those outside of Berlin.	183	83	------	27	116	71	480
5. Death sentences	769	368	49	72	200	204	1,662
6. Life terms	8	2	4	2	------	8	24
7. 15–10 years of hard labor	80	29	6	25	48	78	266
8. 10–5 years of hard labor	234	92	15	37	47	161	586
9. Less than 5 years of hard labor.	97	57	12	19	51	64	300
10. Penal camp:							
a. 15–10 years	------	------	------	1	3	6	10
b. 10–5 years	5	2	5	4	------	5	21
c. less than 5 years	1	1	5	2	------	2	11
11. Imprisonment	87	43	25	42	20	42	259
12. Fined:							
a. by judgment	------	------	------	------	------	------	------
b. additional	6	------	------	------	------	------	6
13. Acquittals	50	16	12	47	14	42	181
14. Procedure suspended: (persons)							
a. by judgment	1	------	8	8	1	------	18
b. by decree	20	4	1	1	28	6	60
15. Settled in other ways (persons)	381	92	22	90	35	103	723

[Handwritten] IV a 35. 44g

TRANSLATION OF DOCUMENT NG-186
PROSECUTION EXHIBIT 340

MEMORANDUM FROM FREISLER, PRESIDENT OF THE PEOPLE'S COURT, 1 APRIL 1944, CONCERNING ASSIGNMENT OF VARIOUS TYPES OF CASES TO THE SEVERAL SENATES OF THE PEOPLE'S COURT

[Handwritten] To the Minister

3204–1. 65

The examination of the charges filed during the first quarter of 1944 shows the necessity of a change in the procedure. For the charges coming in after 1 April 1944, I distribute our work as follows:

A

The first senate will take up—

I. *a.* Attacks against the Fuehrer,

b. Attacks against leading men of the State, the movement [Nazi Party] or the armed forces,

c. Attacks against Germans in foreign countries, on grounds of their German nationality to thereby hit the Reich, or against representatives of the Reich, insofar as these attacks go beyond verbal attacks; in this category also belong all crimes against section 5 of the decree of 28 February 1933.*

II. *a.* Punishable acts of Germans of the intelligentsia or of the economic leadership,

b. Acts hostile to the State based on religious convictions from the Gauen: Baden, Bayreuth, Berlin, Danzig-West Prussia, Duesseldorf, Essen, Franconia, Carinthia, Cologne, Aix-la-Chapelle, Main-Franconia, Moselland, Munich-Upper Bavaria, Lower Danube, Upper Danube, Upper Silesia, Salzburg, Swabia, Styria, Sudetenland, Tyrol-Vorarlberg, Wartheland, Westmark, Vienna, Wuerttemberg-Hohenzollern, and from the Government General, excepting both treason [Landesverrat] and Marxist high treason.

III. Punishable acts of Germans from Alsace, from Luxembourg, Lower Styria, or Upper Carinola and punishable offenses in these areas; punishable acts of Germans in Bohemia and Moravia.

IV. Marxist high treason from Berlin and the areas incorporated since the beginning of the war.

[stamp] The Minister is informed 20 April

V. Non-Marxist high treason, with the exception however of

* Decree of the Reich President for the protection of people and State is reproduced on p. 160.

separatist (often called legitimist) high treason, insofar as it concerns the Alps and Danube and Gauen or Bavaria.

VI. Defeatism, cases of undermining of morale and intentional evasion of military service (Art. 5, KSSVO) from the Gauen Berlin, Brandenburg, Silesia, Pomerania, East Prussia, Mecklenburg, Sudetenland, Upper Silesia, and the Reich Gauen Danzig-West Prussia, and the Wartheland.

VII. Punishable offenses of foreigners [Fremdvoelkischer] — except high treason — from Bohemia, if these offenses were committed after the establishment of the protectorate.

VIII. Impeachment of non-German civilians for punishable offenses against the Reich or the occupying power in the occupied northern areas according to the special instructions for the area.

IX. Chiefly punishable acts committed abroad—with exception of high treason.

B

The second senate will take up—

I. All other cases of Marxist high treason within the borders of the Altreich [pre-1938 Reich].

II. Impeachment of non-German civilians for punishable offenses against the Reich or the occupying power in France and Belgium in accordance with the special directions pertaining thereto.

III. Acts hostile to the State based on religious convictions from the Gauen Halle-Merseburg, Hamburg, Hessen-Nassau, Kurhessen, Magdeburg-Anhalt, Mark Brandenburg, Mecklenburg, Lower Silesia, East-Hannover, East Prussia, Pomerania, Saxony, Schleswig-Holstein, South Hannover-Brunswick, Thuringia, Weser-Ems, Westphalia-North, Westphalia-South—with exception of high treason.

IV. Endangering of the armed forces of befriended states (sec. 5 of the decree of 25 November 1939).

C

The third senate will take up—

I. High treason in favor of the Soviet Union and Poland.

II. Defeatism, undermining of morale, and intentional evasion of military service (Art. 5, KSSVO) from the entire Reich, as far as these affairs are not dealt with by the first senate (A II and A VI) or the second senate (B III), excepting however the Gauen

Essen, Duesseldorf, Cologne-Aix-la-Chapelle, Moselland, Westphalia-North, Westphalia-South, and Saxony.

D

The fourth senate takes up—

I. High treason in favor of all countries of the world except the Soviet Union and Poland.

II. Damaging of means of defense.

III. Punishable offenses of Germans from Lorraine and punishable offenses in Lorraine.

IV. Punishable offenses of foreigners from Moravia, in case they were committed after the establishment of the protectorate, however not high treason in favor of the Soviet Union or Poland.

E

The fifth senate takes up—

I. Punishable crimes except high treason and defeatism, undermining of morale as well as evasion of military service, in the Reich Gauen Vienna, Upper and Lower Danube.

II. Separatist high treason involving the Reich Gauen Vienna, Upper and Lower Danube, Styria, Carinthia, Salzburg, and Tyrol-Vorarlberg.

F

The sixth senate takes up—

I. Punishable offenses except treason and defeatism, undermining of morale and evasion of military service in the Reich Gauen Styria and Carinthia, Salzburg, and Tyrol-Vorarlberg.

II. Separatist high treason involving Bavaria.

III. Accusations according to the law against sabotage of the economy of 1 December 1936.

IV. Accusations according to the decree of the Fuehrer for the protection of the armament economy from 21 March 1942.

V. Defeatism, undermining of morale, intentional evasion of military service (Art. 5, KSSVO) from the Gauen Essen, Duesseldorf, Cologne-Aix-la-Chapelle, Moselland, Westphalia-North, Westphalia-South, and Saxony, insofar as these cases are not taken care of by the first (A II and A VI) of the second senate (B III).

G

Impeachment for failing to report a crime to be dealt with by the senate, competent for the crime involved.

H

If a defendant is accused of high treason or treason against his country, the assignment is to be determined by the accusation of treason, if this is not irrelevant.

Favoring the enemy by treasonous activities, defeatism, undermining of morale, or evasion of military service does not bear any influence on the assignment.

Interrelated cases may be handled by *one single* senate in agreement with the other senates involved. Cases of nonagreement are to be submitted to me.

J

For charges, entered before 1 April 1944 the former plan of distribution of work applies, however, I wish to be notified by 1 June whether and which of these accusations are not yet settled.

Berlin, 1 April 1944

DR. FREISLER

TRANSLATION OF DOCUMENT NG-157
PROSECUTION EXHIBIT 103

LETTER FROM THE REICH MINISTER OF JUSTICE TO THE PRESIDENT OF THE PEOPLE'S COURT, 18 OCTOBER 1944, COMMENTING UPON ITS FUNCTIONS AND THE SELECTION OF PRESIDING JUDGES "IN PARTICULARLY IMPORTANT POLITICAL CASES"

[Handwritten] MIi Berlin, 18 October 1944 [Handwritten]T 276
Copy
The Reich Minister of Justice

To: The President of the People's Court, Dr. Freisler
Berlin W 9
Bellevuestrasse 15

[Handwritten] 18 October Bz

Dear Mr. President:

The importance of the People's Court for the maintenance of the home front has greatly increased and is bound to increase still further after carrying into effect of the Fuehrer's decree of 20 September 1944. The functions of the People's Court must, therefore, not be confined to meting out adequate punishment to the accused, they must moreover fulfill the specific task of political leadership.

This is inherent in the fact that the population not only recognizes the sentences of the People's Court as right, but that, more-

over, it also learns why any particular sentence has become expedient.

The President of the senate is often hampered in conducting the proceedings, because in some particularly important political cases—including cases occurring frequently—the political evaluation of the offense is not always sufficiently shown up with a view to the prevailing situation of the people and of the Reich. If it is sufficient in non-political criminal cases to show up the perpetrator, the deed and the effects of both on the national community and thus to find a just sentence, this is not sufficient for cases tried in the People's Court. With due stress for the political aspect of the case it is necessary to discuss the conditions of the Reich and of the people. When conducting proceedings the president must be able to justify why this particular offense is especially dangerous for the population and the Reich and why it is especially grave. Everybody who is taking part in the proceedings must have the inner conviction when leaving the courtroom not only that the punishment was just but also why it was just. This also and quite particularly applies to the so-called cases of defeatism which from now on will be tried in an increased measure. Likewise, utterances must not be allowed to spring up which, for instance, say that proceedings before a certain senate mean certain death, or that the term "general public" is stretched too far in its legal definition. Whenever such utterances occur they can only be parried by a manner of conducting the proceedings which is superior, calm and—if need be—stone cold. In that case the people must always understand why in these crucial months of the war the instigator deserves death—but not so the gossip monger unless it happened not to be merely silly gossip but a gossip which became dangerous because it was unscrupulous.

The above applies in corresponding measure to all other cases tried before the People's Court.

I, therefore, would like to ask you, Mr. President, to make a special endeavor especially that only such judges will preside in particularly important political cases, who master the material involved also along political lines and who warrant that they are able not only to pass just sentences but also by their manner of conducting the proceedings to convince those present of the correctness of the sentence. If any difficulties as to personnel should occur here, please let me have your oral report.

Heil Hitler!

Yours

DR. THIERACK

5. HEREDITARY HEALTH COURTS*

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

LAW OF 14 JULY 1933 FOR THE PREVENTION OF PROGENY WITH HEREDITARY DISEASES (GESETZ ZUR VERHUETUNG ERBKRANKEN NACHWUCHSES)

1933 REICHSGESETZBLATT, PART I, PAGE 529

The Reich government has enacted the following law, which is promulgated herewith:

Article 1

1. Whoever is afflicted with a hereditary disease can be sterilized by operation, if according to experience of medical science a hereditary impairment of his progeny, either physical or mental, is to be expected in all likelihood.

2. Whoever suffers from one of the following diseases is afflicted with a hereditary disease according to this law—

(1) Hereditary imbecility.
(2) Schizophrenia.
(3) Circular (manic-depressive) psychosis.
(4) Hereditary epilepsy.
(5) Hereditary St. Vitus' dance (Huntingtonian Chorea).
(6) Hereditary blindness.
(7) Hereditary deafness.
(8) Bad hereditary physical malformation.

3. Any person suffering from chronic alcoholism can also be sterilized.

Article 2

1. The right to file such an application rests with the person to be sterilized. If he is incompetent or has been put under tutelage because of feeble mindedness or being under 18 years of age, this right rests with the legal representative and is subject to approval by the court of guardianship. In all other cases of limited competence, the consent of the legal representative is needed for the application. In case an adult person has been under guardianship, the guardian's consent is mandatory.

2. A certificate of a physician, approved in Germany, has to be attached to this application, stating that the person to be sterilized has been familiarized with the meaning and the consequences of a sterilization.

* The hereditary health courts dealt with sterilization of human beings. Because of space limitations, a relatively small amount of the evidence introduced in the Justice Case has been reproduced in this volume. However, sterilization was also the subject of charges in the Medical Case. See "Medical Experiments—Experiments for Mass Sterilization" (sec. VII A 15, Vol. I, pp. 694 ff, this series).

3. The application can be rescinded.

Article 3

Sterilization can also be proposed by—

1. A public health officer.

2. The superintendent of a hospital, sanatorium, asylum, or of a penitentiary for its inmates.

Article 4

The application is to be made in writing and is to be submitted to the attention of a hereditary health court. The facts, upon which this application is based must be corroborated by a medical expert opinion or in some other way. The office [of the hereditary health court] must inform the public health office of this application.

Article 5

The hereditary health court of the district where the person to be sterilized resides has jurisdiction over the decision.

Article 6

1. The hereditary health court is to be affiliated with a local court. It is composed of a local court judge as president, a public health officer and another physician approved in the German Reich, with expert knowledge of matters pertaining to eugenics. A deputy is to be appointed for each member.

* * * * * * *

Article 10

1. The higher hereditary health court is to be affiliated to a district court of appeal covering the same district. It consists of a member of the district court of appeal, a public health officer and another physician, approved in Germany, with expert knowledge of matters pertaining to eugenics. A deputy is to be appointed for each member. Article 6, paragraph 2 applies accordingly.

* * * * * * *

3. The decisions of the higher hereditary health courts are final.

Article 11

1. The operation necessary for the sterilization is to be performed only in a hospital and by a physician approved in Germany. He can perform this operation only after the decree for

sterilization has become valid. The supreme provincial authority will appoint the hospitals and physicians authorized to perform the sterilization. The operation is not to be performed by the physician who made the application or who was a member of the board during the proceedings.

Article 12

1. Once approved by the court, this sterilization has to be performed even against the will of the person to be sterilized, unless he made the application himself. The public health officer has to arrange the necessary measures with the police. Direct force may be used if other measures do not suffice.

2. If circumstances demand a re-examination of the facts, the hereditary health court has to reopen the case and to suspend the sterilization order temporarily. In case of a rejection of the application a reopening of the case is permissible only if new facts have appeared which justify the sterilization.

* * * * * * *

Berlin, 14 July 1933

The Reich Chancellor
ADOLF HITLER

The Reich Minister of the Interior
FRICK

The Reich Minister of Justice
DR. GUERTNER

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

EXTRACTS FROM DECREE OF 5 DECEMBER 1933 FOR THE EXECUTION OF THE LAW FOR THE PREVENTION OF PROGENY WITH HEREDITARY DISEASES

1933 REICHSGESETZBLATT, PART I, PAGE 1021

* * * * * * *

Section 1

(Concerning article 1, paragraphs 1 and 2 of the basic law)*

A condition for sterilization is that the disease, although only temporarily manifested from a latent tendency, has been established beyond any doubt by a doctor approved by the German Reich.

* * * * * * *

* Reference is made to the basic law of 14 July 1933, reproduced in part immediately above.

907802—51——18

Section 3

(Concerning Articles 3 and 4)

* * * * * * *

If an approved doctor in the course of his official activity learns of a person suffering from a hereditary disease (art. 1, pars. 1 and 2) or from chronic alcoholism, he must report this without delay to the competent district public health officer using the form printed as supplement 3 (p. 1024). Other persons who are concerned with the treatment, examination, or advising of sick persons, have the same obligation. In the case of inmates of institutions, it is the head of the institution who has the duty to report the case.

* * * * * * *

Berlin, 5 December 1933

The Reich Minister of the Interior
FRICK

The Reich Minister of Justice
DR. GUERTNER

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

THIRD DECREE FOR THE IMPLEMENTATION OF THE LAW FOR THE PREVENTION OF PROGENY WITH HEREDITARY DISEASES, 25 FEBRUARY 1935

1935 REICHSGESETZBLATT, PART I, PAGE 289

* * * * * * *

Article 4

Authorized persons and counsel can be barred from appearance before the hereditary health courts and higher hereditary health courts for important reasons; this decision is uncontestable.

* * * * * * *

Article 12

1. The Reich Minister of Justice determines the location and the district of the court which is to render the decision, and the number of court chambers to be established. He may transfer the exercise of this authority to the presidents of the district courts of appeal.

2. The hereditary health courts are to be regarded as parts of the local courts, and higher hereditary health courts are to be regarded as parts of the district courts of appeal, with respect to administration and official supervision.

3. The president of the district court of appeal determines the number of medical members and deputies of the hereditary health courts, as needed.

* * * * * * *

Berlin, 25 February 1935

The Reich Minister of the Interior
The deputy: PFUNDTNER

The Reich Minister of Justice
The deputy: DR. SCHLEGELBERGER

The Reich Minister of Labor
The deputy: DR. KROHN

TRANSLATION OF DOCUMENT NG-346
PROSECUTION EXHIBIT 101

CIRCULAR OF THE REICH MINISTRY OF JUSTICE TO ALL PRESIDENTS OF THE COURTS OF APPEAL, 11 MAY 1936, ANNOUNCING COURSES FOR JUDGES DEALING WITH HEREDITARY DISEASE CASES

The Reich Minister of Justice
No. 6234–IV. b 472

Berlin W 8, 11 May 1936
Wilhelmstr. 65
A1 Jaeger 0044

To: All Presidents of the Courts of Appeal
Subject: Courses for judges dealing with hereditary disease cases

It is intended that during the second half of the month of June courses will be held in Berlin and Munich to train presiding judges of the courts and courts of appeal dealing with cases of hereditary diseases in matters of the marriage health law. The course in Berlin will probably take place between 15 and 17 June and the course in Munich between 22 and 24 June. In order to save expenses, only the presiding judges of the courts and courts of appeal dealing with cases of hereditary disease will be admitted to these courses, but not their deputies. The course in Berlin is intended for the judges of the district courts of appeal of Berlin, Brunswick, Breslau, Celle, Dresden, Duesseldorf, Hamburg, Hamm, Jena, Kassel, Kiel, Koenigsberg Pr., Marienwerder, Naum-

burga. S., Oldenburg, Rostock, and Stettin. The course in Munich is intended for the judges of the courts of appeal in Bamberg, Darmstadt, Frankfurt/Main, Karlsruhe, Munich, Nuernberg, Stuttgart, and Zweibruecken. The nonresident participants will have their traveling expenses refunded in accordance with paragraph II of the traveling expenses law. The expenses will be paid by the director of the office to which the official belongs. The amounts paid are to be recorded under chapter 4, title 25 of the budget. Please inform me of the names of the participating judges by 31 May 1936.

An opportunity for a discussion will probably be given on the last day of each course. During the course of these discussions questions may be raised concerning the marriage health law and the law on prevention of progeny with hereditary disease. In consequence of the large number of participants it is however necessary that each judge who wishes to discuss a question will submit it in triplicate directly to us (Berlin W. 9, Vosstrasse 5, Office b) not later than 31 May 1936. If several questions are submitted a separate sheet is to be used for each question. In the case of medical questions a summarized statement of the case is to be attached, if possible; in other cases it is also advisable to state briefly which particular case led to the question. The name, official position, and the court of the judges should be marked at the top of the page on the left hand side.

Enclosed are copies for the presidents of the district courts and for the presiding judges of the main hereditary health courts.

Deputy
Certified [Signed] DR. VOLKMAR

[Signature illegible]
[Stamp: Reich Ministry of Justice] Clerk

TRANSLATION OF DOCUMENT NG-789
PROSECUTION EXHIBIT 432

ANNOUNCEMENT BY THE REICH MINISTER OF JUSTICE, 17 DECEMBER 1943, CONCERNING THE APPOINTMENT OF A REFERENT WITH THE DUTY OF TRAINING JUDGES AND OTHERS IN A RACIAL, HEREDITARY, AND CRIMINOLOGICAL-BIOLOGICAL LINE OF THOUGHT

[initials] KLE [Klemm]

Internal Regulation

Reference: The consideration of racial, hereditary, and criminological-biological [kriminalbiologische] viewpoints in educational questions

With regard to the necessity of putting more emphasis on the racial, hereditary, and criminological-biological viewpoints in connection with educational questions within the meaning of my internal regulation of 12 June 1943 — 1200 E — Ip 2 340 — Oberlandesgerichtsrat Meinhof, without prejudice to his sphere of office in department VI, is also assigned to department II as Referent.

The range of his duties comprises—

The training of judges, public prosecutors, jurists, and other officials, as well as of the entire new generation in a racial, hereditary, and criminological-biological line of thought.

Berlin, 17 December 1943

DR. THIERACK

1200 E — Ip 2 383
[Handwritten] Adjutant KLEMM

TRANSLATION OF KLEMM DOCUMENT 58
KLEMM DEFENSE EXHIBIT 58

DECREE SIGNED BY DR. CONTI* AND DEFENDANT KLEMM, 14 NOVEMBER 1944, TEMPORARILY SUSPENDING ACTIVITIES OF HIGHER HEREDITARY HEALTH COURTS, AND AUTOMATICALLY LEGALIZING PENDING CONTESTED DECISIONS

1944 REICHSGESETZBLATT, PART I, PAGE 330

Seventh decree concerning the execution of the law for the prevention of progeny with hereditary diseases

On the basis of Article 17 of the law for the prevention of progeny with hereditary diseases of 14 July 1938 (Reich Law Gazette I p. 529) in combination with the decree of the Fuehrer concerning the total war effort of 25 July 1944 (Reich Law Gazette I p. 161) it is decreed in agreement with the Reich Minister and chief of the Reich Chancellery, the chief of the Party Chancellery and the Plenipotentiary General for the administration of the Reich:

Article 1

(1) The higher hereditary health courts discontinue their activity temporarily—for the duration of the suspension the definite decision is with the hereditary health courts.

* Dr. Conti was Reich Health Leader (Reichsgesundheitsfuehrer). His activities came into issue in the Medical Case, United States *vs.* Karl Brandt, et al., Volumes I and II, this series. Conti committed suicide in 1945 after Germany's unconditional surrender.

(2) A trial pending in the higher hereditary health courts ends with the coming into effect of this decree. With the termination the contested decision becomes legal. The hereditary health court investigates officially, whether a resumption of the proceedings according to article 12, paragraph 2, of the law for prohibiting carriers of inherited diseases to reproduce is ruled in consideration of the terminated proceedings.

(3) Paragraphs 1 and 2 are not valid for cases in which the higher hereditary health court has already passed a resolution at the time when this decree came into effect and has merely not yet delivered it.

Article 2

This decree goes into effect on 1 December 1944.

Berlin, 14 November 1944.

The Reich Minister of the Interior
As deputy: DR. L. CONTI

The Reich Minister for Justice
As deputy: KLEMM

6. CIVILIAN COURTS MARTIAL

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

DECREE OF 15 FEBRUARY 1945 ON CIVILIAN COURTS MARTIAL PROCEDURE

1945 REICHSGESETZBLATT, PART I, PAGE 30

The seriousness of the fight for existence of the Reich demands of every German determination to fight to the last, and devotion to the utmost. Whoever tries to withdraw from his duties towards the common cause, especially if it is done through cowardice or for personal profit, must at once be called to account with the necessary severity, so that the State will not suffer damage through the failing of one single person. Therefore, the following has been decreed upon the order of the Fuehrer in agreement with the Reich Minister and chief of the Reich Chancellery, the Reich Minister of the Interior and the chief of the Party Chancellery:

I

Courts martial are to be established in Reich defense districts which are menaced by the approach of the enemy.

II

1. The court martial consists of a judge of a criminal court as president and a member of the Leadership Corps [of the Nazi Party], or a leader of a unit affiliated with the National Socialist Party, and of an officer of the armed forces, the Waffen SS [armed SS] or the police, as associate judges.

2. The Reich defense commissioner appoints the members of the tribunal and designates a state attorney as public prosecutor.

III

1. The courts martial have jurisdiction for all kinds of crimes endangering the German fighting power or undermining the people's fighting strength and will to fight.

2. For these proceedings, the regulations of the code of criminal procedure will be applied.

IV

1. The sentence of the court martial will be either death, acquittal, or commitment to the regular court. The consent of the Reich defense commissioner is required. He gives orders for the time, place, and kind of execution.

2. If the Reich defense commissioner is not available, but the immediate execution is indispensable, the public prosecutor is authorized to act in his place.

V

The necessary regulations for amendment, changes and execution of this decree are issued by the Reich Minister of Justice in agreement with the Reich Minister of the Interior and the chief of the Party Chancellery.

VI

This decree goes into effect immediately upon its promulgation over the radio.

Berlin, 16 February 1945

The Reich Minister of Justice
THIERACK

D. Expert Opinion by Defense Witness Professor Jahrreiss concerning the Development of German Law

EXTRACTS FROM THE TESTIMONY OF DEFENSE WITNESS PROFESSOR JAHRREISS*

DIRECT EXAMINATION

DR. SCHILF (counsel for defendants Klemm and Mettgenberg): Professor Jahrreiss, may I ask you to tell us your name, your profession, and your residence.

WITNESS JAHRREISS: Professor at Cologne University; at present on the staff of editors of the record of IMT. Do you also wish me to name my residence, Counsel?

Q. Yes.

A. At this time, in Nuernberg. I was born at Dresden; the date of birth is 19 August 1894.

Q. So that I can afford the Court the opportunity to acquaint itself with your particular research field, may I ask you briefly to describe to us your field of research as professor of law.

A. My work since 1923 has dealt with the fields of constitutional law, international law, and the law by the League of Nations, general constitutional law, and philosophy of law.

Q. May I ask you, just by way of example, to mention your own publications—those of a scientific nature.

A. Well, that is rather a lot; but publications which concern this subject here, I could mention—*Law and Calculability,* on the foundations of law and state; another publication on *The Relation of the Constitution of the Reich to the League of Nations;* then in the textbook which Anschuetz and Thoma edited on German Constitutional Law, my work about *The Equality of the Citizens before the Law;* and above all, my own version of *The German Constitutional System,* of the year 1930.

Q. Concerning the first problem, the German constitutional law, that is the subject on which I wish to start. My first question will open the direct examination. Is it correct that Hitler in the order of the so-called Third Reich was the supreme law giver?

A. Yes, that is correct, although that was not so from the very beginning of that era. That only happened in the course of events. But at the latest, if you'd like me to mention a date, that occurred

* Complete testimony is recorded in the mimeographed transcript, 25 and 26 June 1947, pages 4253–4364.

when the offices of Chancellor and Reich President were united in him; that is to say, 1 August 1934.[1] That is the latest date.

Q. It was like this then—Hitler's authority developed gradually until it reached its final culmination?

A. Yes, that is correct. If I may add this, one must say that the development under Hitler followed a development which occurred prior to his own era.

Q. Do you mean to say by that, that 30 January 1933 did not bring about a complete break of the development prior to Hitler?

A. Yes, that is what I would say.

Q. Do you also mean to say by this that the so-called change-over, that is the seizure of power by the National Socialist Party, was legal?

A. That is a very difficult question. First of all it is difficult because one would have to say in greater detail what events represented the change-over, whether one adheres to the formation of the government on 30 January 1933, or whether one discusses the enabling act, promulgated on 24 March 1933,[2] or how far altogether one wants to extend the events of the change-over. I can only answer conditionally. If one considers only the formation of the government, that is to say the act of entrusting Hitler with the Chancellorship on 30 January 1933, and if by "legal", one means the purely outward formality, then it cannot be denied that the operation was carried out legally, namely, under Article 53 of the Weimar constitution,[3] according to which the Reich President forms the cabinet, and the Parliament—the Reichstag—only afterwards has the opportunity to have a destructive influence on the formation of the cabinet. Under the Weimar constitution, the Reichstag does not form the cabinet alone or together with another organ, but the President does that. The other organ is immediately elected by the people of the Reich. That is why the Weimar constitution contains quite rightly article 54[4] which incorporates the parliamentary system by establishing the institution of the vote of nonconfidence and entrusts the President with

[1] Reference is made to the Law Concerning the Head of the German Reich, 1 August 1934 (1934 Reichsgesetzblatt, pt. I, p. 747). This law reads as follows: "Article 1. The office of the Reich President is herewith united with that of the Reich Chancellor. Therefore, the prerogatives hitherto held by the Reich President are transferred to the Fuehrer and Reich Chancellor, Adolf Hitler. He determines his deputy. Article 2. This law becomes effective from the time of the death of Reich President Hindenberg." Hindenberg died on 2 August 1934. This law was signed by Hitler and 14 Reich ministers.

[2] This act is reproduced on page 163.

[3] Article 53 reads—"The President of the Reich appoints and dismisses the Chancellor of the Reich and, on the latter's recommendation, the ministers of the Reich."

[4] Article 54 reads—"The Chancellor of the Reich and the ministers of the Reich require the confidence of the Reichstag in the administration of their office. Any one of them must resign should the confidence of the Reichstag be withdrawn by an express resolution."

the formation of the cabinet. Yes, in fact one has to say a little more. In the formation of the government, the appointment of the Reich Chancellor is the sole act of the President; side by side with, let us say, the dismissal, with which the countersignature of the Chancellor is purely formal.

In the development of the Weimar constitution, after initial wavering, there evolved the principle that the new Chancellor appointed or signed the dismissal of the old Chancellor and his own appointment, which is really illogical. I don't think there is any need for me to explain that any further. But as the Weimar constitution in Article 50[1] provided that every provision made by the president should be countersigned by the Reich Chancellor, or one of the Reich ministers—at least one—one was compelled to have even the appointment of the new Chancellor countersigned. That means naturally for the new Chancellor that he drags himself out of the mire by his own efforts. Counsel, if your question refers to 30 January—formally the procedure was orderly; a great deal more difficult is the question concerning the Reich law of 24 March 1933, that famous law [the Enabling Act], the validity of which was doubted so much; it is much more difficult to answer if your question refers to that. That law has as its main contents—I can almost say with a little exaggeration—the elimination of the division of powers. Three provisions or groups of provisions of the Weimar constitution are excepted, but for the rest the government could now promulgate laws even if that meant changing the constitution of the Reich; for the normal life of the people, legislators, and supreme administrators are one and the same thing. That is a basic change of the entire structure of the Weimar constitution. And I can say frankly if I, during the first years of the Weimar constitution, as an expert on constitutional law, had been asked whether the Reichstag, even if there was a majority, could not change the constitution under article 76[2]—if the Reichstag would make such decisions, could pass a law which, in effect, eliminates the Reichstag,—if I had been asked such a question I would have said there is nothing about that in article 76 that restricts the passing of such laws; but

[1] Article 50 reads—"All orders and decrees of the President of the Reich, including those relating to the armed forces, require for their validity the countersignature of the Chancellor or the competent minister of the Reich. The countersignature entails the undertaking of responsibility."

[2] Article 76 reads—"The constitution may be amended by legislation. But decisions of the Reichstag as to such amendments come into effect only if two-thirds of the legal total of members be present, and if at least two-thirds of those present have given their consent. Decisions of the Reichsrat in favor of amendments of the constitution also require a majority of two-third of the votes cast. Where an amendment of the constitution is decided by an appeal to the people as the result of a popular initiative, the consent of the majority of the voters is necessary.

"Should the Reichstag have decided upon an alteration of the constitution in spite of the objection of the Reichsrat, the president of the Reich shall not promulgate the law if the Reichsrat, within 2 weeks, demands an appeal to the people."

there is not only legality, there is also legitimacy in every constitution; there are certain basic decisions contained in any constitution which one cannot abandon without the entire losing of his character. But I must say the German science of constitutional law, particularly in the person of the most fanatic champions of democracy, did not take that point of view. Gerhard Anschuetz, who if it is permitted to say anything like that about a republic, was the crown jurist of the Weimar republic, wrote the commentary to the constitution of the German Reich which is the authoritative commentary. Gerhard Anschuetz whose last position was that of professor at Heidelberg, was, I might say, a temple guard of the Weimar constitution, and if he only thought an attempt had been made to shake the foundations of democracy, perhaps by creating a group of judges who could have reviewed decisions by the Reichstag, he would have been furious. I must say that because only now it becomes understandable what authority Anschuetz' opinion carried, which was concurred in by all German constitutional lawyers, that there were no limits for article 76, concerning the amendment of the constitution. Anschuetz stated repeatedly that the Reichstag, with the majority that can amend the constitution, could abolish the republic, the federal state, democracy, even basic laws. No judge was entitled to doubt the constitutional validity of such a law. If previously I said that concerning that law of 24 March, one might have legal misgivings, I had something different in mind. I believe if I had been the President of the Reich, and if I had had the knowledge of the events, I would have refused to issue that law and to promulgate it, for it is the Reich President who has to examine whether the law has come about in a constitutional manner. I am convinced, however, that on no account procedures can be constitutional when the majority present, that is, the majority which passes the resolution, did not constitute the majority of the Reichstag as elected [by the people] but constituted the majority of a Reichstag that had been curtailed by the executive. Much has been said about that, and there is something else that enters into that question, and I have to say that quite openly that has not been discussed before. At that session at which the Reichstag passed that law which changed the constitution, the Reich Chancellor felt that the Reichstag might make difficulties, and he threatened with revolutionary forces; but even that doesn't help and, particularly, it doesn't help according to Anschuetz. Anschuetz and [other] German experts on constitutional law consistently upheld the view that the assurance of the Reich President, given by his signature, that the law had been passed in an orderly manner excluded all scrutiny. Therefore, we have to say, under objective law there

may be misgivings, serious misgivings about that procedure, but according to what at the time was the guaranteed practice of constitutional law which was upheld by the opinion of the most fanatic upholders of the Weimar constitution, the signature by the Reich President excluded any scrutiny as to whether the law came about in an orderly manner. I believe that I have now indicated that the question for the so-called legality of the change-over, even purely formal, is very difficult to answer, but for the rest it seems to me that this is only an argument about words; [actually, it was] a revolution, and it was meant to be a revolution. Hitler even thought it was the only real revolution. And according to its aim and meaning it [i.e., a revolution] cannot be legal; but in any case, if it comes off—that is how it always will be in the world of states—it provides the soil on which the new order, slowly or more quickly, evolves, according to custom, and custom after all is the source of all law.

Q. Professor, we are particularly interested to explain to the Tribunal the constitutional status of the so-called Hitler decrees. May I ask you, now that you have answered the question of legality on the one hand and theories of legitimacy on the other hand, would you now, from the developments, explain the constitutional status of the Hitler decrees within the meaning of my first question as to whether he was supreme legislator of the Reich.

A. I am afraid I shall have to go back a bit for that because that question really concerns the entire question of the so-called constitution of the Third Reich. Even for many a German, Hitler's authority is a mystery, but it must be that for all those who are not Germans. Many misunderstandings which I encounter again and again in conversations are due to the fact that certain unavoidable factors which are involved in any ruling, are ascribed to Hitler's regime. A further difficulty consists in the fact that the peculiar constitutional insecurity in which most of the states in Europe have lived for many years, from the point of view of their constitution, produces phenomena which do not restrict themselves to Hitler's regime, but only appeared there particularly clearly. But above all—because otherwise I cannot provide you with the background—I should like to explain that a little further to the Tribunal—above all, there is considerable ignorance about certain peculiarities of the German situation, in particular concerning the constitution. I believe I may say without encountering any contradiction that in this courtroom jurists are fighting for clarity among themselves which belonged to various schools of legal thought. Above all, there is between the European continental states and their constitutional and legal thought on the one hand and the Anglo-Saxon legal thought, as far as I understand

it, a great difference which cannot be overestimated. On the continent of Europe, in the course of four centuries, a development has taken place by which law and morality in legislative thought are separated sharply; and so as the question of morality arises, the lawyer on the continent of Europe says as a lawyer, "That has nothing to do with me. That may be regrettable, and I myself do think it is regrettable, but after all, that is the historical reality." How far that development goes, I can show to the Tribunal by giving an example which perhaps is the most important, and again that concerns the opinion of Gerhard Anschuetz concerning article 102 of the constitution* as to whether the courts in Germany concerning the validity of the law passed by the Reichstag are entitled to doubt it for ethical reasons. I quote—this is in the commentary of the 14th edition, page 476—"If it cannot even be conceded that the judge is entitled to examine the law as for its being constitutional or not, so it can be conceded even less that he may refuse obedience to a law which was passed constitutionally because according to his opinion concerning certain standards which again according to his opinion are above the legislator, that is to say, morality, ethics, natural law, they contradict these points or because they cannot stand up to certain evaluations."

I had to read this out verbatim. Therefore, it was rather difficult for the interpreter because of the position of the verbs.

The reason for that situation in Germany, which is a situation that applies to the whole of Europe, is this—and I now have to broach a subject, the effect of which did not affect England or the United States. The state of the European continent came into existence from the fragments of the *Corpus Christianum* of western Europe. The break of the medieval realm is the soil on which the modern sovereign states grew. These states starting with Italy believe ever more strongly in the idea that they are sufficient to themselves, that they can live by their own efforts, that they are under no obligation to the past or to the future. The state becomes a purpose to itself. That has been emphasized again and again, and that development goes on from Macchiavelli, the great Florentine; Jean Bodin, the great Frenchman; and as far as Hegel, the the German. As a result, ethical evaluations may be made by the legislator, parliament, or the monarch, but the resolution passed by the monarch or parliament deprives those who are governed by these laws of all right of objection.

May I draw the attention of the Tribunal to one event that occurred under the Weimar constitution. During the first years of the republic it became known among the public that Berlin was thinking of forbidding any revalorization [or revaluation—

* Article 102 reads—"Judges are independent and subject only to the law."

Aufwertung] by law.* The judges of the Reich Supreme Court of Leipzig at that time formed their own association, and that association of judges, in view of that rumor, held a meeting and passed a resolution to the effect that if such a law were to be promulgated, they would refuse to apply it. That happened in 1924, and it was emphasized that such a law would run counter to morality. There was a storm of indignation among the Reich government. The Reich Minister of Justice protested using very sharp expressions, and the Reich Supreme Court did not carry out its threats. However, in 1927 the Reich Supreme Court in a decision published in volume 118 declared—"The legislator in the autocracy is not bound to any other restrictions but those which he draws for himself from the constitution or from other laws."

Now, I ask to be permitted to speak about a second point which concerns only Germany, at least to that extent. It is easy to forget that the German people for 33 years have never had really normal conditions. If one looks at that from the human point of view, it means that about 50 age-groups of German people—that is more than two-thirds—50 age-groups of people have never seen normal conditions; that is, all the people who were born after 1914, and those who, before 1914, did not have any conscious experiences. For all these people, life—and that was the normal thing for them—was a continuous change from open to latent crisis. One was always exposed to danger and always with a longing for stable conditions. The consequence is that for most Germans, order, which deserves that name, is something hard to imagine. To the German people order has become to mean something transitory, something unstable, something upon which one cannot depend, and doubtless it did not contribute to the stabilization of legal thought that, beginning with the time of the Weimar republic the machinery of legislation was running incredibly fast. I would, indeed, desire for the judges [of this Court] to see the maze of decrees and laws published and showered upon the German people since 1919. Most of those were laws or paragraphs of short existence. We had real inflation of legislation, as far as I know, in history without example at any other period. And that was not only so during the Weimar era, it became worse indeed during the period of the Third Reich. Before Hitler came [to power] he turned with strong criticism against that positive manufacturing of laws. In his opinion, only the "sound sentiment of the people"

* The problem referred to by the witness was briefly the following: The value of the German currency having fallen to a very small fraction of its prewar value, debtors were able to pay off debts by paying, in terms of purchasing power, only a small fraction of the original debt. This brought hardship to many creditors. Hence, the question was whether, under the doctrine of "unjust enrichment," or under some similar doctrine, or by virtue of special legislation, these debts, particularly toward creditors in the lower economic strata, should be "revalued."

should find its inclination in laws. But when he was in power, the machinery, if this was possible, then was in even higher gear.

I believe that I do not have to credit it to my own inefficiency but I have to believe that no German jurist can say anything else of himself, but, none of us were in a position to know all the headlines of all the laws and decrees that have been passed. With things as they were, one has to understand that a large portion of the German nation, many jurists among them, became tired and apathetic toward authority, and skeptical. And on the other hand it could not be avoided that many impulsive individuals revolted, wanted to take action, wanted to do something about it, wanted to come to a decision, to a clarification, to a simplification, to find a way to see through all that.

In our era—at least one can say that for Europe—the political disease of fanaticism and doctrinism has broken out; tolerance became more and more rare; each single technical question was tainted with the question of religious allegiance. Under these circumstances, one can easily obtain a picture of the chaotic condition of legal thinking; small wonder that a state, to see to it that laws once decreed have to be carried out by the authorities, demanded *particular* emphasis because otherwise not even the minimum of order could be guaranteed which was at most possible. Particularly because the entire situation, the entire atmosphere was so unstable. The essence that "an order is an order" had to become the last refuge of those actually in power.

And now, a last part of it. Inflicted against this background of all that we find in the constitution which, on paper, perhaps structurally is the most sympathetic, the most logical democratic constitution of the world, with a tremendous, carefully thought-out system of checks and balances, safety valves in order to assure that the individual citizen would be the one to have its full advantage. But that constitution was worked through elaborately, and I say openly, that my determination to study constitutional law was in part based on that constitution which enthused me as a young man; this constitution, at the same time, was very complicated in its structure, its structural power and in legislative procedure.

With the permission of the Tribunal I shall try to explain that life itself demanded to have these matters simplified—rather less artistry but more efficacy. With that I believe, in all brevity, to have said something of that which is absolutely necessary to know if one wants to understand the essence of the Weimar constitution and its development which, long before Hitler, had led to a situation which does not permit to recognize any longer the situation of 1919.

* * * * * * *

In German we call a law which was brought about by the legislative authority, a law in the formal sense. And the basic thought for all, which is to be found in all European constitutions, is this. If the government wants to, let us say, increase taxation, then that means it wants some acts of legislation which authorize the authorities, or the various agencies, to interfere with property. The government, therefore, wants a law in the material sense; therefore it must have a law in the procedural sense or in the formal sense, through legislation. That is what we call the principle of the necessity of the law, the fact that a law is required. Where this is brought about, we have a division of power. And if it were brought about—and it has never actually been carried out—then this is the way it would have to come about. The legislative body then would have to make all substantive laws, but it would do nothing but just that.

Both these cases do not apply. Parliaments, time and again, are given the privilege or the right to come to resolutions or decisions which have different content, for example, decisions on budget. These decisions on budget are not acts of legislation in the sense of setting standards. In German constitutional law it is definitely prohibited to include into the budgets acts of legislation or standards in that sense. The Parliament has a part in the forming of the cabinet. That is one thing. The other—and this is what we need—is the following. It may happen that the government is authorized to enact legislation by virtue of the constitution itself, or by virtue of later laws passed by the parliament. In German one calls these acts of rule making [Akte der Normsetzung] of the government, that is of the executive—which have a legal maxim as content—legal decrees [Rechtsverordnungen]. "Legal" on account of their content, and "decrees" on account of the method.

This institution, which we find in every European state, was the starting-point for the further development and the paving of the way of the orders by Hitler, because in the Weimar constitution there is a law for the government to decree laws, the utilization, or I should say the exploitation of, which led to the fact that since the middle of 1930 the normal legislative body in Germany was really the government. That is the famous provision of article 48, paragraph 2. As a rule, legal decrees on the basis of this article are called dictatorial decrees, but also apart from that during the Weimer era, much authority was received for the government to issue decrees. In countless laws the Reichstag empowered the government, in order to carry out a law, or in some cases in order to amend a law or repeal a law, to issue legal decrees.

However, not only in the Reich do we find this institution or this instrument of legal decrees, but also in the German states,

the German Laender. In the constitution one always finds a [provision concerning the] right to issue emergency decrees (Notverordnungsrecht) and the legislatures of the various states frequently authorize the [state] government to issue decrees in regard to substantive law.

A law of the Reichstag of 13 October 1923, which is called Enabling Law, "Ermaechtigungsgesetz", signed by Reich President Ebert, conferred upon the Reich government the power, among other things, to issue decrees in regard to substantive law, even deviating from the legal principles of the constitution of the Reich. This law is particularly important. It was published in the first years of the Weimar constitution under Reich President Ebert, and it cleared the way for a development which the founders of this law to this day probably regret deeply.

May I refer the Tribunal to the following:

Several months ago, in Munich, a book was published, "The History of the Weimar Constitution." The author is Professor Willibalt Apelt, now at the University of Munich. We used to be together at the University of Leipzig, and I also had the honor to lecture for him in addition to my lectures when he became the Minister of Interior in Saxony; that is, the Police Minister.

He was one of the most outspoken democrats we had in Germany. This book throughout is a [settling of an] account [Abrechung] with Hitler. It altogether lauds the Weimar constitution, and therefore it is particularly important to note that Apelt considers this law the beginning of all the evil in this development and states explicitly that this law cleared the way to that other enabling law of 24 March 1933. * * * The date of the law is 13 October 1923. It appeared in the Reichsgesetzblatt of 1923, volume I on page 943. Since the middle of 1930 one did no more work with enabling law decrees, but one used article 48, paragraph 2. Earlier already that had been applied. If I am informed correctly under Ebert alone, 136 decrees of that kind were passed, that is to say, until 1925 when Hindenburg became President. At first a little less use was made of this means. It was reactivated again when the economic crisis of 1929 was nearing Europe. Conditions in Germany deteriorated from week to week, and under Bruening whole bundles of emergency decrees, of dictatorial decrees, were passed. In 1932 we had progressed so far in that direction that the Reichstag was practically excluded as a legislative body, and the Reich President, together with the Reich government (the Reich cabinet because according to article 50 they had to work together) was really the normal source of legislation. From then on until Hitler's acts of legislation it is indeed only a short step, and if Hitler himself would not have set out to

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give the whole matter a triumphant dictatorial aspect, if he had been satisfied with an enabling act like that of 1923, if he had not had laws enacted by the government but decrees, the entire enabling act would not have caused so much rumpus as it did.

Q. Professor, may I ask you to explain briefly to the Tribunal who Reich President Ebert was, because we have to assume that the name alone does not give a plain indication. * * *

A. We had two Reich Presidents. The first, Friedrich Ebert, who came from the social democratic party of Germany, not elected by the people but by the national assembly, and then the second, von Hindenburg, who was elected by the people.

Q. And my second and other request is that you quote to the Tribunal article 48, paragraph 2 of the Weimar constitution.

A. Article 48, paragraph 2. Concerning the so-called dictatorial powers of the president—and with the permission of the Tribunal, I shall formulate these sentences linguistically in a way which make them easily translatable—"The Reich President may take those measures which are necessary to reestablish public security and order if, in the area of the German Reich, public security and order are considerably disturbed or endangered. If required, he may also intervene with the aid of the armed forces. For that purpose he is authorized temporarily to invalidate in whole or in part the basic laws which are laid down in the articles 114, 115, 117, 118, 123, 124, 153."* May I add, these seven basic laws are the so-called "liberal principles," [basic liberties], the same which we find, for instance, in the Constitution of the United States, the Bill of Rights.

Q. Professor, we are now concerned with an attempt to explain the Hitler decree to the Tribunal. After all we have heard from you now, the development which has led to it that the government governed by decrees rather than by legislation, that development started already as early as 1923, and according to the information we have from you was again stipulated in 1930 at the time of a different government. I think it will be necessary to explain to the Tribunal that this development led up to the Hitler decree; went through various stages of development, and I may ask you still to describe this to us, because in the course of this case it has become necessary that this development be shown as clearly as possible.

* * * * * * *

* Article 48, paragraph 2, reads—"Where public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take the measures necessary for their restoration, intervening in case of need with the help of armed forces. For this purpose he is permitted, for the time being, to abrogate either wholly or partially the fundamental rights laid down in articles 114, 115, 117, 118, 123, 124, and 153."

The articles subject to temporary suspension are quoted in the footnote to the decree of 28 February 1933, the first decree reproduced in section B, above.

The cabinet assumed responsibility [for all orders and directives issued by the Reich President] to the Reichstag by countersigning them, and the Reichstag could react rather disagreeably; the cabinet, if the Reich President and the Reichstag were of different opinions, was forced to make a decision. If the cabinet took the opinion of the Reichstag, then the Reich President either had to give in or change the cabinet; if the cabinet went along with the President, then nothing else was left than to risk the vote of lack of confidence; an essential vote of the Reichstag could lead, therefore, to a struggle of that kind, and in German practice the cabinet which went with the president against the Reichstag was called a "fighting government" [Kampfreigierung]; not the other way around. In the long run it showed that the Reich President, when the Chancellor went with him, was stronger than the Reichstag. That also I may be permitted to describe briefly. If the Reichstag did not agree with the president, was not satisfied with the president's decisions, it could not, properly speaking, do anything. Even though the constitution in article 43[1] reserved to the Reichstag the right to ask the people of the Reich that they demand the resignation or the dismissal of the president. That, in practice, never occurred, and for a very simple reason. If the Reichstag would have come to a decision of that kind, and the people would not have gone along, then that president would have been automatically reelected for another 7 years, and also, the Reichstag would have been dissolved, and that would mean suicide [for the Reichstag]. However, the president is in a much better position; if he is in agreement with the Chancellor, he can dissolve the Reichstag himself. That is where the famous red folder comes in.[2] If, therefore, the president and the cabinet are in agreement, and there is a threat of censure on the part of the Reichstag, then the president can turn over to the Reich Chancellor the order for dissolution [of the Reichstag]. The Reich Chancellor is present in the session, and when it comes to the last, he just shows that red folder and that settles the entire matter. Now, the Tribunal will certainly understand why in discussing article 48, paragraph

[1] Article 43 reads—"The president of the Reich holds office for 7 years. Reelection is permissible.

"The president of the Reich may, upon the motion of the Reichstag, be removed from office before the expiration of his term by the vote of the people. The resolution of the Reichstag requires to be carried by a two-thirds' majority. Upon the adoption of such a resolution, the president of the Reich is prevented from the further exercise of his office. Refusal to remove him from office, expressed by the vote of the people, is equivalent to reelection, and entails the dissolution of the Reichstag.

"Penal proceedings may not be taken against the president of the Reich without the consent of the Reichstag."

[2] The "red folder" contained the order of the Reich President dissolving the Parliament (Reichstag). In some instances, the Reich Chancellor would bring the "red folder" with him into a session of the Reichstag, thus indicating that the Reich President had already signed but not yet promulgated the order dissolving the Reichstag and making it clear to the Reichstag that an adverse vote would lead to the dissolution of the Reichstag.

2, I did not even read paragraph 3,* because there it is expressed that the Reich President has to notify the Reichstag of every dictatorial measure and if the Reichstag wants it withdrawn, and the demands are made of the president, the president has to repeal his measures. If he and the cabinet do not wish to do that, they have the possibility of dissolving the Reichstag, and that brings me back to what I pointed out before. Maybe one cannot understand why the Reichstag permitted itself to be dispossessed, as far as legislation is concerned. It would have had to be made entirely different to be in a position to oppose due to the fact that the major change could not depend upon them. The Reichstag in every demand of repeal risked its own life.

* * * * * * *

Perhaps at this moment I can jump ahead into the Hitler era When the Hitler government had received the right to pass laws it no longer needed the Reichstag. If one wanted to use the Reichstag at all as a legislative body, one did so to save face. But, now the government did no longer make any suggestions as was, in former times, the normal procedure. The government was the legislator itself. But that way was chosen; a way, which during the Weimar era played no part.

Under Hitler the Reichstag since November 1933, consisted only of one faction. That is just as senseless as one party. This faction introduced a bill with the name of Adolf Hitler and three others. Frick, the faction chairman accomplished this, Goering acted surprised, being the president, and then, the whole game went on as you know it. That abnormal way, therefore, was chosen in order to stage the play. Now I go back to the Weimar era. As to whether the bill was introduced this way or that way, for the Reichstag, that was only raw material. It could say, "We will not do anything." It could say, "We will pass it." It could say, "We will change it." If a bill is passed, it means that the bill is accepted or amended; then the Reich President received the law which was been passed by the Reichstag for his signature. Signing a law, that meant as to whether the law was passed in the proper way, and as to whether the text which had been submitted to the president was actually the text which was passed under the law by the Reichstag. (It did, in effect, happen that other documents were submitted to him than those passed by the Reichstag, of course, by mistake. Next, the Reichsgesetzblatt had to publish it with a special wrapper in the changed form.) And when that happened,

* Paragraph 3 of article 48 reads: "The President of the Reich must, without delay, inform the Reichstag of any measures taken in accordance with paragraph 1 or 2 of this article. Such measures shall be abrogated up on the demand of the Reichstag."

then, the president gave the order for promulgation. In Germany we usually call it promulgation, too. So far so good.

So much so good. But, now, it could happen that the Reich council or the Reich President with the consent of the government or the government with the consent of the president or some of the members of the Reichstag, itself, were dissatisfied with the law, and, in that case, the constitution provided that those unsatisfied persons or bodies could appeal to the people. That is very complicated, Your Honors, and I do not think that we need it for our purpose here. You will find it written down but I don't think I need to elaborate on it here.

If such an appeal would have been made to the nation—it never happened, it got stuck in the beginning—then that had to be fought out at the time between signature and promulgation. But the constitution had provided for a special procedure, an act of absolute democracy became possible—the people of the Reich, that is to say, at least one-tenth of the whole electorate,—at that time, that was at least four million voters—could join together and demand that a bill which had to be drafted up to the very last [detail], was to be submitted by the Reichstag, and, in that case, the Reichstag was not as free toward the draft as in the other case. But it was under pressure of an ultimatum. It was only left with the choice either to accept it as it was or the government had to ask the nation. That was attempted a few times but it was never carried out properly.

I should assume that those remarks were sufficient to show to the Tribunal that on the one hand the Weimar constitution was very democratic, with the intent to protect the people and its rights; but that on the other hand the constitution was so complicated in the structure of the bodies and in the legislative procedure, that one need not wonder if an ever stronger movement urged for simplification. Furthermore, the constitution in itself had something unclarified, something provisional and that in severe respects and that always happens if a dualism is created; for every dualism of power endeavors at its own dissolution. * * * We had, furthermore, the small dualism between Reich President and Reich Chancellor; and, I haven't mentioned that yet, there was the old grave German problem of dualism between Reich and Laender; all these various problems of dualism were urging for dissolution and they were in process of dissolution prior to Hitler. Hitler then completed that development. May I explain that in a few remarks?

First of all, the dualism between Reichstag and Reich President was abolished. The Reich President is the victor. Under Hindenburg the formation of the cabinet more and more came under

the power of the Reich President and that of the Reichstag decreased. The end of this development was 30 January 1933. The Reichstag was no longer asked to do any work. Purely formally, under article 53, the president appoints the new government. Article 54 was no longer considered a serious threat. The parliamentary system is dead and we have the first demoting of the Reichstag. The second had already started in the meantime, as I have shown. The Reichstag had already resigned more and more as a legislative body; it is only the culmination of the development, what we see in the law of 24 March 1933 [Enabling Act] and the aftermath, the new reconstruction law [Neuaufbaugesetz] of 30 September 1934; the division of powers is dead. The Reichstag in its original and foremost function has been dethroned. What was its purpose now? In July 1933, political parties were definitely prohibited. A genuine parliament was no longer possible. The first Reichstag elected after this July law, in November 1933, was the Reichstag of one faction only elected by voters of one party only. It has been said that it was purely an assembly of acclamation. The great dualism in the Reich ended thereby and on the grave of the Reichstag there are three crosses. The small dualism between Reich President and Reich Chancellor ended with the death of Hindenburg and is expressed in the law of 1 August 1934, concerning the head of State [Staatsoberhaupt-Gesetz]. The greatest and most serious dualism between Reich and Laender in effect was eliminated before that. Usually one says in the German constitutional science that only the reorganization law of 30 January 1934 had turned the Laender into Reich provinces but that is certainly not correct. Looking at the facts themselves, that step was already taken by the Reich governor law [Reichsstatthaltergesetz] of 7 April 1933. When one summarizes all that and looks at those results together, the final phase is this—the entire power of the State in the German Reich is combined in the hand of that one man who quite arbitrarily can use that power to decide individual cases or to set new norms. It depends only on him, from the practical point of view of power, as to how long he refrained from interfering in the field of judiciary. * * *

Q. Professor, that was the question about the development up to the point when this one man, Hitler, held everything in his hand. I would say the result of historical development. We are interested in explaining to the Tribunal, if I may say so, the dogmatical position of the Hitler decree as a legislator. Therefore, my question concerning your statements up to now concerned the development of constitutional law up to that historical point. But now, the Hitler decree and the act of lawmaking became actu-

ally one and the same. What was the effect of that on the legislative, on the executive, and on all forms of the state life after that time?

A. Perhaps I may begin with the procedure of the Hitler decrees, that is to say, with the exterior manifestations. I have shown that in German constitutional law we had the difference between statute, in the formal sense, and ordinance. The one was the act of the legislature—the other of the executive. On account of the enabling act and as a consequence of the first acts of the Hitler government, the procedure of legislation became a dual one. We still had more or less—for Sundays only, so to speak —the procedure of legislation through the Reichstag. The normal course of legislation was the statutes enacted by the Reich government, which should not have been called that way. We also had, from the imperial days, and we kept it up during the days of the president, the decree by the head of state, especially distinguished in the way of ordinance, for instance the organization act and we had the ordinance by the government. Hitler, by and by—but it happened rather quickly—emancipated himself from those regulations of the laws which were previously valid and concerning the various forms of norms, he used them arbitrarily. As to whether a statute passed by the Reichstag, as I described it, was brought in by suggestion of the National Socialist Party with Hitler as the first mover of the motion, was passed by way of acclamation, without debate; or whether the law was decided on by the government—that happened very quickly by way of circulation—or whether Hitler called it "Decree by the Fuehrer and Reich Chancellor"—later called "Fuehrer Decree" or ordinance, such as the famous ordinance on the Enforcement of the Four-Year Plan—for the legal value that did not matter at all. In all cases Hitler alone decided, whether he would take advice or not, whether there was a cosignature or not, for genuine cosignature in the constitutional meaning, of course, could not exist any more. There have been many arguments as to what the cosignatures which weren't always affixed meant. People have tried very hard to find a meaning, but the only thing that is really certain is that these cosignatures did no longer have the meaning or significance of the proper countersignature. There was nobody toward whom one could have assumed any responsibility by countersigning. Therefore, all fixing of norm, signed by Hitler's name alone or together with other names, is merely an act of will of that man—whether it calls itself a law or something else.

The only difficulty is represented by the so-called secret laws, although I can't quite see where the difficulties are when you look at it properly; that a law which is kept secret before the people

whom it concerns cannot bind those people is obvious. That is not because of some particular legal system but that is because of the very nature of an order. Nobody can be given an order if he doesn't know of the order and if he is not meant to have knowledge of that order. But one must not forget that if Hitler passed a secret law, that as an official directive it was binding for those persons to whom it was made known. Then it was not just a legal norm, but it was an official instruction. As for the citizen, that amounted to the same in effect. If I may use an expression from Germanic law, these various forms by which Hitler announced his will were only different as far as the number of people in his entourage were concerned.

Much more difficult than that question about the form is the question about the restrictions on those contents to which Hitler was subject as a legislator. According to the valid order, limitations in the matter of the contents existed also for Hitler. Already last year, before the International Military Tribunal, I stated clearly that naturally for Hitler too, the limitations of ethics did apply. As to how he himself thought about such matters, I don't know. I never met him, and I would not like to rely on hearsay; but that he knew that others believed him bound by a moral restriction, that is quite evident from the fact that again and again, be it in preambles to the law, be it by the rest of the propaganda machinery, he formulated moral justifications. Whether that was in accordance with his own real ideas, that question may be left open.

But I have already told the Tribunal that these restrictions, as moral restrictions which are no doubt for a great man the most difficult and the most important restrictions, in the conception of the European state on legal matters, are no legal restrictions. The absolute state of the continent passed on that conception to its parliamentary successor.

A little while ago, I had an occasion to show, by the example of Anschuetz, that that remained so until the latest era, until the time of the extreme democratic era of the Weimar republic. If one does regret that or not does not matter here. I simply have to describe what actually happened. If now, in the European meaning, one asks about legal restrictions—and first of all one asks about restrictions of the German law—one will have to say that restrictions under German law did not exist for Hitler. He was *legibus solutus* in the same meaning in which Louis XIV claimed that for himself in France. Anybody who said something different expresses a wish that does not describe the actual legal facts.

On the other hand, certainly there were legal restrictions for Hitler under international law. He, as the head of the State, was

the representative of the German Reich with foreign countries. After the development of affairs, he had to represent the German Reich without the restrictions which the Reich President still had. Hitler alone concluded the treaties and terminated them. He alone concluded alliances and could renounce them. He was bound by international law. Therefore, he could commit acts violating international law. He could issue orders violating international law to the Germans.

Now we are confronted with the most difficult problem: What were the consequences of the violation of international law by an act or an instruction by Hitler? The nonjurists will probably say that the order did not exist. But every jurist knows everywhere in the world that matters for the state, for every state, are not so simple. It is not true that there is even one state in the world which would say, "Every wrong act of state is not an act of state at all," but every government system had inherent in itself, in varying form, a second order so to speak—a kind of self-purification system—a system concerned with finding out whether faulty acts of state are void or valid or are only partly valid. Every state commits faulty acts—acts of which everybody knows that they are not in order and knows it at a certain time. Acts which all the same are maintained, merely because during a legal procedure the end has to come one day.

In the Germany of the Weimar republic, for example, this is what happened. When the Reichstag—I just showed it by the example of Anschuetz—had passed a bill pursuant to article 76, that is, with a majority which could change the constitution, that law, if it had been properly promulgated, was binding for every official agency, even, for example, if it did not comply with an obligation of the Reich under international law.

In this commentary—would you kindly wait a moment—it's a long time since I looked at it last, but I think I can remember where it is. [Reading] Anschuetz says in his commentary on article 10, under figure 7, "International law too, places an obligation on the German judge within the meaning of article 102 and according to article 4, but only insofar as it is generally recognized; in particular, also recognized by the German Reich and does not contradict the Reich laws. Whether that is the case, that the judge has to examine but he does not have to examine Reich laws, for the fact whether they are or are not in accordance with international law, and even if they don't pass this examination, he cannot deny their application." That means if the Reichstag, let us say, with a majority that can change the constitution had passed a law which was contradicting international law, that law was binding for all German official agencies. The Reich had to act as a

sovereign State under the international law governing offenses against international law.

I return to Hitler. What applied to the democratic set-up applied all the more to the set-up under a "leader," and everybody knows that who knew about the conditions surrounding Hitler's decisions. If Hitler issued an order which was faulty from the legal point of view, that did not give the German official agencies any reason to refuse obedience, for in every state there has to be an authority beyond whom there is no appeal.

In the case of Hitler something else, something special applies. He who sees things differently and believes that the German official agencies were not merely entitled but perhaps even under an obligation to examine Hitler's orders as to their legality not from the scientific point of view, but merely with the practical purpose of possibly refusing obedience, claims no more, no less than that Germany had no dictatorship at all. Then it would not be comprehensible what was the sense of a fight of the whole world against that regime.

I believe I have now answered your question. I would like to say one more thing, so as to emphasize the gravity of the development. I had the permission to show the Tribunal the structure of the acts of the State. Naturally that structure can also be applied to Hitler's acts, but only one of those acts lost its meaning almost completely under Hitler. If Your Honors will kindly recall chart 1 to your memories, where on the left side we had the norms and then the authorization norms, the norms which authorized interference, I had differentiated between special and general relationship or subordination—pointing to the soldier and the citizen.* Those differentiations under Hitler gradually lose meaning. Hitler exerted and overburdened the strength of the German people to such an extent that finally he no longer saw before him citizens and smaller groups of persons under special obligation among them, but for him the Germans, all Germans were always on duty. A private sphere of activity no longer existed for him. With him there is no meaning in the differentiation between substantive laws and official instructions. It is all the same to him. The citizen is dead, because all have become officials. That is the final point of a development which, from a complicated state of affairs, was working towards simplicity, and that is the gruesome result.

PRESIDING JUDGE BRAND: Dr. Schilf, would you pardon a question directed to the witness at this time? Dr. Jahrreiss, if this question interferes with the orderly course of your presentation,

* In a previous section of his testimony, the witness had differentiated between the ordinary private citizen, who was affected by many norms only indirectly, and such categories as the soldiers and the public employees, who were more directly affected by certain norms.

I suggest that you ignore it. But you told us in your discussion of procedure your views as to decrees signed by Hitler and one or more ministers. Would you care to specify or to indicate to us a little the view you have with reference to the justification of authority decrees not signed by Hitler, but signed by one or more of the ministers? I think we have seen a good many of those in the record. In other words, decrees executed or signed only by various of the ministers, but not by Hitler. Do you understand my question?

WITNESS JAHRREISS: Yes, thank you. I have spoken so far only about orders by Hitler, but in German constitutional law dating back to the days of the monarchy and the Weimar republic we have not only norms fixed by the Reichstag or the head of the State, but also many norms laid down by the government, in the narrower sense by the minister. The ordinance [Verordnung], of which I spoke in the beginning differentiating it from the statutes passed by legislators, is normally the ordinance of a minister, and under German constitutional law the following is valid. That was not changed in the Hitler era. Administrative ordinances, that is to say, norms which are not legal principles in the narrower meaning, are issued by every minister within the framework of his own department, without any special basis. Other ordinances, that is to say, legal ordinances, can only be issued—he can issue them, but he can only issue them if he has been authorized to do so by the constitution or by a legislative act. That was, in fact, what I described at the beginning. And so, in the Weimar era, we had many ministerial ordinances if the law empowered the minister to issue them. If I may add this, the result of that differentiation was this, if the courts had to apply an ordinance by a minister, or to be more precise, when it was doubtful whether it was to be applied, then the court had to examine whether the minister was empowered, was authorized to issue it. If the court denied that question, the ordinance did not exist. May I ask whether this was in answer to your question, Your Honor?

PRESIDING JUDGE BRAND: I was interested especially in the source of authority, of decrees signed by various ministers after Hitler came into power. Would it be accurate to say that such decrees received their validity because of a delegation of power to the minister directly from Hitler?

WITNESS JAHRREISS: Yes, for legal ordinances. Hitler was the legislator. He could issue the ordinances himself but he could also delegate authority.

DR. SCHILF: Professor, I should like to follow up your words. In the Hitler state, so to speak, all people were on duty. There

were no longer any citizens. You said the citizen was dead. May I ask you, in our legal language we call an order by a phrase which is very concise and which might explain it better to the Tribunal, that the law also in the former meaning was a law that was the same as an order to a servant. May I ask you to tell me whether that general instruction to an official, a civil servant, to a servant was the same as the law which had been solemnly promulgated in the Reichsgesetzblatt?

WITNESS JAHRREISS: If I have understood your question properly, you want to know whether the obligation was the same?

Q. Yes.

A. Yes, no doubt. For those who were concerned, those to whom the order was addressed, the order issued by Hitler, whether it was concerned with an individual case or whether that was a legal norm or whether it was an official instruction, was binding.

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DR. SCHILF: Now I want to ask you, what, in principle, was the relation between international law and the law of the individual state, and I would like to ask you whether that relationship was changed under the Hitler state?

WITNESS JAHRREISS: Counsel, I suppose I am right in assuming that by that question you refer mainly to Article 4* of the Weimar constitution?

Q. Yes, that is my intention.

A. Among the methods by which human beings are directed in social intercourse, there is, as one of several, the order [Befehl]. That in itself, unsympathetic as it appears to people everywhere as a method, has the one characteristic that it is unavoidable. Consequently, there is nowhere among human beings a sphere where there is no rule. On the other hand, all mankind in effect today stands in permanent relation of life with one another without, as a whole, being subject to one rule. Both together result in the situation which again and again worries people, which we call the situation referring to international law. Only groups of mankind, smaller groups or larger groups, are under a common rule. Therefore, if a continuous life, in spite of being divided into various units of rule, is to be made secure, and that in a proper manner, then there must be norms which hold together in an entity those various units of rules.

Or to express it in a different way, the power of authority of the various units must be brought in line in such a way that a

* Article 4 reads: "The generally recognized rules of international law are valid as binding constituent parts of the law of the German Reich."

community life is possible. That means, however, the ruling authority of the individual units must be restricted by the whole. The central point of international law is therefore constituted by those norms which lay down that limitation of the authority of the individual groups. Therefore, I suggested, and I was the first person to demonstrate that in science, that the law of an individual state, that is to say the constitutional law, should never be described without also describing the limitations under international law. If we were to achieve the situation, if I may say so here, whereby everywhere in the world all young jurists from the very beginning would be accustomed to see the constitutional questions of their own country always in connection with those of international law, then a great deal would have been done to strengthen international law.

Summarizing, that means the individual state is placed under an obligation by international law to arrange its own order by legislation in such a manner that the authorities in their decisions work in such a way as is demanded by international law. In [legal] science, that is called—the state is under an obligation to organize its law in accordance with international law. How can that be done?

There are several methods available. The legislator can, from case to case in his own system, amend those provisions which need changing so as to comply with international law. He does not need to mention international law at all in doing so. That is the way states proceed again and again. A different method is the one which is called the method of transformation. That is, the legislator does not trouble to bring into line the law of his country, word by word, and paragraph by paragraph, with international law, but he tells his official agencies, "Consider the norm of international law which in itself only binds me, as if I had cast it into a law."

That method, which in German we also call "Recasting" [Umgiessung], can be applied specifically or generally. That is to say, the legislator, as soon as he has to consider a new treaty under international law, can recast that treaty or he gives general instructions for the application of the international law which is valid in the particular case. Both methods have been used among states.

Concerning this method of transformation, a difficult problem arises. In all states which have laws of different rank, as in the German Reich under the Weimar constitution—that is to say, either laws which have the validity of the constitutional laws, or ordinary laws—the legislator has to ask himself whether he intends to apply the recast international law to the highest group

or not. Under the Weimar constitution, for example, it was indisputable that the recast international law had merely the position of an ordinary law. There might even be a state which would place the recast international law above constitutional law. What do we need that for? Every official agency in every state finds itself in the situation where it is confronted with several laws of its own state which appear to contradict one another, or in fact do contradict one another, which, however, all claim validity. I need not tell you jurists that since the days of Roman law everywhere norms have developed concerning the elimination of such conditions; where state laws have varying status, further norms of collision have been constituted. If a state would have a general norm under which international law takes precedence over all domestic law, that would be the greatest safeguard which is possible at all, that the law of the country is handled in accordance with international law. I do not know whether there is such a state. The German Reich at any rate was not one of those states. I think with this background I can now answer your question.

The relation between international law and the law of the Reich has been regulated in the Weimar constitution in article 4 and article 45, paragraph 3.* There have been many arguments about article 4, at the time when the national [Constituent] assembly was sitting [in 1919]. After many arguments and after sufficient attention had been paid to article 45, paragraph 3, eventually the following legal situation evolved. As far as the German Reich, by treaty, enters into obligations under international law, in such spheres of life which are subject to the legislative authority of the Reichstag, the President of the Reich may not ratify the treaty for Germany before the Reichstag has agreed by law. That is a transformation of a special nature, and anticipated transformation, for if the treaty is concluded, because the other partners ratify it also, then, at the moment the treaty becomes valid, the special recasting has already been effected. For the rest, all other international law, as far as it is generally recognized, but also acknowledged by Germany, is generally speaking recast by article 4. Both ways of recasting gave international law the status of an ordinary law of the Reich. Yesterday I had opportunity—concerning the question as to the moral limits of rule—to point out that under the Weimar constitution the courts were not authorized to examine a law as for its validity under international law, and certainly not the administrative authorities. Under Hitler that attitude was not changed. The general method of transformation of article 4 was kept on, and the specific one

* Article 4 is quoted in footnote immediately preceding.

Article 45, paragraph 3, reads: "Alliances and treaties with foreign states which refer to matters in which the Reich has legislative power require the consent of the Reichstag."

was needed even less frequently because the approval of the Reichstag was no longer required for the conclusion of treaties. Hitler could conclude every treaty under international law himself. As soon as the treaty had been concluded, as soon as it had come into force, it had already been recast, for Hitler's ratification was, from the domestic point of view, a Fuehrer Order.

Q. Professor, to supplement your explanations, may I ask you to read out to the Tribunal article 4 and also article 45, paragraph 3, so that the passages you mentioned become quite clear.

A. Article 4 says: "The generally recognized rules of international law are valid as binding constituent parts of the law of the German Reich law." Article 45 says: "Alliances and treaties with foreign states which refer to matters in which the Reich has legislative power require the consent of the Reichstag."

Q. Another supplementary question, Professor. You told us that treaties under international law were concluded by Hitler alone. I would like to ask you to explain to us how the question can be solved concerning the person who was subject to Hitler's order if there were contradictions?

A. I believe I understand your question to mean that among the laws or ordinances which were valid in Germany at the time, there were some which were contradictory to that which Hitler had decreed concerning the treaty. That is not a particular problem. I have already pointed out that that problem was merely the problem of collision, and if Hitler, in contradiction to the treaty he had concluded later on, issued an order in a general way or in a specific case contradicting the former order, the later order, if the contents were the same, was to apply and the old maxim applied—*lex posterior derogat priori*—that was so concerning the relations of the laws under the Weimar constitution, and it was the same under Hitler; but I think it will be necessary for me to say a little more on that subject. It can happen, and it does happen again and again, that a state knowingly, in its legislation, gets itself involved in a contradiction with international law. The last will of the state is decisive for the official agencies. In that case, the nation until that collision has been eliminated, lives under constitutional law which contradicts international law. The settlement, which is bound to come, is brought about by international law by the state being regarded as one which has committed an offense under international law, and entails and holds that responsibility to the provisions of international law, and as quickly as possible that inconsistency has to be removed by later legislation. As to whether further consequences arise, that we need not discuss here. In the case of every state the following applies. For

the official agencies which have to apply the law to a certain specific case, there are frequently, if one proceeds logically, several laws—there are after all many situations in life which extend beyond the frontiers from the human point of view or from the material point of view.

One can bear in mind that instead of the state's own law or side by side with the law of that state, foreign law can be applied, or it may be a case of church law possibly having to be applied. The question as to the application of international law, therefore, belongs to a wider scope of the great problem which is called the problem of the norm concerning the application of law, or in other words in every legal system there is, by the side of the system which regulates the relations between human beings as such, a system which instructs the authorities as to which law they are to apply in each case. I do not know of any state nor do I know what law could be possible which does not proceed in this way. The officials have to apply the law of the state which is in force at the time except if the legislator admits or orders another solution. Consequently, the provision of the status of recast international law is, therefore, only one possibility of the various possibilities of applying international law.

Q. Professor Jahrreiss, for the purpose of this trial we are interested in establishing whether an official himself was confronted with the question that international law deviated from the state law. If he himself was confronted with that situation, I want to ask you in what direction did he have the choice, or did he have any choice at all? Was he restricted to one norm according to the general view or to the view of the Reich constitution as far as it was still in force under the Hitler regime? Was he bound by that?

A. First of all, I have to explain the underlying facts of your question. Apparently you have in mind the case where a law or an individual decision exists which, in the view of the official, is inconsistent with international law.

Q. Inconsistent with international law, but which unilaterally is the law of his country, and this official now is confronted with the question to what norm is he to adhere?

A. I have already said that under the Weimar system which on that point was not changed under the Hitler regime the official had to apply the recast international law as an ordinary Reich law, and now he had to solve that problem of collision which you have mentioned, in the same way in which he solved the problem of collision between two ordinary Reich laws which were contradicting each other. In effect if the law under Hitler had been

issued and afterwards the Reich assumed a new obligation under international law which was recast, then that had to be applied and not the former law, and vice versa. Have I answered your question?

Q. Yes, but there was one more possibility for the imaginary official. If the law of a country perhaps intentionally deviated from international law, what norm did the official then have to apply?

A. I have already said that in the Weimar era already the moral background or the background of international law of a legislative act was removed from the scrutiny of the official and even removed from the scrutiny of the judge and of the Reich Supreme Court. The background of international law could not even be examined by the Staatsgerichtshof, [supreme constitutional court]. The supreme constitutional court was only allowed to examine whether it was constitutional, but it was not allowed to examine it from the point of view of international law. To express it differently, whether the law had been passed by the State in such a way that it was inconsistent with international law on purpose or not, that could not play any part at all; and that was the legal state of affairs, regrettable as it may be.

Q. For the purpose of our trial we are particularly interested in the norm of the Hague Convention of Land Warfare. May I ask you to explain to the Tribunal with special reference to whether the principles of transformation which you have explained apply to the Hague Convention of Land Warfare as well?

A. Counsel, with that question you have approached a particularly difficult problem. You know that the validity of the Hague Convention of Land Warfare also concerning the clause of general participation has very often been doubted. The Hague Convention of Land Warfare with us was recast, and specifically—that cannot be doubted in my view—most of what is said in the Hague Convention should be considered as recast pursuant to article 4 of the constitution even if a specific recasting did not occur. That follows from the history preceding the Hague Convention of Land Warfare. When the parties to the treaty, among them the German Reich, in 1907 signed the "Convention Concerning Land Warfare," for the most part they only laid down in law such points which in any case were already international laws by customs and, therefore, assured. It would not always be easy to say whether a provision of the Hague Convention belongs to that group in part or not or as a whole. Have I answered your question correctly?

Q. I would like you to refer to article 1 of the Hague Convention and to read it to the Tribunal.

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A. Yes. You mean article 1 of the Convention, or the appendix? Article 1 of the Convention you mean. Very often when one talks of the Hague Convention of Land Warfare, one means the appendix. Article 1 is a particularly concise example for the fact that the states were conscious of the character of international law such as I described, because it places the states under an obligation to give instructions to their land armies which are in accordance with the enclosed Hague Convention. As to the methods they employ, they are left open to the various states. For example, the German Reich could without mentioning the Hague Convention have passed a German law as to the behavior of the German army in wartime. It was technically easier to give the order to pay attention to the Hague Convention in the event of war. And thus, the points laid down in the treaty as international law, and which in the proper meaning do not affect the individual human being but only bind the state as a whole, were reinterpreted by the legislative authority to mean regulations applying to the conduct of the individual.

Q. Thank you, that answers the question.

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Q. Professor, I had the opportunity to show you the book of Heinrich Triepel, International Law and State Law. I would like to submit to you pages 153 and 154 and ask you to read that part to the Tribunal and to explain whether that is in accordance with your opinion.

A. I have in front of me the book of Heinrich Triepel, International Law and State Law of 1899. This book—

Q. Excuse me, Professor. Is it the first edition? I have just been asked if there are several editions.

A. No, there are not several. It is the first edition. This book, at the time, was a sensational book for the science of international law in the whole world. It was the first book which systematically treated the questions which I am supposed to supply information about here today. And what Heinrich Triepel laid down at that time basically has been recognized in the entire science of international law and only after the First World War a certain lack of security in theory, not in practice, developed because the so-called "Vienna theory of law" [Wiener Rechtsschule] founded by Hans Kelsen, who was my predecessor in Cologne, and who is now teaching in the United States, with its so-called "pure theory of law" or "norm logic" conceived the things logically. This did not affect the practice of international law at all, and thus the sentence is applicable which Triepel formulated on page 153 of this book,

"Judges and subjects are under the obligation to apply the law of the state, even if contrary to international law, and to follow it. It is not up to them, but up to the government to take into consideration the differences and the divergencies with international law which may arise out of this."

DR. SCHILF: May it please the Tribunal, I have concluded my questions to Professor Jahrreiss.

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CROSS-EXAMINATION

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MR. LAFOLLETTE: * * * I do want to ask you, Dr. Jahrreiss, a hypothetical question. You may not agree with the hypothesis which I hypothesize or the implications perhaps inherent in them, but just for my own purpose and for orderly procedure I ask you to consider my question and answer it on the basis of the facts which I hypothesize, purely. Let us assume that I was subject to the complete power of an individual we will call "A" to force me to obey his orders implicitly; and, under those circumstances, I saw "A" procuring a strong rope, strong enough to bind a man completely and securely. Secondly, that I saw him preparing a strong wooden frame upon the ground, with iron rings through which he could pass the rope; and, so placed, that they could bind the legs and arms of a man securely. Third—a wooden block so shaped that a man's neck could be placed on it with his head extended beyond it. And four, that I saw this man "A" sharpening an axe large enough and strong enough to cut through the neck of a man. And suppose at this same time I also saw, standing always in view, from one to six men, each of whom I know that this man "A" has a violent hatred for and has threatened to kill; and each of whom I know that this man "A" has the power to capture if he chooses. Now then, let us assume that this man "A" captures one or more of these men that he hates, and that I know he hates; and binds this man with the rope that I saw him prepare, upon the frame that I saw him build; and places his neck on the block that I saw him prepare; and that then "A" hands me the axe which I saw him sharpen and orders me to cut off the head of this captured, bound man. Would you say that under those circumstances I would be guilty or not guilty of killing the man whose head I severed at the direct order of "A" who had the full power to order me to do so.

DR. JAHRREISS: I understand it this way—that guilty or not guilty is to be considered as guilt under criminal laws.

Q. On the assumed facts, yes.

A. I just want to ask you a question. Do you mean it as a legal question or as a question of morality?

Q. As a question of law.

A. Of law, yes. And according to what criminal law, and in what state?

Q. You can name the state; I don't care.

A. Well, is that supposed to be a question in Utopia?

Q. Let's put it in Germany.

A. In Germany?

Q. In Germany, yes, after 1933.

A. Yes, all right. Here then, we would be faced with terrible problems with which all of us since last year have been torturing ourselves so terribly, and I confess that in spite of having thought about it a great deal, that I have not yet found my way out of the dilemma into which we have been brought. Perhaps I can answer this hypothetical question by saying, by stating first, the points of view which in a conflicting manner make the answer more difficult. Perhaps first of all I should say, so that this should be clear, Mr. Prosecutor, how I, myself would behave.—I don't know. No matter how horrible the whole thing is, I don't believe that I—well, the Charter of the International Military Tribunal anticipates that an appeal to higher orders should not be admissible. It is not my task to criticize those regulations. However, perhaps I may be allowed to say that this regulation, if it should really be valid law in any state whatsoever, would have very dangerous consequences for order in general. One of the four judges of the IMT, the French judge, Donnedieu De Vabres, in a lecture which he gave this last April expressly stated that this regulation brings with it many difficulties for the idea of the discipline imposed by the state. I have the text of his lecture here. It is a lecture which Professor Donnedieu De Vabres gave before the Association des etudes, Internationales Criminologiques. May I quote a short passage from it? May I read it in French?

THE INTERPRETER: Yes, you may.

WITNESS JAHRREISS: "Since the statute was interpreted this way under the rules imposed by the IMT, it has in a sense of individualism gone beyond regulations of international law and domestic law, this regulation is open to the objection that it will endanger the necessary discipline for the preservation of the state. Such a regulation can be applied in the future only with prudence and circumspection." I am quoting this here only in

order to demonstrate that if any rules exist at all, a certain harshness is absolutely necessary, unavoidably necessary. I always told my young students who started out on a study of law that they would have to devote themselves to perhaps the most bitter fact in life of man, and that is the rule, because by nature man hates the rulership, at least if he is subjected to it, but if this is the case every state basically has to require that its laws are executed, even if the person concerned, for moral or religious reasons, or other reasons, is of a different opinion. On the other hand, Mr. LaFollette, every state knows that there is some limitation somewhere. For example, the German Reich had a military penal law. In it there was the quoted article 47. In the jurisdiction of the Reich court, however, this paragraph was applied more and more in a restricting sense because discipline had to be above all.

Now, Mr. Prosecutor, before the IMT, I, in the expert opinion which I gave, which you were kind enough to quote here, stated expressly and emphatically, I believe, what the limit of humaneness or humanity is, but at the same time I pointed out that this limit is frequently not sharply drawn; and I believe, and this comes closer to your question, that perhaps after all the problem with which we are concerned here cannot quite be done justice to, if a case is described quite as drastic as you just said.

Last year during the first 4 months of the trial I experienced it, and those were the most difficult times of my entire life. I experienced and saw what terrible things happened under Hitler's regime, and I have no way to express my horror and to describe this sufficiently in any language, but I believe that you will agree with me if I say that those are occurrences which are outside of legal discussion entirely, for, Mr. Prosecutor, even about injustice one can, if one is exact, speak with legal reasons only in cases where—excuse me—the injustice is within normal limits.

I myself was a criminal judge. One single murder frequently, in the court of assize, occupied our time for 2 to 3 weeks, and it was a terrible thing. Two murders by one person—that was horrifying. If someone had eight to ten murders on his conscience, then he was described as a mass murderer in the press of Europe, and people asked themselves whether this was something that could be handled by means of the penal code at all.

When, last year, in the courtroom of the big trial I listened to the witness, Hoess, of Auschwitz, when he answered the question of the prosecutor as to how many people he had killed, if I remember correctly, he answered he didn't remember exactly whether two and a half or three million. At that time it was quite obvious to me that neither positively nor negatively this had anything to do anymore with legal considerations because, Mr. Prosecutor,

no matter what a state regulates concerning the question of review of a law the state has to think of normal conditions. These occurrences and matters cannot be measured by any order of the world at all. Therefore, I believe that these things that happened in Germany behind a complicated system of secrecy, a system of mutual delimitation, and if then one adds the pressure of conscience of millions of people who felt themselves hemmed in between patriotism and hatred of the system, then the question which you put to me attains a very bitter human weight, and I can only say I don't know any way out.

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PRESIDING JUDGE BRAND: In order to better understand your views which you have ably expressed, I would like to ask you a few questions. I understand your view to be that judges were obliged to obey the law of their State of Germany even though in doing so they violated a principle of international law. That is a fair brief statement, is it not, of the matter?

WITNESS JAHRREISS: Yes. During the Weimar republic this was already uncontestedly applicable, and with the permission of the Tribunal, I read the commentary of Anschuetz to article 102.

Q. And you would apply the same principle after 1933, would you not?

A. After 1933? There was much less the question whether this was different than before.

Q. What court or tribunal ordinarily enforced the rule that judges must obey the law of their State under such circumstances? I assume the answer is obvious.

A. Excuse me. I didn't understand your question, sir.

Q. What tribunal ordinarily enforced against the judges or upon the judges this obligation to obey the law of the State even though they in doing so, violated international law?

A. I never heard that a court violated this principle so that there was no need to force the judges to conform to it. Mr. President, I never heard that a German court did not apply a Reich law because in the opinion of the court it was contrary to international law. I never heard of such a case. You see, it was entirely uncontested. The court, just in such a case, couldn't do anything but through official channels call the attention of the government to this contradiction so that the government, in accordance with its obligation under international law, would see to it that the laws were changed. Let us assume the case that the Reich Supreme Court, for example, in deciding a case had come to the conclusion

that a German Reich law was contrary to an obligation of the Reich under international law. Then the Reich Supreme Court was not able to say—the indictment is refused because the Reich law which supports the indictment is contrary to international law. The Reich Supreme Court could do nothing but either to postpone the trial and to report to the government so that perhaps changes would be made in time, but it was not even obliged to do that. It was obliged only if it did make a decision to decide in accordance with national law if it was contrary to the international law. That was the legal situation during the Weimar republic.

Q. That answers my question. * * * The Reich Supreme Court would in proper cases lay down the rule that the lower court judge should enforce the German law even though it violated some principle of international law for which Germany as a state might be diplomatically held responsible, is that true?

A. No, that is not quite correct. I said that the Reich Supreme Court, just the same as the other German courts, in regard to this question, did not have any doubts at all, and therefore, it did not make any rules with which the lower courts had to comply. That was not necessary at all.

Q. Then the lower courts themselves recognized this rule of which you speak that they must enforce the law of the State even though it violates a principle of international law?

A. Yes, and they only had to look at the Anschuetz commentary; that said so expressly.

Q. Well, at least prior to 1918, was there any tribunal other than the court of the state which could punish the public officer or a judge, for making a decision which was contrary to international law, if it was made in compliance with the law of the state?

A. No.

Q. If the principle enunciated among other bodies by the first tribunal, the IMT Tribunal, namely, the principle of the penal responsibility of an individual officer for violations of international law, should be applied, then you have, do you not, a modification of your principle which you have stated with reference to the necessity that judges must obey the law of the state. In other words, if that principle of penal responsibility of the individual has become a part of international law, then the anomalous situation would arise where the officer, perhaps the judge, may have been required by his state law to make a decision, but may, nevertheless, be responsible if any tribunal has jurisdiction to try him, for a decision contrary to international law. Isn't that true?

A. If I understood your question correctly, Your Honor, the general validity of the principles of the charter as international law could, in regard to judges of those states which require that their officials apply the law of the state as the final will, bring about tragic conflicts of conscience, for which, in my opinion, there is no indubitable legal solution at all. But, Mr. President, I do not know whether I quite understand your question correctly.

Q. I do not think I will attempt to repeat it further. I understood your position. It is true, is it not, that there was no tribunal in Germany, perhaps anywhere else, which had statutory jurisdiction to apply international law in a penal proceeding against a public officer of the state who had complied with the state law?

A. Yes, that is correct.

Q. Then, if there were a tribunal that had jurisdiction to apply that law, might it not perhaps, arrive at a different decision, legally, from the decision which this court of the state itself, would arrive at; might not an international tribunal, having jurisdiction to pass upon the question, arrive at a different answer as to criminality of an individual officer who had violated international law, but had not violated the law of the state?

A. Yes, that would be so, but, Mr. President, if I may say so, that is the very thing which I call the tragic situation of the official concerned.

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E. General Development of the Administration of Justice under Hitler

EXTRACTS FROM THE TESTIMONY OF DEFENDANT SCHLEGELBERGER*

DR. KUBUSCHOK (counsel for defendant Schlegelberger): Witness, what is your career, your professional career in particular?

DEFENDANT SCHLEGELBERGER: I was born in 1875. After I had finished my legal studies and had passed my doctor's examination, I became judge in the first and second instance. In 1904 I became judge of the Lyck District Court in East Prussia. In 1909 I became assistant at the Prussian Court of Appeals, Kammergericht. In 1914 I became Kammergerichtsrat. The Kammergericht is the Court of Appeals of Berlin, the highest court in Prussia.

*Other extracts from the testimony of defendant Schlegelberger appear below in sections V B, V C 2 a, V D 2, V D 3, and V E. His entire testimony is recorded in the mimeographed transcript (26, 27, 30 June, 1 July 1947, pp. 4367–4568).

At the Kammergericht, I worked in several senates: in the civil senate which dealt with the ordinary cases of civil law; in the commercial senate; in the patent senate, and in the senate for voluntary jurisdiction. During that period I wrote my first scientific works in that field which dealt with the experiences I have gained in practice. In 1918, that is to say at the end of the First World War, I became assistant at the then Reich Justice Office which later on became the Reich Ministry of Justice. That agency had very little to do with administrative tasks. At that time, it only dealt with one court. It was the highest court, in fact the Reich Supreme Court in Leipzig. Apart from that, the Reich Justice Office only dealt with legislative tasks.

As an assistant, I was put in charge of legislative preparatory work in the field of commercial and economic law, and I continued to do that work when after a few months I became Geheimer Regierungsrat and Vortragsrat at the Reich Justice Office. When in 1927 I became ministerial director, I still continued to deal with the same tasks. In 1931, the only Under Secretary of the Reich Justice Office, Dr. Joel, an old gentleman—not to be confused with the defendant Joel—was appointed minister, and I took his position as Under Secretary. I retained that position when in 1932 the Bruening cabinet was replaced by the Papen cabinet, and when Guertner, who had previously been Minister of Justice of Bavaria became Reich Minister of Justice. Reich Minister Joel, as well as Reich Minister Guertner at that time dealt with penal matters themselves. I merely dealt with matters of civil law.

Only when in 1934 the Prussian Ministry of Justice was merged with the Reich Ministry of Justice, and now a vast number of administrative tasks were transferred to the Reich Ministry of Justice, then a new Under Secretary position was created, and that for penal matters. The Under Secretary of the former Prussian Ministry, Under Secretary Freisler, obtained that post. That division of tasks in civil and penal matters remained in force when on 27 January 1941 quite suddenly Reich Minister of Justice Guertner died, and I, as the most senior Under Secretary, was placed in charge of the conduct of affairs. I retained my civil cases and Freisler dealt with penal matters. I was placed in charge of the conduct of affairs of the ministry as the senior Under Secretary. I was never appointed Deputy Minister of Justice, and I never had myself called so, because that was, of course, impossible. I only was in charge of the conduct of affairs.

This picture, that is to say, that I merely acted as a representative, but that I actually dealt with the same work which I had dealt with before, that became also outwardly apparent. On purpose, I never worked in the Minister's office; I never moved into

the Minister's home; and I drew the salary of an Under Secretary, not that of a Minister. On 20 August 1942, at my own request, I resigned.

Q. You have described your work as Under Secretary, and you have said that you worked largely in the sphere of civil law. Which were the most important tasks with which you dealt?

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A. In accordance with the particular interest which I had always had in economic matters, and in accordance with the work I had done previously, I was allotted the task of cooperating during two particularly fateful years of the German Reich in the maintenance of support of the economic life of the country. It was the stabilization and maintenance of currency: that was in 1923 because of, and until the end of, the inflation, and later on in 1933 on the occasion of the economic collapse. The inflation period was followed by the establishment of the Rentenmark currency, a new currency which replaced the paper mark. The inflation was also followed by the ordinance at which I worked, under which businessmen had to draw up a balance in gold marks, and it was also followed by the tremendous task of remonetization legislation. The collapse of the banks necessitated many discussions and consultations, and ordinances as for instance concerning rates of interest. Later, I worked on the new law concerning drafts and checks, and I may quote as my special work the two big economic laws promulgated in 1937, the law on shares and the law on patents. When in 1942 I resigned from my office, a new law on companies with limited liability was just about to be issued. At that time the general reform of civil law had been started, not immediately by way of a new codification, but by individual laws. When I left my office, the marriage law and the testament law were completed.

Q. Apart from your professional work as a judge, and later on as an official in the Ministry, did you ever engage in any scientific research work?

A. I can wholeheartedly affirm that question. Immediately after I took my state examination, I started on my first big project, and the first book of mine, which appeared in 1904, was a treatise on the law of retention; it was a work of historical nature. At that time I intended to take on a university career, but nothing came of that, because my home university, Koenigsberg, did not create a new chair for commercial and economic law. But I could not give up my literary work, and ever since then that has occupied me consistently side by side with my official work. The special

fields with which I dealt were economic law and voluntary jurisdiction, that is to say the law concerning the procedure in matters concerning family, hereditary, commercial law and document regulations. In 1923 I became Honorary Professor at the University of Berlin. Naturally, I followed that call while retaining my official position, and I held lectures at the University of Berlin until the outbreak of the war. In 1925 the University of Koenigsberg conferred upon me an honorary doctor's degree of political science.

Q. Did you also deal with foreign law?

A. Yes, foreign law, too, has occupied me intensively for a long time. Perhaps I may first mention one of my latest works, a large comparative encyclopedia, the "Manual of Comparative Civil and Commercial Law." That book summarizes reports on civil and commercial law of all countries, written mostly by national experts, and I may say the law of the United States is dealt with by Professor Atkinson of Kansas University. This work which necessitated a tremendous amount of correspondence, brought me in touch with eminent jurists all over the world. I have deepened those contacts since 1929, because I went abroad to hold lectures, and those trips were above all to give me an opportunity to observe the effect of the law, at least in some countries, actually on the spot. I did succeed in doing so in Argentina; in Chile, where I dealt especially with banking laws, I wrote an essay on that subject; and in Brazil where I became an honorary member of the Brazilian Lawyers' Association. I held lectures in Budapest, Madrid, Warsaw, Stockholm, Copenhagen. I should like to add that I am coeditor of the periodical "Foreign and International Private Law", a publication of the Kaiser-Wilhelm Association; and, also coeditor of a publication on Scandinavian law.*

* * * * * * *

Q. Witness, were you active in party politics?

A. No, I never joined any party; I always stayed away from politics. My life was devoted to the practical administration of justice, and to legal research. If looking back now, I should say which one of parties of the German people I fitted into, I would call myself as belonging to the right one of the progressive, conservative direction which was promoted by the German People's Party, [Deutsche Volkspartei] and which was also represented by the German Nationalist Party [Deutsch-Nationale Volkspartei].

* The portions of the record omitted here pertain to such matters as the order of trial and the offers of documents. At this point no testimony has been omitted.

Q. What was your attitude towards the NSDAP and national socialism?

A. In 1933 I was approached on the subject of joining the NSDAP; I refused. My reason was, first the fact that I could not subscribe to the program of the NSDAP. Furthermore, another reason was my view that Under Secretary of justice should remain neutral even on the surface and, therefore, must not be obliged to any parties. I was never a National Socialist. It is obvious that a party program, in its manifold aspects, has many a point which one can adopt; for example, the program's aim of bridging class differences, that is to say, the creation of a true national community; that point I welcomed heartily, but, concerning the program of the NSDAP as a whole above all, the way in which it was to be put into effect, that was far removed from my own ideas. My own conservative attitude as a human being and as a jurist accounted for that. It came as a great surprise to me when, on 30 January 1938, the Fuehrer's Chancellery informed me in a letter, signed by Bouhler, that Hitler had ordered that I was to join and be accepted by the NSDAP. I said that that came as a great surprise to me. I myself, like other Under Secretaries who had also come from the middle classes, had never heard of that order, and it was impossible to refuse because that would not merely have meant I would have given battle not only to the Party, but the State itself. But I never departed from that view. The membership which was ordered against my will and forced upon me, I never made use of. I never attended a Party conference or meeting. Naturally, I did not hold any office in the Party either.

Perhaps the fact that I never changed my attitude is also demonstrated by the fact that neither my wife nor my sons ever belonged to the Party. My social contacts, too, as far as they were not conditioned by official affairs, moved almost exclusively within the circles of non-Party members.

Q. The Hitler order by which Schlegelberger's membership in the Party was decreed will be submitted by me as Schlegelberger Document 34, Schlegelberger Exhibit 92,* as soon as the document books shall have been completed.

Witness, what effect did that attitude of yours have on your official position?

A. I always saw to it that Party members and Party functionaries were treated just like every other citizen. That played a part particularly in personnel matters. I only appointed that person to an office who, in my view, was properly qualified; and I refused to reward Party stars by appointing them to an office.

* Reproduced below in section VC1a.

On the other hand, the attitude of the Party toward the Ministry and myself—and I shall have to come back to that later on—made great difficulties and brought about many inner conflicts.

At this moment I should like to point out the case to which the prosecution referred concerning notaries and their hostile attitude to the Party. They demonstrated it so obviously that when I came to hear of it in my official capacity I could not form a proper opinion on it. If I had tried to suppress those cases it would have been unavoidable that the Party would interfere, which definitely would have claimed that the notaries had violated their duty of allegiance toward the State and the head of the State. Perhaps the Party would have welcomed it, because such opposition would have been a welcome cause to discredit the administration of justice and to jeopardize my personnel policy, on which depended the fate of many officials.

DR. KUBUSCHOK: The witness has referred to the case of the notaries which, under Document NG–901, Prosecution Exhibit 436,[1] was submitted by the prosecution.

PRESIDING JUDGE BRAND: What was the exhibit number?

DR. KUBUSCHOK: Exhibit 436.

The prosecution refers to your lecture held at Rostock University in 1936.[2] That lecture is compared as to its aim with a speech by Reich Jurist Leader Frank, and the prosecution sees in it an avowal of national socialism. Please give us some explanations about that speech.

DEFENDANT SCHLEGELBERGER: Counsel, you have pointed out that that speech was made in 1936. Before I discuss the details about that speech I should like to say a few words as to how, at that time, one was able at all to discuss political questions in public. It wasn't that way that, when National Socialist quarters laid down program points, one was allowed to make a frontal attack. I ignore altogether the point of personal danger that might have arisen for an opponent. I would not have fought shy of that danger, because a person who held the office which I held was in daily danger. However, such a frontal attack would have resulted in the opposite of what I wanted to achieve, that is an increase of the opposition against reasonableness.

One had to look for opportunities which one could use, and for example, the locality had something to do with that. I chose the university for the place of my speech, and that had a decisive influence on my audience. I had to see to it that the National

[1] Reproduced below in section V C 1 a.

[2] Opening statement for the prosecution, section III A, above.

Socialist ideas which I wished to attack were beaten with their own weapons.

The actual reason for my speech was the fact that Freisler again and again, before the public, pointed out that the Party program was enforceable like law and was at least the framework of the law. Therefore, one was obliged to carry out that program immediately and completely.

I do not think I need to enter into any details here as to what it would have meant if that doctrine had been recognized. In the practice of the judges it would have meant separation from all legal provisions; the Party program could have been applied at random everywhere. It would, so to speak, have been the roof law under the protection of which, according to the wishes of those extreme National Socialists, legal life would have developed.

It was my aim to point out that such a construction would not be necessary at all, that the existing laws would also do justice to the fact that Germany was now a state under National Socialist government. I must point out that the law adapts itself automatically to changed conditions of life and ideologies, and from that the standard and the speed of legal changes are decided.

I intended to put in the place of the revolutionary changes of law, advocated by Freisler, an evolutionary development of law. I based myself on the principle of the interior change of the legal system, a principle which, for the first time, I propounded already in 1929 in one of my works where I also elucidated that principle. That was at a time when one could really not say that I might have based my arguments on the National Socialist thought. The compromise laws, which had already been promulgated, I mentioned intentionally without evaluating them. That was how I had argued against that thesis, and I believe had refuted it. I also used the opportunity to give my views concerning other important topical questions as well. I turned against the interference with the carrying out of sentences which I considered inadmissible. Due to previous incidents, I warned the judges against currying favor with high Party officers. I appealed to the pride of the judges and the consciousness of their independence. I also found reason to turn against it that some jurists in an absolutely inconsiderate manner, placed their own egotistic endeavors in the foreground, and did not show any understanding whatsoever for the sound idea of a true people's community.

Generally, I used a tactic which I had employed repeatedly: I committed the high Party leaders to adhere to many of their good words which they had probably spoken without reflection. I reminded them that Hitler during his first speech before the Reichstag had declared the independence of the judges as neces-

sary. I pointed out that Frank* had mentioned the internal value of justice; and, that Goering, in public, had spoken against interference with the administration of justice.

Q. What was your relationship with Hitler?

A. I believe that one must distinguish between the personal and the material evaluation, and at the same time one must connect the two. I believe that Hitler, concerning my own person, had a certain measure of respect. I believe he saw in me the experienced civil servant, who was without ambitions, and who devoted himself to work and research. Concerning my sphere of work, civil law, he had not the slightest interest in it. The fact that I was unpolitical, aroused a certain amount of distrust in him; that, I suppose, explains the fact that in contrast to civil servants of the same rank, I was never offered an honorary position either in the SS or the SA. That I, in contrast to other high civil servants of the same rank, was not awarded the Golden Party Badge; and that he restricted my connection with the Party to the absolute minimum, again explains in particular, I believe, the positively brutal attack on me in the well-known Reichstag speech of 26 April 1942. The fact that I was placed in charge of affairs after the death of Guertner certainly was not a demonstration of confidence. This is how I would like to put it: It was just a makeshift solution. At that time Hitler could not yet make up his mind to appoint a new Minister of Justice. What played a certain part, perhaps, was that the chief candidate for the office, Frank, was at that time Governor General of the Government General and was not available. Thus, there was no way out, but to let the Ministry put the Under Secretary, who had seniority in the office, in charge of the Ministry. Hitler's distrust, as far as I was concerned, was altogether justified from an objective point of view. I may say, and I wish to place special emphasis on this, that I was never fooled or influenced by Hitler's demoniacal qualities, and I saved my own conscience, as far as he was concerned. For myself, Hitler was the declared opponent, in fact, the person who held the administration of justice in contempt. That conviction naturally placed me in a clear position. As far as it did not jeopardize my goal, I upheld my different opinion quite openly toward Hitler. That was already the state of affairs at the time of Guertner. I may say that all my life, as long as I held office, I was out to fight for justice and against arbitrariness. In the avowal of justice there was no difference between Guertner and myself. Guertner was the recognized protector of justice, but

* Hans Frank, former head of the National Socialist Legal Workers' Association, and of the German Academy of Law, Reich Minister and Governor General of the Government General (Poland).

he was not a fighter. If in the development, which was slow to begin with and later became faster, he gave up his opposition in some respects, that certainly is not due to a lack of the honest will to uphold justice. Frequently he came to me for advice and assistance. But that time was overshadowed by a continuous struggle with the Reich Jurists' Leader [Reichsjustizfuehrer] Frank. In continuous attacks, Frank tried from his position as Reich legal office leader to achieve his final goal which was to get the office of Minister of Justice and then to change the Ministry and make it into a National Socialist Ministry. That struggle can only be understood if one knew who Frank was. Frank was the legal adviser and in difficult times the defense counsel of Hitler, and, therefore, he was particularly close to him. Before 1933 even, he had been the leader and propagandist of National Socialist legal ideas. If one bears that in mind, then one sees already on the one hand, the Ministry with its expert officials, the official activities; on the other hand, the combination of National Socialist ideas on law with the aim of overrunning the Ministry. Frank recognized Guertner's qualities; therefore, he tried by the tactics of continuously wearing him down, to achieve his aim. If one knows National Socialist methods, one knows how stubborn and tenacious such a battle was in the methods with which it was waged, and that struggle had reached its climax when Guertner died, and I took over the conduct of affairs.

Q. What was the situation at that time?

A. One gets a true idea of that situation if one forms a picture in one's mind of those three groups or parties which were fighting against the administration of justice with the aim of conquering the administration of justice in order to destroy it. I call these fighting groups by the names of their leaders, Himmler, Bormann, Goebbels; and, in so doing I would like to emphasize that during the whole time I only talked once to each of those three men.

Himmler proceeded by different roads; the undermining of confidence in the legal administration of justice and the conquering of its competence. Attacks were being made continuously on the administration of justice in the periodical of the SS which had already been mentioned in this trial, *Das Schwarze Korps* [The Black Corps]. They were not content with criticizing sentences, but proceeded to defame in public the judges who had passed the sentences. Himmler collected material by sending secret observers to the court sessions. The officials of the Ministry were watched and spied upon. Anonymous secret reports, in which the Ministry was attacked, were sent out. Persons who had been acquitted by court sentences were taken into police custody. Others, who had

been sentenced to a term in prison, were seized by the police, and as the administration of justice heard later, many of those persons were killed by shooting. All these things were intended and designed to undermine the confidence in the administration of justice. The administration of justice was to be discredited in public again and again as a backward and outmoded institution both as regards personnel and the subject matter. Himmler proceeded, I should like to say, with cynical frankness, on the basis of this propaganda. He deprived the Ministry of Justice of many fields of competence, and claimed for himself even many more fields of competence from the Ministry of Justice. He invoked the power of his position under Hitler and demanded that the competence for penal cases concerning Poles and Jews should be transferred to the police. His attempts to conquer the public prosecutor's offices for the police continued until the end. It is obvious that that aim, which was placed higher and higher, by necessity would lead to the thought of whether one would not have to show that by new and more stringent measures one was in a position to overcome the criticism which Himmler used as a pretense, and thereby take the wind out of his sails.

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Q. What part did Bormann play in that struggle against the administration of justice?

A. Bormann's work extended, above all, to personnel policy. Under the existing provisions, no ministry could appoint an official or promote him against the opposition of the Party Chancellery. The Reich Ministry of Justice always made its selection entirely on the basis of professional qualifications. Bormann, on the other hand, attached importance exclusively to the political opinion and the merits for the Party. If he objected to a suggestion made by the Ministry of Justice, and it was not possible to overcome the opposition, there was nothing else to be done at first, but to wait for a better situation perhaps, and leave the position unfilled. I experienced it myself that the position of a president of a district court of appeal remained vacant for that reason for more than a year. But it is obvious that the possibilities of such action had a certain limit. It was inadvisable to leave an unlimited number of positions vacant. And sometimes one was forced to appoint to the administration of justice personnel of only moderate qualifications, whereas persons who were better qualified were left out. Bormann knew very well how to promote Hitler's antipathy for the administration of justice on the one hand, and on the other hand how to exploit the naturally weak and unpolitical position of the Ministry under Hitler. Hitler continuously

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received newspaper clippings about court proceedings and sentences. Usually, the facts were distorted, or the reports, in any case, were always inadequate. Hitler was always approached on these subjects only at a moment when for some other reason he was disgruntled and his attention had to be distracted. Those reasons very often resulted from the war situation. For Bormann, the administration of justice was the lightning conductor. The Gauleiters cooperated with him. They collected the material with great glee by getting newspaper clippings from provincial newspapers. The Gauleiter of Munich [Gau Munich–Upper Bavaria], Wagner, excelled. Every opportunity was used to discredit the administration of justice before Hitler with entirely inadequate documentation. The key to that situation lies in a statement which Goering made to me at the time the administration of justice became centralized.[1] I will revert to that later. Therefore, our main endeavor had to be to inform Hitler at the earliest possible moment, and, of course, completely and honestly. I shall have an opportunity to explain how those attempts were constantly sabotaged by Bormann.

I should like to say now that our attempt was to prevent Hitler from changing sentences after they had been passed by suggesting that the presidents of the district court of appeal should confirm the sentences whereby merely a technical, nonpolitical review would have been carried out. That attempt was intentionally brought to naught by Bormann for he realized that thereby it would have been impossible for Hitler to reopen, on the initiative of Party, trials which had been concluded.

Q. The possibility which the witness mentioned concerning the possibility of Bormann's interference with every appointment of an official results from the decree of 10 July 1937 published in the Reichsgesetzblatt of 1937, page 769.[2] I shall submit that decree in a supplement to my document book.

Witness, concerning the evidence submitted by the prosecution, could you discuss a case which reveals such efforts being made by the Party?

A. I am able to do that. I refer to the statements made by the prosecution witness Ferber. He dealt with a case about which Guertner had frequently talked to me. That was the case against Heller in which the law against motor car traps [Gesetz uber die

[1] Prior to the Hitler regime, the administration of justice was largely in the hands of the German Laender (States). When Hitler abrogated the federal system, he also centralized the administration of justice.

[2] Decree of the Fuehrer and Reich Chancellor concerning Appointment of Civil Servants and Termination of Civil Service Status, (Schlegelberger 127, Schlegelberger Def. Ex. 123), is reproduced above in section IV B.

Autofallen-Stellung] had been applied. For the information of the Tribunal I may say that law was promulgated on 22 June 1938. It is based on the particular initiative of Hitler.

The facts of the case were as follows: Soon after that law had been promulgated, Heller and his mistress as the riders of a driving school [sic][1] had attacked a driver and had robbed his money. While the case was being tried before the Special Court in Nuernberg in the presence of Gauleiter Streicher, and Denzler, the Gau legal office leader, Hitler appeared in Nuernberg unexpectedly. A death sentence against Heller was expected for certain. Evidently Streicher and Denzler intended to submit to Hitler in his presence a proposal for a death sentence on the basis of this new law in which Hitler was particularly interested. A telephone call was put through to the Ministry of Justice to hear an opinion on the question of clemency. Opposition was encountered there on the part of the Referent. That Referent was Ministerialrat Westphal, who was indicted here.[2] He refused to give his opinion because the legal problem which had arisen in the Heller case was being dealt with in a case before the Reich Supreme Court which was still pending and was there to be submitted for the opinion of the Reich Supreme Court judges. At that point the Party representatives became busy. Denzler reported this information to Hitler implying that Guertner obviously was sabotaging the application of this law, which Hitler himself had promoted, and he boasted that that was enough to bring about Guertner's fall. At any rate, that interference on the part of the Party led to the fact that Hitler, following Denzler's report, ordered the death sentence to be executed without waiting for the Ministry of Justice to give its opinion.

In Berlin, Hitler took to account the Referent Westphal in great anger for sabotaging the law, and only because Guertner acted on behalf of his own staff and only with the greatest effort was it possible to save Westphal.

Q. The Heller case which has just been mentioned begins in the transcript, page 1324, English text.[3]

What part did Goebbels play in that struggle against the administration of justice?

A. Goebbels set the machinery of propaganda to work against the administration of justice. He deluded the public by telling

[1] According to the testimony of prosecution witness Ferber (Tr. p. 1325) Heller and his mistress were riders in a taxicab.

[2] The defendant Westphal committed suicide in Nuernberg jail after indictment but before the arraignment.

[3] Counsel refers to the testimony of the prosecution witness Karl Ferber, (31 March, 1, 3, 8 April 1947, pp. 1312–1315, 1319–1466, 1576–1630, 1665–1746). None of his testimony has been reproduced herein.

them that the people no longer had any confidence in the judiciary. That was a delusion for the opposite was true.

His propaganda machine not only made direct or camouflaged attacks against the judiciary in public and tried to lower their prestige, but he also tried by his art of dialectics in his speeches on the administration of justice quite deliberately to lead the judges astray and to put their consciences as judges to sleep. He coined the concept of the exigency of the State, and said that the courts, too, ought to make that their starting point. For a sentence, first of all expedience was decisive, and only later, perhaps, justice might also be considered.

Q. Goebbels' speech before the members of the People's Court is contained in Document NG–417, Prosecution Exhibit 23.[1]

What were the opportunities at the disposal of those power groups and which they made use of in their struggle against the administration of justice?

A. Himmler, Bormann, and Goebbels were the closest confidants of Hitler. They had access to him at any time. For him they represented the uncompromising incarnation of national socialism. He listened to them when they alleged national socialism was being endangered by the administration of justice. The entire apparatus of Party politics, police, and espionage was at their disposal. On the other hand, the Ministry of Justice was entirely isolated. Contact between the ministries, which would have strengthened its position, no longer existed.

Q. Here I would like to refer to the verdict of the IMT, English transcript, page 16963[2], and I would like to quote that passage briefly: "As to the first reason for our decision, it is to be observed that from the time that it can be said that a conspiracy to make aggressive war existed the Reich cabinet did not constitute a governing body, but was merely an aggregation of administrative officers subject to the absolute control of Hitler."

Witness, will you continue, please?

A. In view of that situation, what could a Ministry of Justice do which was directed merely by an Under-Secretary as acting Minister who, furthermore, was not a member of the Party and whose words, naturally, did not get the same hearing as those of a Minister; a man who, as the indictment said, never attained cabinet rank? According to an express instruction by Hitler, the chief only was told those things which were necessary for him to fulfill his own task. It is evident that that instruction made possible all kinds of limitations. * * *

(Recess)

[1] Reproduced below in Section V C 2 a.

[2] Trial of the Major War Criminals, *op. cit.*, volume I, page 275.

Q. Witness, before the recess we discussed the possibilities at the disposal of these power groups. Please, will you continue.

A. I ventured to point out that Hitler had given an explicit order that a chief of any office should only be instructed about that which he had to know in order to carry out his tasks. And that went very far. That situation is better explained by the fact that Minister Guertner, for instance, only found out about the euthanasia decree* when in reports on the situation rendered by the presidents of the district courts of appeal, a certain suspicion arose that this decree was carried out, and Guertner categorically demanded an elucidation. Whereas other ministers were authorized to listen to foreign broadcasts, that was prohibited to the Minister of Justice under threat of punishment. When I objected against this, I was told in reply that I should turn to the Ministry of Propaganda which would inform me about everything that happened.

I may point out that the opinion of the International Military Tribunal states that on account of the control over broadcasting and the press, and the propaganda machine, an independent judgment based on freedom of thought became an absolute impossibility. I, from my own experience, can only confirm that statement. A significant example is given by the following occurrence—an example showing the extent of that spy system. The Gauleiter of East Prussia had protested against the administration of justice in his district. In order to examine these complaints in 1940 or 1941—I do not know the date precisely any more—I traveled to Koenigsberg and found out that as for the reports by the president of the district court of appeal, the Gauleiter was informed about these reports sooner than I was. Based on warnings received from reliable sources, I had to expect that in the various offices of the municipality which I had to visit, special microphones had been installed for the occasion of my visit, and I could only talk with my personal Referent by driving out to the beach and picking out an isolated beach chair there in order to be able to talk to him without anybody listening to us and spying on us.

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* Three of the defendants in the Medical case were tried and convicted upon charges of participation in the euthanasia program. (See United States *vs.* Karl Brandt, et al., Vol. I, p. 794, and Vol. II, p. 171 ff., this series.) Concerning the time when Guertner received a copy of a Hitler notice regarding euthanasia, the prosecution in the Justice Case introduced the following document (630-PS, Pros. Ex. 383), the original of which was on the letterhead of "A. Hitler" and dated Berlin, 1 September 1939:

Reichsleiter Bouhler and Dr. Brandt, M.D. are charged with the responsibility of enlarging the authority of certain physicians to be designated by name in such a manner that persons who according to human judgment are incurable can, upon a most careful diagnosis of their condition of sickness, be accorded a mercy death.

[Signed] A. HITLER

[Handwritten note]

Given to me by Bouhler on 27 August 1940.

[Signed] DR. GUERTNER

III a 3/ 41g R s /

Q. The passage in the opinion of the International Military Tribunal, to which the witness referred, is contained in the English transcript on page 16,813.[1] Witness, the prosecution charges you with the fact that the Ministry of Justice was in an official contact with these offices which you have just mentioned. What can you say about this?

A. I believe that that contact is inherent in the structure of the State: the distribution of tasks to the various agencies. A cooperation with the police was certainly to a certain extent unavoidable. According to German law of criminal procedure, the prosecution is not in a position at all, without the cooperation of the police, to carry out the required investigations pending trial. If a denouncement has been received by the prosecution, the prosecution has to conduct the necessary investigation first of all. That the prosecution should do all that itself, considering the large number of things to be done, is quite impossible. The prosecution, therefore, has to turn to the local police and, for good reasons, in the German Judicature Act and the German Code for Penal Procedure, the police are designated as an auxiliary organ for the prosecution and directed to cooperate upon request of the prosecution.

Apart from the police, frequently the SD is mentioned in the trial. On the part of Hitler, the SD apart from its function within the Party had received important tasks, such as the delivery of information to various Reich agencies, and therefore even the court authorities had to refer to that source of information.

Q. In this connection, may I refer to Document NG–219, Prosecution Exhibit 42.[2] Please continue.

A. The position of the Party Chancellery, was regulated legally in a way that changes of personnel, that is to say, promotions and appointments could only take place with the cooperation on the part of the Party Chancellery. That I have already pointed out. Added to this was the fact that in 1942, the Chief of the Party Chancellery was given the position of a Reich Minister participating in legislation. It was therefore necessary to let him participate in the preparation of every law.

Q. The decree of 16 January 1942, to which reference was just made, I shall submit as Schlegelberger Document 23, Schlegelberger Exhibit 63.[3]

A. And then finally the Ministry of Propaganda. The fact that this Ministry was directed by Goebbels may cause, to a non-

[1] Trial of the Major War Criminals, op. cit., page 182.
[2] Reproduced below in section VC3a.
[3] Reproduced above in section IVB.

German's mind, the misconception that this was a Party function. That, as I said, would be a misconception because the Ministry of Propaganda was not a Party office but a Ministry, just as the Ministry of Justice or the Ministry of Finance, or the Foreign Office, and that there was an official channel between all the ministries is a matter of course in every state. But that connection was also a necessity from the point of view of [self] defense. Only thus was it possible, at least from time to time, to guard oneself against surprises. Only thus was it possible, perhaps in the very last moment, to make successful objections.

Q. The witness referred to a provision of the Code of Penal Procedure according to which the prosecution could authorize the police to make investigations. That is article 161 of the Code of Penal Procedure. Furthermore, in this connection, article 146 of the Judicature Act has to be considered. About the importance of reports and information from the SD, I shall submit as Schlegelberger Document 92, Schlegelberger Exhibit 85, a report from the handbook for allied troops.

Witness, in your own camp, that is to say in the field of the administration of justice itself, did you have to fight against opposition?

A. That question, unfortunately, I have to confirm emphatically. First of all, and very briefly, I again have to mention Frank in this connection, the representative of the National Socialist legal ideology, who through all available channels succeeded in bringing this thought before the public. As means, he had at his disposal, first the legal publications under his influence, the National Socialist Legal Workers' League whose president he was, and the Academy of German Law which he had created. That academy which possibly, in view of its composition, could be considered a sort of scientific institute to aid the administration of justice, evolved by Frank as a competition in order to direct the Ministry of Justice, to overrule and to discredit it with the Party. As soon as he found out, from his own information sources, that the Ministry of Justice intended to carry out reforms, he mobilized his academy immediately which on its part was to prepare plans and to publish them, and not much emphasis was placed upon their quality. But the main purpose was to demonstrate that Frank was the leader of the living young justice in opposition to the old senile machinery of justice of the State. Apart from that goal to carry out his famous thesis, "Right is that which serves the German people," he also for personal ambitions and, last but not least, for that ambition, had intentions to take over the post of Ministry of Justice.

Q. Could you name other personalities who in that manner fought against the administration of justice?

A. From the inside, unfortunately, yes. I have not completed my statement. I am thinking of Thierack. Thierack had very close connections to Bormann. He concentrated his efforts at first on the President of the People's Court, a position he held at the time. Behind the back of the Ministry of Justice in 1936, he arranged that Hitler make a speech before the People's Court. As these proceedings have shown, in 1937 he had attempted to arrange another speech of that kind.

Q. The witness refers here to Document NG–209, Prosecution Exhibit 105.[1]

A. The judges of the People's Court in this manner should be brought to understand that the People's Court was an institution of a special nature, in closest connection to Hitler himself; and that it was only by a mistaken step that the People's Court had been incorporated into the administrative structure of the Ministry of Justice; and concerning that administrative connection in 1938, again in all secrecy, he tried through the Chief of the Reich Chancellery, to have the presidency of the People's Court, following the Italian example, subordinated immediately to Hitler. To my knowledge, Thierack, after he became Minister,[2] did not continue with these attempts. As I was informed from various sources, in his attempts to become Minister, he is alleged to have promised to the Party that the office of the prosecution should be turned over to the police. I shall later refer to the occurrences during the trial of the Czech Minister-President Elias; but in the end I still have to emphasize what extraordinary difficulties were made for me by the personality of Freisler.

Q. Who was Freisler?

A. Well, the witness Behl once characterized Freisler as the representative of the Party interests in the Ministry of Justice. That was correct. His career was the following: Freisler was a prisoner of war in Russia during the First World War. After the end of the war he remained in Russia for a considerable period of time. About his activities during that period of time in Russia, a veil has never been completely lifted. After he returned, he became an attorney at Kassel, mainly acting as defense counsel for National Socialists. When the Prussian Ministry of Justice was put in the hands of Minister Kerrl, the latter called the old

[1] This document is a letter of 14 September 1937 from Thierack, at that time President of the People's Court, to Lammers, Chief of the Reich Chancellery, in which Thierack suggested that Hitler address a further meeting of the members of the People's Court in connection with their "fight against treason." This exhibit is not reproduced herein.

[2] Thierack became Reich Minister of Justice in August 1942.

Party member, Freisler, to the post of Under Secretary. He remained there until in 1934, on the occasion of the merger of both offices in 1934, he was transferred to the Reich Ministry of Justice. Freisler no doubt possessed a high degree of intelligence, but quite apparently he was of abnormal spiritual inclinations that ranged from extreme brutality all the way to a rather feminine weakness. After he had insulted his assistants in the worst possible manner without any reason, it would occur that soon after he came to them to ask for their forgiveness in a very servile manner. The Tribunal has actually made the acquaintance of Freisler optically and acoustically.* He was quite well informed about problems of criminal law, but he lacked any continuity and seriousness in his work. He was restless and imbued with a lust for power, always looking for new tasks and new problems. He was an old Party member, and he had the Golden Party Badge, but he represented that type of National Socialist who again and again fearfully vied for the favor of Hitler. Hitler definitely recognized him as a one hundred percent National Socialist, but personally did not think as much of him as Freisler would have liked. Therefrom, and from his task to supervise the Ministry from the National Socialist point of view, and from his indisputable intelligence and his expert knowledge in the field of criminal law, the dangerous qualities in his personality could be seen. He knew where he had to start in order to achieve his goals. To work with him was extremely difficult, and I may well say here that Freisler was the one, after all, who undermined the work and the strength of Guertner and contributed to his early death. And so, as far as I was concerned, my continuous attempts to restrict Freisler made it extremely difficult for me in my position. He did not stick to decisions which we had made in long debates. He made secret promises to the [Nazi] Party which, after they became apparent, restricted the Minister in his possibilities of action.

Again and again I discovered that, partly intentionally, partly out of neglect, he had failed to report to me on important occurrences. He had prohibited his ministerial directors from reporting to me directly. He wanted to do everything alone. In addition, although he did not drink much, he could not restrain himself once he started to drink, and in a condition of that kind he frequently made statements which gave an entirely wrong picture of the intentions of the Minister. Then when the disappointment came, when the agencies concerned found out that the practice of the Ministry was not according to these statements, then, of

* The defendant refers to the showing before the Tribunal of a German sound film showing scenes from the actual trial of some of the persons allegedly involved in the attempt upon Hitler's life on 20 July 1944 (NG-1019, Pros. Ex. 192). In that trial, Freisler acted as the presiding judge of the People's Court.

course, there were serious accusations on the part of the Party and a renewed struggle.

His unstable nature brought it about that when I made objections to him he, frequently in tears, promised to better himself; but his moral strength was not sufficient to make him keep these promises for any length of time.

Of course, my position with regard to Freisler was weaker than that of Guertner. I was, indeed, in charge of the work of the Ministry, but only due to the fact that I was the senior Under Secretary; otherwise we were on the same level. The possibility of influencing him or influencing others against him, was very limited for me, all the more because my mission was not set for a certain time, but could be repealed any day. Therefore, I could only find the optimal accomplishment of my tasks in maintaining the status quo in the Ministry of Justice as it was at the time of Guertner's death; especially if one takes into consideration as a matter of course that on the one hand the attacks from the Party became stronger, being faced with a weaker man in charge of the Ministry, and that on the other hand this weaker man was always confronted with the necessity of an increased resistance on his part.

In these proceedings here the witness, Father Wein,* confirmed that during the time when I was in charge of conducting the affairs, the administration of justice had not deteriorated and that only the appointment of Thierack brought about an absolute change-over. I ask you to try to understand that in that I found a justification for the work of my life under these conditions as I have described them.

Q. What did the taking over of the post of Minister by Thierack mean to you?

A. I believe I should continue at the point where the speech made by the prosecution left off. The prosecution said, "Schlegelberger had seen the storm brewing." That is quite correct. I anticipated a storm, and I tried to prevent it. The attitude of Thierack up to that time and his close relations with Bormann did not leave any doubt as to his program, and just as I interpreted that, it came about. As soon as Thierack assumed office, a complete change-over occurred. It was not a gradual deterioration, but it was that famous construction of a strong National Socialist administration of justice as it had been ordered by Hitler. I merely point to the changes in the administration of justice and in legislation which are contained in material submitted by the prosecution. If one sees what had been demanded for a long time and which by all means was tried to achieve, if one sees how that

* Testimony is recorded in the mimeographed transcript, 28 April 1947, pp. 2675–2691; 2716–2729.

all of a sudden now came into effect, I believe then only one can find the right measure for that which I, in a continuous struggle, had prevented or had delayed. I do not want to omit but to describe briefly the complete change in personnel policy. With the exception of the man in charge of the budget department, all ministerial directors were released by Thierack and many Referenten transferred. The entire top level of the Ministry had changed overnight. Furthermore, twenty-two presidents of district courts of appeal, eleven of them the best ones on the basis of their qualifications, and four general prosecutors were retired.

If in the dire situation of war such a unique measure is taken, one demonstrates most clearly that my dismissal and the appointment of Thierack, in the feeling of Hitler and Thierack, represent the point at which an entire new development starts. The purge measures by Thierack were extended also to the many non-Aryan judges or judges with Jewish relatives who at that time were still in service and to many officials who did not just belong to the Party.

I believe that my decision to fight until the very limit, and to stay that long in the Ministry, has found its justification. Clearly anticipating that with that new man [Thierack] chaos would start for the administration of justice, there was only one thing left to me; although the burden physically and psychologically was at times almost impossible to bear, to try and bear it, and to fight as resiliently as possible. Of course, it was clear to me, and I had to experience the fact too, that I would be beaten at times, and had to decide to make detours wherever I could take that upon my conscience.

Q. In your opinion, what was that extreme limit which could still be justified—of those which you have just mentioned?

A. If the Tribunal was good enough to follow me in the description of my life, then it will easily recognize what my work at that time meant to a man whose life was devoted to the law. At times, today, it is hard even for me to transfer myself back again into those days and to bring those days back. In a system which was worked out to the very last detail of expediency and power, there was a lonely island amidst the continuous storm in those days—that was the administration of justice. I had to experience how the storm hit again and again, and how certain sacrifices had to be made to this storm of power in order to prevent it from triumphing completely. For me, in that situation, there was only one consideration—can a measure be made compatible with the uncompromising principles of law such as I had considered them so far as a matter of course? Was not everything now only a question of power? How could I avoid that lust for power and

prevent the accomplishment of these designs? What will go through regardless of my cooperation and what can I prevent without cooperation? And that deliberation led me to find that extreme limit which I have mentioned before. It was for me the final abolition of the independence of the courts. I had to try to maintain this independence at all costs. In spite of and in the face of the devilish propaganda on the part of Goebbels, I was of the firm conviction that the German courts and German judges were still in good shape. Although, now, from the large number of the many sentences, particularly of the more recent period, the prosecution may select a few in order to prove that legal principles were abandoned in the sentences. To deal with individual cases is not my task in these proceedings. A full examination of the entire field of the administration of justice would show that this conviction of mine was very well founded, and that the maintenance of the integrity of the German courts was a goal which was well worth my work and my trouble; because I was, and still am, of the opinion that the work of the courts is the most secure guaranty for the law. Therefore, I tried again and again to draw various fields within the scope of work of the courts. For instance, in the economic field, the problem of getting agriculture [farms] out of debt [Landwirtschaftliche Entschuldung] the question of hereditary and marriage health, but the basic prerequisite was that the courts had to remain independent. When, in 1937, in the German Civil Service Law, Hitler was given the right to retire any civil servant if this civil servant could not be expected at any time to fight for the National Socialist State, in my capacity as chief of the Department for Public Law at the Ministry, I had a security clause inserted for the judges; this clause provided that measures regarding the judicial civil servant could not be based on the objective contents of a judge's decision. Once the independence of the courts was lost, the protection of the courts was lost, too. The activity of the courts could even become a danger. Therefore, I drew for myself this extreme limit for my stay in office. With the resolution of the Reichstag of 26 April 1942,[1] my struggle reached its final stage. It was not quite clear, as it appeared frequently with Hitler's speeches whether or not his speech had attacked the administration of justice merely for tactical reasons, and whether the true objects were general ones.[2] Dr. Lammers, the Chief of the Reich Chancellery, to whom I spoke immediately after the speech about all these matters, confirmed that background to me as being the true objective of Hitler's polemics. I had to create clarity. I wrote to Hitler a report

[1] This resolution is reproduced on page 204.

[2] Hitler's speech to the Reichstag on 26 April 1942 (NG-752, Pros. Ex. 24) is reproduced below in section VC2a.

[Fuehrerinformation] to the effect that the judges were extremely disturbed by that speech. I had explained to the judges that with all the weight of my office, I would protect every judge who acted according to his conscience and to the law. That clarified the situation as far as I was concerned. If Hitler's speech really meant the beginning of the end of the independence of the courts, then he had to consider my statement as an open declaration of war. That was what I wanted, and I wanted to bring about a breach, in that case, on purpose.

Q. How did your dismissal come about?

A. Hitler at first did not answer that letter which I just mentioned. There was a lot of talk behind the scenes about a new appointment for the post of Minister. A few weeks later, Lammers, Chief of the Reich Chancellery, called me to him and told me that Hitler had made up his mind to appoint a new Minister of Justice, and he asked me what my attitude would be if the choice fell on Thierack. I replied that to work with Thierack was quite out of the question. Literally, I added, "I would not sit at the same table with Thierack." Lammers replied, that was what he had thought, and for that eventuality he was instructed by Hitler to offer me another office comparable to the position I was holding. He had thought it over and was now prepared to offer me the position of President of the Reich Supreme Administrative Court. I rejected that offer and asked Lammers to inform Hitler that I would accept a new office under no circumstances, but wanted to be retired. Soon after, Lammers wrote me that I should come to his quarters at Zhitomir and receive the document concerning my retirement from office and thereafter, to report to Hitler at his headquarters at Vinnitsa in order to take my leave. That order I carried out. On that occasion, Lammers, on order from Hitler, gave me a check for 100,000 marks, which should make it easier for me to bridge the transition into retirement.

I was not happy about that donation; on the contrary, I was greatly disturbed. I got in touch with the Chief of the Presidential Chancellery, Dr. Meissner, and asked how I could avoid accepting that amount. Meissner replied that refusal was impossible, because it would mean an unfriendly act toward Hitler, and all the bad consequences would have to be accepted. Thereupon, I did not return the check and when the Russians came, that amount was still untouched in the bank. At Vinnitsa, Hitler received me. The conversation lasted about 20 minutes. Hitler told me approximately the following: He required his officials to carry out his instructions without criticism of any kind. He added, "Since you have already criticized my measures, I believe it is better if we separate." He was referring to the report which I have already

mentioned. I took advantage of that opportunity to tell Hitler with all the frankness at my disposal that an intact and independent administration of justice was a vital question for Germany; that his method to form his judgment on the basis of information received from Gauleiters, and his intention to retire judges who had done their duty, was an impossibility. The very concept of a judge required independence. People would never respect the judgment of a dependent judge as an expression of law. I added that if I had remained in office, I would have continued to protect anybody who was prosecuted unjustly.

Hitler took these statements on the whole quite calmly. Time and time again he even nodded approval; but when I touched upon the question of the independence of judges in connection with his Reichstag speech he suddenly harangued against the generals and got into a hot fury which slowly ebbed like a dying flame.

Q. The prosecution alleges that there was a conspiratorial cooperation between you and your codefendants. Will you briefly describe your relations with the codefendants?

A. As for these relations I have, in part, to answer absolutely in the negative. A number of my codefendants I have only met here. Not with a single one of the defendants here did I have any personal contact beyond official connections. These official contacts in most cases consisted of just occasional conferences required by the work.

As the defendants' dock shows, the prosecution has selected a mere few from the large number of officials of the administration of justice. All of them, together with other colleagues, worked only in that field to which they were assigned. If one would follow the principle of conspiracy as expounded by the prosecution, the entire administration of justice since 1933 would have to be considered one organization in the meaning of the count of the indictment. And I believe that an opinion of that nature would best be rebutted by the fact that when I left the Ministry of Justice, that great change took place. That is sufficient rebuttal for the assertion of personal homogeneity of the officials and the judges.

Q. We want to depart now from personal matters and discuss the complaints made against you. The objective charges made against you begin with the centralization [Verreichlichung] of the administration of justice. Will you give us your general point of view concerning that question?

A. When the empire was founded in 1871, certain agencies of the Reich were founded as an over-all authority beyond the limits of the individual federal state. The same occurred in the field of

justice. At that time, it was called the Reich Justice Office [Reichjustizamt] and, in fact, was a Reich Ministry. Later, it got that name. The Reich Justice Office had almost exclusively legislative functions. It had to deal with regulations for the administration of justice.

Once such a regulation had been passed, all states had to issue executive laws for the execution of the respective regulation. That meant that after each major Reich law had been passed, more than 20 laws had to be passed in the various states to carry out the principles of the Reich law.

What that machinery meant can be seen if one looks at the collection of these executive laws of various states. With great surprise you find that this fills two fat volumes. As for administrative tasks, the Reich Justice Office, as already mentioned, only had to take care of the Reich Supreme Court, and in the course of time, the Reich Patent Office. Here, also, the various states [Laender] had to cooperate. The selection of judges for the Reich Supreme Court required most difficult negotiations. One has to have seen that, in order to realize fully with what jealousy each individual state saw to it that these various posts were filled according to a definite key.

It could happen that a small state could not even offer an appropriate candidate for such a position at the Reich Supreme Court, but then one had to preserve the claim and register it very carefully so that the next time, they could be given it. It was just as difficult to select officials for the Ministry of Justice. That, too, required negotiations and thus it came about that, long before 1933, everywhere, the desire for a uniform administration of justice for the entire Reich was expressed. I may remind you that the witness Behl* has stated that even the Social Democratic Party of Germany was expressly of that same opinion.

Q. Witness, you referred to the assumption of the administration of justice by the Reich.

A. Before the recess I pointed out that the desire for a uniform, centralized administration of justice had already existed in the period prior to 1933. The Reich Minister of Justice, Guertner, worked for that idea of the centralization of the administration of justice with great energy. The fact that he as a Bavarian did so, although it is generally known how very much Bavaria was interested in a life of its own, explains best the fact that Guertner had very good reasons for doing so. As often occurs in life, by accident a circumstance arose which speeded up the execution of that idea. This is what happened:

* Dr. Ferdinand Behl testified as a prosecution witness. His testimony is not reproduced herein. It is recorded in the mimeographed transcript, 18–21 March 1947, pp. 562–826.

Once when I had a conversation with Kerrl, the Minister of Justice of Prussia at that time, and visited with him the training camp for Prussian law students—a camp which has been repeatedly referred to in this trial—I said to him that it must have cost a great deal of money to set up that camp; Kerrl laughed and replied, quite frankly:

"Oh, it didn't cost me anything. The amounts were donated by large firms, in whose cases we were very considerate about prosecuting them under penal law. Naturally, the money was not transferred to me directly, but it came to me via the Winter Relief [Winterhilfe] account. However, the Winter Relief Organization made it available to me, and with that money we built up a very decent camp, as you can see for yourself."

I was more than disgusted when I heard about those practices he thus unveiled. I made a report to Guertner.

The right of supervision over the Ministries of Justice of the Laender, was not in the hands of the Reich Minister of Justice. Guertner and I agreed that those practices must be stopped at the earliest possible moment, all the more so since one did not know whether or not in other Laender, similar things might be happening as were happening in Prussia. One could not tell what was happening because the ministries of the Laender throughout had new men working with them concerning whose persons, in some cases, one had certain misgivings, and justified misgivings. Frank was the Minister of Justice for Bavaria, and Thierack was the Minister of Justice for Saxony.

That experience increased Guertner's energy in carrying out his work of centralization. The basis for that work was laid down in the first and second centralization laws dated 16 February and 5 December 1934.*

The result of the centralization, the transfer of the tasks of the Ministries of Justice of the Laender to the Reich, was this, from the political angle: The entire administration of justice from now on lay in the hands of a minister who was not a member of the Party and who, as Minister of Justice for Bavaria, had enjoyed the confidence of all parties from the extreme right to the extreme left. I myself, who also was not a member of the Party, remained at my post. The National Socialist Ministers of Justice of the Laender lost their official positions in the administration of justice.

The opinions of the Party as to the centralization of the administration of justice is evidenced best by a statement of Goering's, which he made to me in 1941 when, in the course of a

* The first mentioned law is reproduced in full on page 167, and the second in part on page 172.

conversation, I said to him that the Party at every opportunity made difficulties for our ministry, he said to me: "That cannot surprise you. The reason lies in the centralization of the administration of justice under the circumstances under which it was achieved. That is the reason why the Party as a group is opposed to the Reich Ministry of Justice and makes life as difficult as possible for that ministry. The Party is of the opinion that the administration of justice should again be taken over by National Socialist hands." Goering added, "I myself will never pardon Guertner and you for the way you acted in 1934."

Q. I shall submit Schlegelberger Document 26, Schlegelberger Exhibit 66,[1] in reference to the aforesaid statements. Will you please give us a brief description of the organization of the Reich Ministry of Justice?

A. Under the very top, that is, under the Reich Minister of Justice, there were two separate under secretariats: the under secretariat for civil law matters, the head of which was myself; the direction of the secretariat for penal law matters which was in the hands of Freisler. Further, he was in charge of the so-called organization section [Organisationreferat], the Hereditary Farm Law [Erbhofrecht] and the Inspection Office for Judicial Affairs [Justizpruefungsamt].

Under the two under secretariats there worked a total of six ministerial directors each of whom was the head of his specialized divisions. The number of these divisions and their sphere of work changed several times in the course of time.

Inside some departments, subsections had been created which were in charge of a Ministerialdirigent. The number of higher officials[2] in the Reich Ministry of Justice amounted to approximately 250. Personnel matters were divided into regions. As regards the East, I was only in charge of my own home province, East Prussia. Otherwise, I dealt with western and southern Germany, Freisler was in charge of the remaining [regions]. Freisler was in charge of the People's Court. The Reich Supreme Court and the Reich patent office were in my charge. The two divisions, directed by Under Secretaries were entirely separate from one another. Freisler and myself had different times at which we went to report to the Minister. The Minister asked me to come to see him when Freisler had finished his report and had left the room. Only very rarely, and only when one of my officials was to be appointed to a head office in Freisler's sphere, or vice versa, did

[1] This document is the Second Law concerning the transfer of administration of justice to the Reich, dated 5 December 1934. Extracts from this law are reproduced as a part of Doc. NG-715, Pros. Ex. 112, on p. 172.

[2] Higher officials belong to the top group of German Civil Servants. See table on German Civil Service Ranks in the appendix.

907802—51——22

the two of us meet at the Minister's. If one of the under secretaries was absent, his affairs were dealt with by the Minister together with the competent ministerial director. The other under secretary did not deputize for the one who was absent.

May I cite an example? In 1938 I had to go to the hospital as a result of an accident, and at that time the Minister did not discuss the new German marriage law with Freisler, but with the head of the respective department. If the Minister were also absent, the Under Secretary, who was present in Berlin, did only a certain amount of duty for his colleague. That is to say, he was available for matters which could not possibly be postponed. In my recollection, that happened only very rarely, for this was one point over which Freisler and I were in absolute agreement. Neither had the wish to meddle with the other's affairs.

Furthermore, Freisler when he went on a business trip or when he went away for the summer holidays was practically always in contact with Berlin. Therefore, he told Dr. Guertner that a deputy for which I was the only possible candidate was neither necessary nor desirable. It did happen that when the Minister did not feel well and left the office earlier, he asked me by telephone to sign and to dispatch letters which he had already signed in draft form. Now and then that could have concerned matters which fell into Freisler's sphere when Freisler could not be reached.

I should like to cite as example the letter which the prosecution submitted about the fight against political Catholicism. Concerning details accompanying that letter, I know nothing about this. In particular, I do not know what particular pressure was exercised or what instructions Hitler had issued in virtue of his right to lay down the directives of policy but I should like on this occasion to say something about what was the practice of the Ministry in regard to church affairs. I should like to point out what the witness for the prosecution, the Catholic Priest, Schosser, testified here on 9 May. According to his testimony, the Ministry refused on the occasion of a church funeral for Poles to take steps against the Catholic clergymen.

DR. KUBUSCHOK: The letter which you have mentioned is Document NG–630, Prosecution Exhibit 428.[1] The examination which you mentioned here of Father Schosser is on page 3021 in the English transcript.[2]

* * * * * * *

[1] Reproduced below in section V F.

[2] Extracts from the testimony of Father Schosser are reproduced below in section V F. Further testimony of defendant Schlegelberger, dealing with treatment of Jews, is also reproduced below, section V D 2.

V. EVIDENCE CONCERNING PRINCIPAL ISSUES IN THE CASE

A. Introduction

This major section of the volume contains selections from the evidence concerning leading questions or issues of the trial. The evidence selected for publication herein constitutes only about one-twentieth of the total mimeographed record. Hence, all issues of the trial are not covered, and numerous items of evidence mentioned in the printed materials are not reproduced herein. Where extracts from testimony have been reproduced, a footnote indicates the pages of the official mimeographed transcript where the entire testimony can be found.

Both prosecution and defense evidence is contained in each of the sections into which the evidence selected has been organized. The prosecution evidence consists in the main of contemporaneous documents of the Nazi era, most of them discovered in German archives by Allied investigators after Germany's unconditional surrender. The defense evidence consists principally of extracts from the testimony of defendants. A substantial number of the contemporaneous documents offered by the defense have also been selected for publication. With one or two exceptions, the contemporaneous documents have been reproduced within the various sections in chronological order, regardless of whether they were offered by the prosecution or the defense. In selecting defense testimony under the various topical sections, considerable emphasis has been given to the testimony of the three defendants Schlegelberger, Rothenberger, and Klemm who were appointed Under Secretaries in the Reich Ministry of Justice, and to the testimony of the defendant Rothaug, presiding judge of the Nuernberg Special Court.

The defendants were charged with participation in various types of criminal conduct "by distortion and denial of judicial and penal process." The selections from the evidence below have been grouped into five main sections (sec. VB through VF) treating of various types of conduct by which it was alleged that the defendants engaged in criminal acts as principals or accessories.

In Hitler's Third Reich many persons were placed entirely outside the judicial process. Therefore the first section (B) is concerned with measures under which persons were committed to

the "protective custody" of the police (usually the Gestapo) or to the concentration camps of Himmler's SS.

The next four sections (C through F) deal with various methods whereby it was charged that perversions of law and the judicial process were employed to persecute, imprison, and execute or exterminate large numbers of persons. Section C, which contains evidence on numerous topics, has been divided into three periods of time: 1933–January 1941 when Guertner was Reich Minister of Justice; January 1941–August 1942, when the defendant Schlegelberger was acting Reich Minister of Justice; and August 1942–1945, when Thierack was Reich Minister of Justice. The next section (D) deals with large groups of persons allegedly subjected to discriminatory treatment of many kinds: Germans, Poles, Jews of several nationalities, the Night and Fog prisoners from occupied western Europe, and others. Section E deals with the growth, development, and application of such concepts as treason, undermining the defensive strength, and public enemies. These concepts were applied in cases against persons who were not nationals of Germany as well as against Germans. The final section (F) deals with the handling of religious matters.

Because of the close relationship of the developments of these various topics to the crowded history of the Nazi regime, there necessarily is considerable over-lap between the several sections into which the evidence has been organized. A case where a Pole was convicted of treason against Germany (reproduced here in sec. E) cannot be divorced from the materials concerning the general treatment of Poles (included in sec. D2). The Night and Fog prisoners offer another example, since these prisoners were ordinarily kept incommunicado in concentration camps, and the evidence concerning them (D3) is closely related to the evidence dealing with protective custody and concentration camps (B). The over-lap is often quite pronounced in the extracts from the testimony of defendants. Most of the defendants were active in a number of different fields and held different official positions during the 12 years of the Nazi era. In making out his case, each defendant chose his own course in grouping together various items. In facing this unavoidable problem of over-lap, the editors have employed footnotes extensively in making cross-references between the materials contained in various sections, particularly in extracts from testimony where mention is made of decrees and other documents reproduced in various parts of the volume.

B. Measures Outside the Judicial Process—Protective Custody, Transfer of Persons to Concentration Camps and the Police

TRANSLATION OF KLEMM DOCUMENT 28
KLEMM DEFENSE EXHIBIT 28

ORDER OF PRUSSIAN MINISTRY OF JUSTICE, 15 MARCH 1934, INFORMING AUTHORITIES OF GOERING'S DECREE OF 11 MARCH 1934, AUTHORIZING THE GESTAPO AND CERTAIN PRUSSIAN AUTHORITIES TO ORDER PROTECTIVE CUSTODY FOR POLITICAL REASONS*

No. 76 Order concerning measures of protective custody, Executive Order of the Prussian Ministry of Justice of 15 March 1934 (I 3540), *German Justice,* page 341.

On account of its importance also with regard to the official sphere of activities of judicial authorities, I hereby inform these authorities of the following decree, by the Prussian Ministerpraesident (Secret State Police), dated 11 March 1934.

Berlin, 11 March 1934

The Prussian Ministerpraesident [Goering]
Secret State Police
Insp. 1946/11 March 34

Subject: Order concerning protective custody

Effective immediately I order the following:

1. The regulations which so far dealt with competence with regard to the application of protective custody for political reasons are cancelled. In future restrictions of personal freedom in accordance with article 1 of the Decree for the Protection of the People and State, dated 28 February 1933, may be ordered with effect on the entire state territory [of Prussia] by the Secret State Police Office only, and within their local fields of jurisdiction by the Oberpraesidenten, Regierungspraesidenten, the police president in Berlin and the local state police offices.

The district police authorities, especially the Landraete, are no longer competent for such measures. The measures hitherto ordered by them will be rescinded as per 31 March unless they have been extended by order of the competent police authorities of the constituent states.

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Offices of the Party and the affiliated organizations may not carry out arrests on their own initiative. In case of disobedience

* This order was printed in *German Justice* (Deutsche Justiz), 1934, 96th year, pp. 341 ff.

to this order the competent authority will interfere, and report to me, at once.

To the Ober- and Regierungspraesidenten

Secret State Police Office in Berlin

Police President in Berlin

State Police Offices

TRANSLATION OF JOEL DOCUMENT 8
JOEL DEFENSE EXHIBIT II[1]

LETTER OF REICH MINISTER OF JUSTICE GUERTNER TO REICH MINISTER OF THE INTERIOR FRICK,[2] 14 MAY 1935, PROTESTING AGAINST THE "MISTREATMENT OF COMMUNIST PRISONERS BY POLICEMEN"

Copy

The Reich Minister of Justice 3751 PS of the IMT
Z.F.g 10—1717.34

Personal

Berlin, 14 May 1935

To the Reich and Prussian Minister of the Interior,
Berlin

Subject: Mistreatment of Communist prisoners by policemen
Enclosure: 1 loose sheet

My Dear Reich Minister!

Enclosed you will find copy of a report of the inspector of the Secret State Police, dated 28 March 1935.[3]

This report gives me an occasion to state my fundamental attitude toward the question of the beating of internees. The numerous instances of ill-treatment which have come to the knowledge of the administration of justice can be divided into three different causes for such ill-treatment of prisoners.

1. Beating as a disciplinary punishment [Hausstrafe] in concentration camps.

2. Ill-treatment, mostly of political internees, in order to make them talk.

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[1] In the IMT trial, this document was identified as Document 3751–PS and introduced in evidence as Exhibit USA–828.

[2] Wilhelm Frick was one of the defendants sentenced to death by the International Military Tribunal. Concerning Frick's relation to concentration camps, the IMT stated, "From the many complaints he received, and from the testimony of witnesses, the Tribunal concludes that he knew of atrocities committed in these camps." (Trial of the Major War Criminals, op. cit., vol. I, p. 300.)

[3] The enclosure was not offered in evidence.

3. Ill-treatment of internees arising out of sheer fun, or for sadistic motives.

I should like to make the following detailed comments on those three categories:

About No. 1. In the remand prisons and penal establishments under the Ministry of Justice, there was no need to introduce corporal punishment as a disciplinary measure. The experience of the administration of justice has taught that a well trained, reliable, and conscientious personnel of wardens is in a position to set up and to maintain model order under a strict discipline, even without corporal punishment. The more training and discipline the prison guards have, the less need exists to introduce corporal punishment as a disciplinary measure.

But if, contrary to this view, one is to suppose that there might be a need to introduce corporal punishment in concentration camps, it appears indispensable that this disciplinary measure and the manner of its application should be determined, uniformly and unambiguously, for the whole territory of the Reich. It has happened recently that camp orders of individual concentration camps concerning this matter and the use of weapons, contained unusually severe instructions which were brought to the knowledge of the internees as a stern warning, while the warden personnel was administratively informed that these regulations which dated mostly from 1933 were no longer applicable. Such a situation is equally dangerous for the warden personnel and for the internees. It would therefore appear, after the question of imposing protective custody was generally settled by the competent minister, that in the interests of all concerned, one should urgently and clearly define responsibility and legal aspect, furthermore that the same responsible authority would have to settle, by means of camp regulations generally applicable, the question of corporal punishment as a disciplinary measure, which is still unclarified, as well as the question of the use of arms by the warden personnel.

About No. 2. I cannot concur with the opinions expressed in the enclosed letter. The present penal law, which I have to enforce, renders liable to particularly severe penalties those officials guilty of inflicting ill-treatment in the performance of their duties, especially when such ill-treatment is used to extort admissions or statements. That these legal provisions also reflect the will of the Fuehrer and Reich Chancellor is shown by the fact that, during the suppression of the Roehm revolt, the Fuehrer ordered the shooting of three members of the SS who had ill-treated prisoners in Stettin. That being the legal situation, it is out of order to grant

silently one part of the police forces permission to extort statements by means of ill-treating prisoners. Such a measure would destroy the respect for the existing laws and would thereby lead necessarily to the confusion and demoralization of the officials concerned.

Furthermore, such statements extorted by force are practically without value if they are supposed to serve as evidence in trials for high treason. The courts which have jurisdiction in cases of high treason consider to an ever increasing degree statements of the defendants made before the police as worthless and without any evidenciary value for court decisions. This was the result of their getting convinced in the course of numerous proceedings that confessions and statements made before the police were extorted by ill-treatment.

Moreover, I cannot follow the statements contained in the attached report in as much as the beating of Communists held in custody is regarded as an indispensable police measure for a more effective suppression of Communist activities. These explanations of the Gestapo office show precisely that the methods used up to now have not been successful in combatting the illegal Communist machine or to hinder its development.

Experience shows that such police measures may perhaps partially be successful but that they never can attain a total suppression and destruction of an illegal revolutionary organization which alone is of importance in the long run. Behind such revolutionary organizations there are professional revolutionaries of great experience and frequently exceptional intelligence. These succeed very soon by means of cleverly camouflaging all more important functionaries in excluding for all practical purposes the possibility of betrayal as a result of mistreatment.

About No. 3. The experience of the first revolutionary years has shown that the persons who are charged to administer the beatings generally lose pretty soon the feeling for the purpose and meaning of their actions and permit themselves to be governed by personal feelings of revenge or by sadistic tendencies. As an example, members of the guard detail of the former concentration camp at Bredow near Stettin completely stripped a prostitute who had an argument with one of them and beat her with whips and cowhides in such a fashion that 2 months later the woman still showed two open and infected wounds on the right side of her buttocks, one 17.7 by 21.5 centimeters and the other 12.5 by 16.5 centimeters, as well as a similar wound on the left side of the buttocks 7.5 by 17 centimeters. In the concentration camp at Kemna near Wuppertal, prisoners were locked up in a narrow clothing locker and were then tortured by blowing in cigarette

smoke, upsetting the locker, etc. In some cases the prisoners were given salt herring to eat, so as to produce an especially strong and torturing thirst. In the Hohenstein concentration camp in Saxony, prisoners had to stand under a dripping apparatus especially constructed for this purpose until the drops of water which fell down in even intervals caused seriously infected wounds in their scalps. In a concentration camp in Hamburg four prisoners were lashed for days—once without interruption for 3 days and nights, once 5 days and nights—to a grating in the form of a cross, being fed so meagerly with dried bread that they almost died of hunger.

These few examples show such a degree of cruelty which is an insult to every German sensibility, that it is impossible to consider any extenuating circumstances.

In conclusion, I should like to present my opinion about these three points to you, my dear Reich Minister, in your capacity as cabinet member in charge of the establishment of protective custody and the camps for protective custody.

1. It seems now absolutely necessary that the competent minister should decree unified camp regulations for all camps for protective custody, which shall regulate completely and unmistakably the question of corporal punishment as disciplinary measure, and the question of use of weapons by the guards.

2. It appears necessary that the competent cabinet minister order valid for all police authorities an absolute prohibition against mistreatment of prisoners for the purpose of forcing statements.

3. All mistreatments which are entirely or partly due to personal reasons must be prosecuted vigorously and punished under close cooperation of all governmental offices concerned.

Heil Hitler!

[Signed] DR. GUERTNER

TRANSLATION OF DOCUMENT NG–326
PROSECUTION EXHIBIT 456

DIRECTIVE OF 12 JUNE 1937 FROM HEYDRICH, CHIEF OF THE SECURITY POLICE, TO POLICE OFFICES, CONCERNING PROTECTIVE CUSTODY FOR JEWISH RACE DEFILERS

Copy

The Chief of the Security Police Berlin, 12 June 1937
S–P (II B) No. 4021/37

[Handwritten] Annulled 28 August 1937
[Handwritten] Ku

Subject: Protective custody for Jewish race defilers.

From what I can see from a statistical survey, cases of race defilement have increased considerably recently. In order to take preventive measures against this danger, it is to be examined in every single case of race defilement whether protective custody is necessary after the sentence inflicted by law has been served.

For this purpose I request that a short report be made 1 month prior to the discharge of the condemned from prison with the valid judgment concerning the case of race defilement attached.

Apart from this I request that immediately after termination of legal proceedings in a case of race defilement in which a male person of German blood has been sentenced, the Jewess involved be taken into protective custody and reported to this office.

No publicity whatever is to be made of this order.

[Signed] HEYDRICH
S. Certified: [Signed] KASKATH
Clerk

To all—

Higher State Police Offices
State Police Offices
Higher State Police Offices
Criminal Police Offices

TRANSLATION OF SCHLEGELBERGER DOCUMENT 90
SCHLEGELBERGER DEFENSE EXHIBIT 83

EXTRACTS FROM THE REGULATIONS OF THE REICH MINISTRY OF THE INTERIOR, 25 JANUARY 1938,[1] CONCERNING PROTECTIVE CUSTODY

* * * * * * *

Circular Decree[2] of the Reich Minister of the Interior
25 January 1938—Pol. S–V I No. 70/37—179 g

Secret

Article 1

Admissibility

1. For the protection against potential enemies of the people and the State, the Secret State Police [Gestapo] is hereby author-

[1] This document was taken from "General Collection of Regulations," a secret publication of the Reich Security Main Office (RSHA) compiling numerous regulations of concern to the various police agencies.

[2] The introductory paragraphs of this regulation were omitted from the document as introduced in evidence by the defense. These paragraphs read as follows:

ized to impose protective custody as a compulsory measure on all persons who through their behavior endanger the welfare and the security of the people and the State.

2. Protective custody shall not be decreed for punitive purposes or to take the place of legal imprisonment. Punishable acts are to be judged by the courts.

Article 2

Competence

1. Competence to order a person into protective custody rests exclusively with the office of the Secret State Police.

2. Motions for an order of protective custody are to be addressed through the local and regional State Police agencies to the office of the Secret State Police. With every motion detailed reasons are to be given which must include defensive statements [Einlassungen] made by the arrested person. As soon as the person under provisional arrest has been interrogated, a copy of this interrogation will be forwarded immediately.

3. An order for protective custody can only be issued after the accused has been heard on the charges raised against him.

Article 3

Temporary Arrest

1. The office of the Secret State Police, and the regional and local state police agencies are authorized to order the temporary arrest of any person to whom the provisions of article 1 apply, provided—

a. That such person is likely to engage in subversive activities unless detained.

b. That there is danger that evidence may be destroyed [Verdunklungsgefahr].

c. That the person is suspected of preparing for his escape.

"The following regulations regarding protective custody go into effect on 1 February 1938. At the same time, the following are rescinded:

"a. My decree of 12 April 1934—I 3311 A/28.2 along with the supplement of 26 April 1934 and 10 July 1934 (directed to governments of the states and to the Reichstatthalters).

"b. My decree of 12 April 1935—VI B 757A/3014 along with the supplementary decree of 1 June 1935 VI B 11568/3014 (directed to the governments of the states, Reichstatthalters, Prussian presidents of government districts).

"c. My decree of 17 June 1935—III P 3311/329 (directed to the state government and the Reichstatthalter).

"d. The decree of office of Secret State Police of 3 July 1934—B Nr. 19582 II I D (directed to the presidents of the Prussian government districts).

"e. The decree of the Political Police Commander of the Lands of 9 September 1935—B. Nr. 37840/35 II I D (directed to the political police of the states and the Prussian State police offices)."

2. The record must show that the accused has been advised of his provisional arrest within 24 hours after he has been seized. Likewise the record must show that he has been advised of the reasons for his being placed under temporary arrest.

3. A person under temporary arrest must be released not later than 10 days from the day of his arrest, unless an order for protective custody has been issued within that period by the office of the Secret State Police.

Article 4

Right to Issue Directives

The right of the Reich governors, the Land government, the Oberpraesidenten, and the Regierungspraesidenten, to issue directives to the superior State Police and Police offices, is not affected by articles 2 and 3.

Article 5

Order for Protective Custody

1. To place a person under protective custody an order for protective custody must be issued in writing by the office of the Secret State Police. At the time of his arrest or not later than the day after the order for protective custody has been transmitted, the accused will be handed a copy of the order for which he has to sign a receipt.

2. Any order for protective custody must include a brief statement of the reasons for which protective custody was ordered.

3. The next of kin (wife, parents, children, brothers, or sisters) of a person under protective custody are to be informed that he has been placed under protective custody and where he is located, unless special reasons render such action inadvisable.

4. If a civil servant is taken under protective custody the Secret State Police must immediately notify his superior agency and state the reasons for his protective custody.

5. If a member of the NSDAP or of any of its formations is taken under protective custody, the Secret State Police must notify the Party agency concerned and state the reasons for his protective custody.

Article 6

Execution

As a matter of principle, persons under protective custody are to be placed in State concentration camps.

Article 7

Duration

1. Protective custody is to last no longer than necessary to achieve its purpose.

2. Release from protective custody is ordered by the office of the Secret State Police. It is the responsibility of the Secret State Police to examine at regular intervals of not more than 3 months whether the protective custody is to be lifted. The arrested person must be released not later than 3 days after the protective custody has been lifted.

Article 8

Foreigners

Foreigners, who have been taken into protective custody, are to be deported unless special reasons render such action inadvisable.

Article 9

Executory Regulations

Executory regulations to implement the preceding provisions shall be issued by the chief of the Security Police.

To the Office of the Secret State Police, the regional, and local State Police Agencies.

For information only:

The Reich Ministers, Reich Governors, Land Governments, The Prussian Oberpraesidenten, Regierungspraesidenten, and the Police President of Berlin.

(Not published)

PARTIAL TRANSLATION OF DOCUMENT NG-2218
PROSECUTION EXHIBIT 604

CIRCULAR LETTER FROM DEFENDANT SCHLEGELBERGER TO PRESIDENTS OF DISTRICT COURTS OF APPEAL, 31 JANUARY 1938, REQUESTING LISTS OF ATTORNEYS ALLOWED TO DEFEND PRISONERS HELD IN PROTECTIVE CUSTODY

Berlin, 31 January 1938

Copy

The Reich Minister of Justice

4611—1a[7] 194/38

The Presidents of the District Courts of Appeal

Subject: Defense of prisoners in protective custody by attorneys

To prepare a decision of the Reich Leader SS and Chief of the German Police on whether certain attorneys can generally be allowed to defend prisoners held in protective custody, you are requested to examine immediately whether attorneys in your district, and which ones, could be considered in this respect. To defend prisoners held in protective custody, qualification and reliability are necessary to a particularly high extent. Therefore, in making the selection, a very strict standard will have to be applied. Mere membership in the NSDAP—as far as it was acquired only after 30 January 1933—will generally not warrant the necessary extent of reliability; on the other hand, this qualification will not have to be denied merely because the attorney is no Party member. Only such attorneys can be considered whose attitudes prove beyond doubt that they fully approve of the political plans of the State and of the ideological aims of the movement. For the rest, it will have to be assumed that attorneys not acting as counsel for the defense in criminal cases—will generally not defend prisoners held in protective custody either.

I request that attorneys qualified according to these rules to defend prisoners held in protective custody and who, if possible, ought to reside at various places of your district be in sufficient number entered into a list arranged according to State Police Offices. As to their qualification I request that the president of the bar then be consulted, the necessity of a strictly confidential treatment will have to be pointed out to him. Agencies, other than the judicial administration, will not be consulted. I then request that two copies of the list be submitted and that the opinion of the president of the bar be attached. Concerning the attorneys mentioned in the list, personal data and qualification for each of them have to be attached in addition to the character and political attitude of the attorney, particularly the manner of his professional training as counsel for the defense in criminal cases has to be explained in this statement; furthermore, if possible, whether it can be assumed that the attorney enjoys the confidence of the State Police Office.

Negative reports, if such is the case, are requested.

As Deputy
[Signed] SCHLEGELBERGER

Note

I have discussed the question with the attorney Dr. Dormann today. He received from me 3 copies of the decree to deal with

them; it was especially pointed out to him that the affair was strictly confidential. After contacting Dr. Droege he will try to compile for Hamburg and Bremen a list of such attorneys who are qualified to defend prisoners in protective custody.

Note

After 2 weeks

11 February 1938

[Signed] LETZ

Note.—I have reminded Dr. Dormann by telephone. The list is under deliberation at present.

Note

1. To be submitted to the Senator.
2. Two weeks.

5 May 1938 [Signed] LETZ

When opinion arrives, report has to be made.

[Signed] ROTHENBERGER

Certified true copy.
Hamburg, 9 August 1947

[Signed] VON THADEN
Justizoberinspektor

[Stamp]

Hanseatic District Court of Appeal
Hamburg

TRANSLATION OF DOCUMENT NG-366
PROSECUTION EXHIBIT 256

MINUTES OF DEFENDANT KLEMM ON CONFERENCES OF REICH MINISTER OF JUSTICE WITH ATTORNEYS GENERAL AND PRESIDENTS OF COURTS OF APPEAL, 23 AND 24 JANUARY 1939, CONCERNING PROTECTIVE CUSTODY

Conference with the Attorneys General [Generalstaatsanwaelte]* on 23 January 1939

Protective custody after serving punishment, after acquittal, after release from arrest pending trial.

* Although the term Generalstaatsanwalt may be translated literally as state chief attorney, the term was ordinarily translated at the trial as "attorney general" or "chief public prosecutor." Similarly, Staatsanwalt has ordinarily been translated as "attorney general" or "public prosecutor."

From the individual districts:

Munich (Leimer)—In Memmingen 4 cases of arrest for protective custody occurred and 2 of those after penal detention, 2 after arrest pending trial (not advisable, because executed in the same prison, probably even in the same cell), 8 in Augsburg, 1 in Kempten, 7 in Munich, altogether 359 after penal detention. The cases are decreasing.

Hamm (Semler)—No detrimental cases. 1 case in Arnsberg with the explanation that there is no intention to criticize the sentence. There have been frequent requests for calling back in cases where no warrant of arrest is issued.

Berlin (Jung)—The State Police [Stapo] takes functionaries of the KPD [Communist Party] into protective custody after penal detention. In cases where a warrant of arrest in high treason affairs is rejected, protective custody is to be ordered at once. Furthermore, in 1937 and 1938 a few priests and Jews in protective custody in cases of refusal of warrants of arrest. Protective custody justified on an acquitted sexual criminal (later conviction). No further annoying clashes.

Jena (Wurmstich)—Penitentiary inmates as a rule always in protective custody after penal detention likewise traitors and defaulters [violating restrictions acknowledged by signature upon release]. As regards the detrimental cases, improvement since 1936. Jehovah's Witnesses are arrested on principle after penal detention, but are mostly released after 3–4 days.

Duesseldorf (Hagemann)—3–4 percent of the released are taken into protective custody. Jehovah's Witnesses are released, if they countersign. There are frequent requests for calling back in cases, where no warrants of arrest are issued.

Stettin (Staecker)—Only in very few cases protective custody after penal detention. In 2 cases (abortion by female defendant Dr. Buchholz and 1 other case in accordance with section 175a of the penal code [Sodomy]) protective custody was entirely justified as the result of the appeal has shown. (Case Buchholz 4 years of hard labor.) As a rule, Jehovah's Witnesses and high treason criminals are arrested pending trial.

Celle (Schoenering)—On principle, traitors, Jehovah's Witnesses, homosexuals, and persons guilty of abortion are taken into protective custody after penal detention. 4 detrimental cases of protective custody: priest, RM 10,000 bail; race defiler, RM 15,000 bail; acquitted because of proved innocence; Jew (after being acquitted of acting maliciously against the State); insulter of the SS (after penal detention).

Hamburg (Drescher)—Protective custody as preventative measure after penal detention, etc., has to be acknowledged as justified, but not as a correction of a judicial decision. No special details.

Karlsruhe (Lautz)—Jehovah's Witnesses as a rule are taken into protective custody after penal detention. Protective custody after repeal of the warrant of arrest was justified in 2 cases.

Graz (Meissner)—The Chief Public Prosecutor asked the State police in 2 cases for actions of protective custody, because a 13-year-old gangster could not be prosecuted and because the use of violence could not be clearly proved to a priest in a case of sexual crime.

Brunswick (Mueller)—There is one case, where protective custody as a correction of a judicial decision is embarrassing, because protective custody is justified (priest, sexual criminal). In another case, (priest, sexual criminal) the protective custody is not justified. In general the State Police is trying to act in agreement with the public prosecutor.

Oldenburg (Christians)—On principle, functionaries of the Communist Party are taken into protective custody after penal detention, furthermore, Jehovah's Witnesses in almost all cases. Only a few unsatisfactory cases.

Naumburg (Hahn)—Frequent request for calling back if no warrant of arrest is issued. The impression has been given that judges are deciding for a warrant of arrest, because protective custody seems to them harder than arrest pending trial. Often the criticism of justice because of actions of protective custody is not absolutely unjustified.

Special example: A former SS Sturmfuehrer (disloyalty) after 1 year of penal detention was given another year in protective custody.

Nuernberg (Bems)—Cases of protective custody after penal detention, etc., have decreased, although frequently protective custody is exercised, if no warrant of arrest is issued. Protective custody as criticism of justice has not occurred any more. On principle, high treason criminals, Jehovah's Witnesses and race defilers are taken into protective custody after penal detention.

The minister ends the conversation by stating that in the interest of justice those cases are to be regretted where protective custody is to be regarded as justified criticism of justice, besides no objections can be raised against preventative measures.

[Signed] KLEMM
25 January 1939

907802—51——23

Conference with the *Presidents* of the Courts of Appeal on 24 January 1939

Protective custody after serving term of imprisonment, after acquittal, after release from arrest pending trial.

Hamm (Schneider)—Conditions have improved during the year 1938. The most important cases are the ones after arrest pending trial. The taking into protective custody is performed more carefully today because of the reputation of justice. The complaint has been made that the length of protective custody is assuming the character of punishment. In one case (public notary) protective custody after release from arrest pending trial was justified. Some lawyers refrain from submitting a complaint of arrest because protective custody is pending. There are judges who in case of doubt issue a warrant of arrest in order to avoid protective custody. In one case of criminal proceedings homosexuals were released from arrest pending trial and later on legally acquitted; during the trial, however, they were brought to court from protective custody every day. Monks from Dorsten were taken into protective custody after their acquittal.

Darmstadt (Scriba)—In one case defendant taken into protective custody while still being in court after acquittal. In some cases protective custody was inflicted after repealing arrest pending trial, release, however, was obtained after objecting by the administration of justice. General picture: Decline of measures of protective custody in face of contradictory legal decisions.

Berlin (Hoelscher)—In 1938 only 3 cases of protective custody. A decline of arrests has been observed.

Duesseldorf (Schwister)—Frequent requests for calling back if warrant of arrest has been refused. It has even been noticed that corresponding agreements were made between the investigating or examining judges and the State Police (Duesseldorf). In one case protective custody was justified and in another case one additional year of protective custody. Those cases are very rare now; good understanding exists between the court and the State police. Therefore the impression that justice is being criticized does not exist.

Naumburg (Sattelmacher)—A mitigation has been noticed, however, there are frequent requests for calling back if warrant had been refused.

Hamburg (Rothenberger)—Cases of protective custody have been increased, because the warrants of protective custody are decided on in Berlin. In 6 cases, Jewish women have been taken into protective custody because of sexual intercourse with Aryans.

In the case of Laeiss *vs.* half-Jewess, she has already been under protective custody for 1½ years. State police file notes from police records state:

(1) Protective custody, "to make the punishment finally effective."

(2) Protective custody, "to make the served sentence still more effective."

(3) Protective custody, "because of the big number of previous convictions."

(4) Protective custody, "to prevent prejudicing the course of justice through the interference of lawyers as defense counsel."

Rostock (Goetsch)—Good cooperation with the State Police, only preventive measures have been noticed.

Graz (Meldt)—No difficulties, not the slightest disharmony, or criticism of the law.

The minister concludes the discussion by indicating that it is to be the task of the presidents of the courts of appeal to see that arrests in the courtroom by the State Police are avoided and recommends for the rest to remain in contact with the State Police.

[Signed] KLEMM
25 January 1939

PARTIAL TRANSLATION OF DOCUMENT NG-629 PROSECUTION EXHIBIT 28

[Also Rothenberger Document 3
Rothenberger Defense Exhibit 3][1]

EXTRACTS FROM A REPORT ON A 1 FEBRUARY 1939 CONFERENCE AT THE MINISTRY OF JUSTICE BETWEEN DEFENDANT ROTHENBERGER AND VARIOUS COURT PRESIDENTS[2]

Report on the conference of [court] presidents on 1 February 1939

Present: Senator Dr. Rothenberger, Attorney General Dr. Drescher, Vice President Letz, District Court Presidents Korn and Dr. Ruther, Bremen, Local Court President Dr. Blunk, Local Court Directors Schwarz, Boehmer, Hansen, and von Lehe, Senior Judges of Local Court Gersdorf and Stender, Chief Public Prosecutor Lohse, Bremen, Oberlandesgerichtsrat Dr. Segelken and the undersigned.[3]

[1] Defense counsel often reproduced in their document books documents which had previously been introduced as prosecution exhibits, and in these cases the document ordinarily acquired both a prosecution and a defense exhibit number.

[2] Document reproduced immediately above reports on two meetings of this conference.

[3] Document is not signed.

Senator Dr. Rothenberger and the attorney general reported on the discussions at the meetings of the presidents of the courts of appeal and attorneys general with the Reich Minister of Justice.

Senator Dr. Rothenberger first asked for a report on the attitude of the judges with reference to the articles in the "Schwarze Korps" [Black Corps, official newspaper of the SS] before his speech on 28 January 1939, and wanted to know whether his address had put their minds at ease. With the exception of Wandsbek where the articles of the "Schwarze Korps" evidently were not noticed, it was the general opinion, expressed particularly by the district court president of Hamburg and Director Hansen, Altona, that the judges were actually extraordinarily disturbed by the attacks of the Schwarze Korps. The statements made by Senator Dr. Rothenberger have had a rather soothing effect since there was now some hope for improvement. However, there were doubts as to whether the Reich Minister of Justice would succeed in carrying his point against the Schwarze Korps i.e., the SS. These doubts were based especially upon the former passive attitude of the ministry.

I. The attorney general then reported on the penal development of the events of 9 to 11 November.* The former regulation according to which the State Police is the final authority in deciding whether or not such a case should be followed up, has been abolished following a decision by the Reich Ministry of Justice. The Reich Minister of Justice and Chief Public Prosecutor Joel have stated that it would, of course, be impossible to handle these things the normal legal way; if, at first, the law as such has been changed by order from higher authorities, then it would not be possible to prosecute those people involved in the perpetration. Therefore, by way of example the conception of violation of the public peace would have to be abandoned. This can be legally justified because the perpetrators lacked the knowledge of illegality since they acted on order. As far as the criminal offenses committed during the encounter are concerned, negligible acts should be disregarded. Otherwise, cases will be withdrawn, but only by order of the Fuehrer, while serious criminal offenses, as for instance rape and race defilement have to be prosecuted. The order for prosecuting will be issued in every case by the minister after, to begin with, the perpetrators in case they are Party members or members of a Party organization have been expelled by a special department of the Supreme Court of the Party which has been established in Berlin.

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* The reference is to the widespread acts of violence against Jews during this time, a period often referred to as "Crystal Week" because of the large number of windows in Jewish stores which were broken.

Goering had strongly disapproved of the events. In his opinion, it was the hardest blow the Party had ever received.

Comments concerning these events should not be prosecuted under the Heimtueckegesetz if they were occasioned by well founded protest.

Senator Dr. Rothenberger pointed out that nothing had happened in Hamburg, thanks to Gauleiter Kaufmann's attitude which Ministerpresident Goering had expressly recommended. He asked for understanding in the attitude of the Reich Minister of Justice and to pass that understanding on to the judges.

As far as prosecution under the Heimtueckegesetz is concerned, because of comments about the events between 9 and 11 November, he stated that the court might find itself in the position where it would have to investigate the facts. Such cases would have to be reported.*

* * * * * * *

IV. The discussion on the question of protective custody by the police was then reported upon. The standpoint of the ministry is, which also finds approval here, that protective custody measures, insofar as they are purely of a preventative nature, cannot be objected to; that, however, corrective measures such as have become known in various cases should not be permitted.

Senator Dr. Rothenberger requested *immediate presentation* of all cases in which the judge is under the impression that the police are attempting to correct the verdict through their arrest measures. In addition to this, all cases should immediately be reported in which the police effect an arrest in the courtroom.

* * * * * * *

PARTIAL TRANSLATION OF DOCUMENT NG-340 PROSECUTION EXHIBIT 257

LETTER FROM BOUHLER, CHIEF OF THE FUEHRER'S NAZI PARTY CHANCELLERY, TO LAMMERS, 26 JULY 1939, CONCERNING HITLER'S DECISION TO PLACE PERSONS IN SECURITY DETENTION UNDER HIMMLER FOR WORK IN CONCENTRATION CAMPS

Berlin W 8, 26 July 1939
Vosstrasse 4

The Chief of the Chancellery of the Fuehrer in the NSDAP

To the

Chief of the Reich Chancellery, Dr. Lammers

* Further parts of this report, dealing with the question of "race pollution" and the treatment of Jews, are reproduced below in section V D 2.

Subject: People in security detention

Dear Party Member Dr. Lammers,

Some time ago the Reich Leader SS made a request to the Reich Minister of Justice to the effect that some of the people in security detention be put at his disposal for important work in the concentration camps. The urgency for this increased, when on the 50th birthday of the Fuehrer a great number of persons in protective custody were dismissed. The request of the Reich Leader SS was refused in the letter of 14 July 1938 because these persons apart from carrying out work to fulfill the requirements of the penal institutes also did such work as appeared urgent under the Four Year Plan. When, however, the penitentiary Brandenburg-Goehrden was inspected by the chief of the office for matters concerning pardoning, the Chancellery of the Fuehrer, it was established that a large number of the people in security detention were busy painting cardboard soldiers for private firms. Considering the far more important work (which can actually be regarded as urgent in connection with the Four Year Plan) which is being carried out by prisoners, for example, in the concentration camp Sachsenhausen and in the adjoining brick yard, the Fuehrer has ordered that all dispensable persons in security detention are to be put at the disposal of the Reich Leader SS immediately.

At the request of the Reich Leader SS, after inspecting the concentration camp Sachsenhausen in the spring, I supported the request he made to the Fuehrer. I was then given the order to ascertain the way in which the persons in security detention were occupied at the present time. During the process of my investigation I established what was required, and I also received the following report from the Reich Ministry of Justice concerning this matter:

> "According to the most recent information, there were 4,303 persons in security detention. Of these 4,096 are working; i. e., 721 of them (16.8 percent) are carrying out work for the requirement of the penal institutes and other authorities; and 3,375 persons in security detention (78.4 percent) are engaged in work in connection with the Four Year Plan (including work for export and for military use). The remaining 207 persons in security detention (4.8 percent) were not working on the day of my investigation, in consequence of illness or because they had to undergo a term of imprisonment."

There can be no doubt that the persons in security detention who are working on the toys mentioned, and who, per person, enable the institute to earn daily RM 1.20–1.80 are inserted under the heading of "urgent work for the Four Year Plan."

In consequence of my report in Obersalzberg, the Fuehrer, who already had leanings toward this interpretation after my first report, decided that the persons in security detention were to be incorporated into the concentration camps under jurisdiction of the Reich Leader SS.

I have on purpose refrained from informing the Reich Minister of Justice directly. I request you to inform the Reich Minister of Justice of the decision of the Fuehrer.

I have informed the Reich Leader SS of the decision of the Fuehrer and of my letter to you.

Heil Hitler!

Yours faithfully
[Signed] BOUHLER

TRANSLATION OF DOCUMENT NG-190
PROSECUTION EXHIBIT 284

VARIOUS MEMORANDUMS AND LISTS OF REICH MINISTRY OF JUSTICE, 28 SEPTEMBER 1939 TO 7 MARCH 1941, CONCERNING EXECUTIONS WITHOUT TRIAL OR EXECUTIONS AFTER TRIAL UNDER VARIOUS CIRCUMSTANCES

I. Note by Reich Minister of Justice Guertner to Lammers, 28 September 1939, Concerning Executions of Three Persons Without Trial and Urging Clarification of Problems Created by Punishment "Without Criminal Proceedings and Without a Sentence."

Note

1. *Publications in the press*

a. The Reich Leader SS and chief of the German police reports that Johann Heinen, Dessau, was shot on 7 September 1939, because of his refusal to cooperate in tasks for the protection of the security of the national defense. In addition, Heinen was a criminal who had been convicted previously for theft.

b. The Reich Leader SS and chief of the German police reports the following have been shot:

(1) On 11 September 1939 Paul Mueller from Halle because of arson and sabotage. Mueller had been convicted previously 8 times to imprisonment and penitentiaries because of crimes violating property rights.

(2) On 15 September 1939 August Dickmann from Dinslaken, born 7 January 1910, because of his refusal to fulfill his duty as a soldier. D. stated as a reason for his refusal that he was a Jehovah's Witness. He was a fanatical follower of the international

sect of the serious explorers of the Bible [ernste Bibelforscher, Jehovah's Witnesses].

2. *Statement of facts*—Details are not known here since the judicial authorities had nothing to do with the matter. Whether the military judicial authorities have knowledge of it (case Dickmann) is not known here either.

3. *Legal basis for the executions without trial*—The Fuehrer is said to have ordered these executions, or to have approved them. Furthermore, he is said to have ordered that the Reich Leader SS should maintain by all means the security within the territory of the Reich, and this order includes also immediate execution in cases of actions in violation of war laws (report of SS Brigadefuehrer Dr. Best).

Upon the request for information about this order of the Fuehrer, Gruppenfuehrer Heydrich replied that the Minister of Justice should contact the Fuehrer directly in regard to the executions.

4. *Legal situation*—Should the information made available to the Ministry of Justice be correct, then a concurrent jurisdiction would now exist in the nonoccupied territory of the Reich, that is outside of the area of combat and operation. There would exist in this area a concurrent jurisdiction for the punishment of war crimes between the People's Court, the military courts, and the Special Court on one hand, and the police on the other hand. According to which criteria should the question of the competency be decided in the individual case?

Within the nonoccupied territory the state of public order and security does not permit that any authority should be hampered or disturbed in its activities.

The criminal procedure according to the war laws is practically the same as the procedure before the courts martial. The Special Courts have just not been *called* courts martial. I refer to the case of the farmer Glein from Obersleben near Weimar, who during the night of 18 September 1939 put fire to his grain-rick and thus destroyed 100 hundred-weights of grain. He was sentenced to death by the Special Court on 18 September 1939.

5. In a further case (Ernst Georgi of Freiberg), a warrant of arrest had been issued against the defendant on charges of fraud. The State Police, Office Plauen, suggested to place Georgi at the disposal of the Secret State Police, and to cancel the trial fixed for the 18th of this month, since this file should be treated in a special way according to an order of the chief of the Security Police and, therefore, a transfer to the trial in Freiberg would not be feasible.

In this case the crime was committed before the war decree [Kriegsverordnung] took effect. After a short period the defendant was returned to the public prosecutor. The trial took place, and the sentence (10 years penitentiary, and protective custody) was passed on 26 September 1939. The Security Police did not refer to a general order in this case. What the legal basis was for the interference with the court proceedings, is not known to me.

6. I think it to be urgent that the problem, whether crimes committed in the nonoccupied territories should be punished according to the war laws, or by the police without criminal proceedings and without a sentence, be clarified in general.

Berlin, 28 September 1939 [Signed] DR. GUERTNER

The above note, I handed over to colleague Lammers on 28 September 1939.

Berlin, 30 September 1939 [Signed] DR. GUERTNER

2. Handwritten File Note by Guertner, 14 October 1939, on a Conference with Lammers Concerning Executions Without Trial upon Order of Hitler

Note: 14 October 1939, 12:00 V. [Noon]

Lammers saw me by order of the Fuehrer.

He said that yesterday he had informed the Fuehrer about the contents of my manuscript. The Fuehrer said he had not issued *general* directions. He said he had ordered the 3 executions [Erschiessungen]. He also could not give up this right in individual cases, since the courts (military and civilian) did not prove capable of coping with the peculiar conditions of war.

Thus, he had ordered now the execution of the Teltow bank robbers. Himmler would contact me in this matter before the day is over.

14 October 1939

[Signed] GUERTNER

3. Draft of a Proposed Letter from Guertner to Himmler, 30 November 1939, Concerning the "Carrying-out of Death Sentences"

Berlin, 30 November 1939

The Reich Minister of Justice

To the
Reich Leader SS and Chief of the
German Police in the Reich Ministry of the
Interior, Heinrich Himmler

Subject: Carrying-out of death sentences

Enclosures: 2 documents (one copy of sheets 110–115 of the file IIIg 19 5039/39 and one of the attached list II, sheets 67–72 of the file IIIg *10a* 5010/39)

[Handwritten marginal note] To be submitted again on 30 November 1939

[Initialed] GTR [Guertner]

Dear Herr Himmler!

For your information I submit in the enclosure[1] two copies of list reports to the Fuehrer about the death sentences passed since 3 September 1939, the day I have been put in charge of decisions about appeals for mercy in regard to death sentences—and about the decisions I made, or intend to make.

In regard to the shootings, mentioned at the end of list II it has been published in the press that the perpetrators, as for instance in the cases of Latacz, Jacobs, and Gluth, had made themselves guilty of resistance by force or, as for instance in the case of Potzleschak, had tried to escape. Let me point out that these publications—always using the same phraseology—were apt to attract the same attention of at least those persons who participated in the criminal proceedings. On the day before the shooting of Latacz the press had reported about the trial which took place in the hospital for prisoners on remand. Latacz who prior to his transfer was lying in the prison hospital, had a bandage with metal braces. Thus, also the broad public was informed about his physical condition, and knew that a resistance was hardly possible in such a condition.

Heil Hitler!
Yours very much devoted

To be signed by the Minister [initialed] Dr. C.[2] [Crohne]

28 November

[1] The exact status of the enclosures mentioned is not known. Since the letter itself was only a draft, the marginal notes of which indicate that it was submitted to Dr. Guertner's consideration more than once, it is not clear whether the original list mentioned was initially compiled and then substituted by a completely new list, or whether the list compiled initially was merely revised by new additions as time passed. However, it should be pointed out that the list reproduced below, and which was submitted as part of the file as found by Allied authorities, contains entries as late as 30 January 1940. It should also be noted that the three cases specifically mentioned in the draft letter of 30 November 1939 (Latacz, Jacobs, and Gluth) are all cases mentioned in the following list.

[2] The initials indicate that Dr. Crohne, a department chief in the Reich Ministry of Justice, proposed this draft or, in any event saw it before it was shown to Reich Minister Guertner. Dr. Crohne was chief, first of Department III, and later of Department IV, in the Reich Ministry of Justice.

4. List compiled by the Reich Ministry of Justice tabulating information concerning 18 persons executed without sentence or after sentences for a term of years*

Current number	Name	Facts in the case	Proceedings and execution	Stage of proceedings in which execution was carried out	Method of transmission of orders to us
1	Johann Heinen Dessau, –g 10b 1634/39 g–	He was ordered to help in the construction of an air raid shelter and refused to do so arguing that he was a stateless person.	No sentence. Reich Ministry of Justice was informed by a newspaper notice. Shot on 7 September 1939.		
2	Paul Mueller Halle, –g 10b 1634/39 g–	Arson and sabotage. Details unknown.	No sentence. Reich Ministry of Justice was informed by a newspaper notice. Shot on 15 September 1939.		
3	August Dickmann Dislaken, –g 10b 1634/39 g–	As a Jehovah's Witness he refused to serve in the army.	No sentence. Reich Ministry of Justice was informed by a newspaper notice. Shot on 15 September 1939.		
4	Horst Schmidt Kassel, –g 10b 1634/39 g–	Wearing the uniform of a navy officer he pretended to be a member of the crew of a victorious submarine and committed numerous frauds.	No sentence. Reich Ministry was informed by a newspaper notice. Shot on 6 November 1939.		
5	Israel Mondschein Kassel, –g 10b 1634/39 g–	He committed rape using violence on a German girl.	No sentence. Reich Ministry was informed by a newspaper notice. Shot on 6 November 1939.		

* Concerning this list, see footnote on preceding page.

4. List compiled by the Reich Ministry of Justice, etc.—Continued

Current number	Name	Facts in the case	Proceedings and execution	Stage of proceedings in which execution was carried out	Method of transmission of orders to us
6 7	a. Franz Broenne, b. Anton Kropf prisoners in protective custody, Mauthausen –g 10b 140/39 g–	They assaulted an SS guard and knocked him down.	No sentence. Reich Ministry was informed by a special delivery letter of the Reich leader SS of 9 December 1939. Were hanged on 8 December 1939.		
8	Spressert, –III g 10b 1859/39 g–	Attempted indecent assault on a half-Jewish girl, whose father was a Jew.	No sentence. Reich Ministry of Justice was informed by a newspaper notice.		
9	Witte –g 10b 1859/39 g–	Refusal to work in a plant important to the war effort.	No sentence. Reich Ministry of Justice was informed by a newspaper notice.		
10 11	a. Paul Latacz b. Erwin Jakobs, Berlin, –g 10b 1846/39 g–	They attempted, on 30 September 1939, to rob the Teltow county savings bank.	By sentence of the Berlin Special Court of 13 October 1939 sentenced to 10 years penitentiary.	Shot on 14 October 1939 by order of the Fuehrer.	No order was transmitted to the Reich Ministry of Justice.
12	Franz Potleschak Langwied, –g 10b 1743/39 g–	He snatched away a girl's handbag from her, on 21 September 1939, taking advantage of the black-out.	By sentence of the Munich Special Court of 6 October 1939 sentenced to 10 years penitentiary in accordance with paragraph 2 of the decree concerning public enemies.	Shot on 16 October 1939.	No transmission of orders to the Reich Ministry of Justice, subsequent information by report of the senior prosecutor, Munich, and by letter of the Reich Leader SS of 29 November 1939 stating that the information had been omitted by mistake.

13	Joachim Israel Joseph, Berlin–Spandau, –g 10b 1895/39 g–	He committed 6 cases indecent assaults on girls under age, in the ages of 4–10 years.	Sentence of the Berlin Special Court of 23 October 1939; for indecent assaults coinciding with race defilement, sentenced to 6 years penitentiary.	Shot on 25 October 1939.	Letter from Bormann of 25 October 1939 to the Reich Ministry of Justice stating that by order of the Fuehrer the Jew was to be handed over to the Secret State Police in order to be shot.
14	Gustav Wolf Naumburg, –g 10b 1931/39 g–	He attacked a girl in broad daylight and after having repeatedly stabbed her with a knife, he robbed her wrist watch and attempted to commit an indecent assault.	By sentence of the Criminal Court Naumburg of 25 October 1939 he was sentenced to 10 years penitentiary for highway robbery; and attempted rape.	Shot on 1 or 2 December 1939 after sentencing.	The order of the Fuehrer (through the Reich Leader SS) to the Reich Ministry of Justice was transmitted through Oberreg.rat Werner of the criminal police office, by telephone and letter on 1 December 1939, to the effect that the sentenced person was to be handed over to the Gestapo.
15	Fritz Bremer Breslau, –g 10a 5631/39 g–	He called on family members of soldiers fallen in the Polish campaign and stated he had been informed by his nephew serving on the eastern front about the heroic death of the relative concerned. He presented letters written by himself allegedly written by his nephew and finally had "travel expenses and other costs" refunded to him.	By sentence of the Special Court at Breslau of 14 December 1939 he was sentenced to 15 years in the penitentiary in accordance with paragraph 4 of the decree concerning public enemies.	Shot on 21 December 1939.	The order of the Fuehrer was transmitted by phone and letter on 21 December 1939 by Oberfuehrer [Gruppenfuehrer] Schaub to senior public prosecutor, Joel.

4. List compiled by the Reich Ministry of Justice, etc.—Continued

Current number	Name	Facts in the case	Proceedings and execution	Stage of proceedings in which execution was carried out	Method of transmission of orders to us
16	Max Gross, Munich, –g 14.177/40 g–	On 13 November 1939 he took a 3-year-old boy with him and when the latter was reluctant, coerced him by slapping and tried to commit, as admitted by himself, an indecent assault on him. The crime was prevented by the arrival of the mother.	By sentence of the Munich criminal of 5 January 1940 he was sentenced to 6 months in prison for duress in coincidence with bodily injury.	Shot on 20 January 1940 after the extraordinary objection had been submitted to the special division of the Supreme Court (Reichsgericht). (In this connection, see remark 87).	The order of the Fuehrer was transmitted by telephone by the Gruppenfuehrer Schaub to the senior public prosecutor, Joel. Later on confirmed by a letter of Schaub to Joel.
17	Viktor Meyer Berlin, –g 14.225/40 g–	He stole things belonging to his brother and to a businesswoman (repeated offense) and knocked down and robbed a prostitute.	By sentence of the Berlin Special Court of 19 January 1940 he was sentenced to 12 years in the penitentiary for repeated theft and for serious robbery in coincidence with bodily injury.	Shot on 30 January 1940.	Transmission by telephone of the Fuehrer's order by Schaub to senior prosecutor Joel. Later confirmed by letter.
18	Alfred Gluth Marburg, –g 5.4688/39 g–	7 cases of arson, from February to September 1939; buildings, shacks, storehouses, and supplies of agricultural products.	By sentence of the Berlin Special Court of 17 November 1939 he was sentenced to 10 years in the penitentiary [handwritten: prison?] for arson in coincidence with paragraph 1 of the decree concerning crimes committed by means of violence.	Shot on 18 November 1939.	No order received by the Reich Ministry of Justice. The case became known from newspaper reports.

5. File Note of 6 March 1941 Submitted by Dr. Crohne to the defendant Schlegelberger, concerning "Executions Planned and Carried Out on the Basis of Dubious Information"

1. *Gluth case*—In the summer of 1939 the almost 18-year-old locksmith apprentice Gluth set 4 fires in Marquardt near Potsdam in order to disturb the population, and to show off afterwards as an especially efficient member of the fire brigade. The medical expert stated that Gluth was still in the age of puberty and that the state of his development was equal to that of a 16½-year-old boy. In the opinion of the experts his acts were caused by the physical and mental changes connected with the age of puberty, and further by the awakening of the desire to do important things, which is typical for this age. Sentence: 10 years' imprisonment.

The Fuehrer ordered his execution. According to the statement of SS Brigadefuehrer Mueller, the expert opinion was known to the Fuehrer, but the latter stated that it would be foolish to save such persons, who are a danger for society for further infamous actions. On 19 November 1939 Gluth was shot for offering resistance.

2. *Trampe case*—Trampe stole jewels and clothes from the apartment of a friend, who was the wife of a soldier, and pawned these articles for RM 200. He had access to the apartment in his capacity of repair man. Afterward the soldier's wife and her husband agreed with Trampe on the damage. Trampe defended himself by stating that he was by want compelled to steal, that he intended to redeem the stolen objects later and that he was sure from the beginning that the couple would forgive him afterward because of their friendship and because of his distressed condition. The court accepted his statement as true and sentenced him to 6 years of penitentiary. The press reported that his defense was untruthful, and that it was not accepted as true by the court.

Trampe was shot on 27 September 1940 by order of the Fuehrer. It is not known here whether the shooting took place merely on account of the incorrect reports of the press.

3. *Jackubetzki case*—The milker Jackubetzki had a savings account in the Landeshaus in Breslau. These were the savings from his wages. One day he came to Breslau without money and wanted to withdraw his savings. Since the Landeshaus was already closed, he got the idea of taking away the handbag from a woman walking in front of him in order to get money for his trip home. He did that, and was sentenced to 10 years penitentiary.

Referring to a press report in the "Nachtausgabe" [Evening Edition] (not in the file) the Fuehrer expressed, on 9 December 1940, by phone through the SS Gruppenfuehrer Schaub his aston-

ishment about the fact that J. was not sentenced to death. In the "Nachtausgabe" the case was misrepresented; it could not be seen from the article that the deed concerned was prompted by the occasion.

On 26 February, Under Secretary Dr. Freisler conferred with SS Gruppenfuehrer Schaub and related to him the details of the perpetration, whereupon Schaub considers the case as settled.

4. *Kuhlmey case*—Kuhlmey in his capacity as an auditor knew a number of manufacturers who were drafted into the army. He asked their wives to authorize him to adjust their allowance cases. He cheated the wives of 4 soldiers by giving them altogether about RM 375 less than he had received at the public welfare office. He cheated the public welfare office of about RM 3,000 by obtaining allowances on false pretenses and without the knowledge of the woman concerned, and by keeping the money for himself. Sentence: 5 years penitentiary. There still are some minor cases to be sentenced.

On 14 October 1940, Schaub notified us by phone that the Fuehrer had learned about the case through an article in the V.B. [Voelkischer Beobachter] of 9 October 1940. If, in the still open cases the death sentence should not be imposed, a transfer to the State Police will be ordered. It cannot be seen from the report of the "Veolkischer Beobachter," under the headline, "Soldiers' wives thoroughly cheated" that K. caused detriment first of all to the welfare office and in addition also to a few women. It contains some hints though that K. also received subsidies which were not due to the women, but creates the impression that the total amount of about RM 3,500 was withheld to the detriment of soldiers' wives.

[Handwritten note] Submitted to Under Secretary Dr. Schlegelberger according to order. Case 1 does not belong here.

[Illegible initial] 6 March 1941
[Illegible initial] 6 March

7 March [Signed] DR. CROHNE

PARTIAL TRANSLATION OF DOCUMENT NG-369 PROSECUTION EXHIBIT 258

LETTER FROM PEOPLE'S COURT PRESIDENT, THIERACK, TO GUERTNER, 14 AUGUST 1940, RECOMMENDING TRANSFER TO CONCENTRATION CAMPS WITHOUT TRIAL OF PERSONS FALLING WITHIN A "MINOR GUILT" CATEGORY OF HIGH TREASON

The President of the People's Court
1400–I, Confidential!

To the Reich Minister of Justice
Berlin W 8
Wilhelmstr. 65

Berlin W 8, 14 August 1940
Bellevuestr. 15

[Stamp]

Reich Ministry of Justice
17 August 1940
Dept. III

Immediately after I was recalled from the war, I realized that things were not as I had expected when plans for the People's Court were worked out. It was overloaded with trials and this because it had to handle cases which it had certainly not been intended to judge. This happened especially in cases which arose in the Protectorate of Bohemia and Moravia because as yet there was no possibility of transferring the cases to the courts of appeal. But even among cases which are ready for such a transfer there are some which should not be dealt with by the courts of appeal for various reasons.

However right it is to exterminate harshly and uproot all the seeds of insurrection, as for example we see them in Bohemia and Moravia, it is wrong for every follower [Mitlaeufer], even the smallest, to be given the honor of appearing for trial and being judged for high treason before a People's Court or, failing that, before a court of appeal. In order to deal with these small cases and even with the smallest, the culprits should surely be shown that German sovereignty will not put up with their behavior and that it will take action accordingly. But that can also be done in a different manner, and I think in a more advantageous one, than through the tedious and also very expensive and ponderous channels of court procedure.

I have therefore no objection whatsoever if all the small and smallest followers who are somehow connected with the high treason plans which have been woven and plotted by others are brought to their senses by being transferred to a *concentration camp* for some time. This would have the further advantage that dispositions would be taken quickly and that they would be doubly effective because of that, and that these dispositions could be rapidly modified if by the measures taken the culprit were brought to a better attitude.

One can think, in addition to this, of the many cases of *article 90c of the Criminal (Penal) Code,* in which, by inconsiderately exploiting the strong position of the foreign state, persons who

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had to cross the border for some reason or other (work, or visiting relatives) were used to find out something about the neighboring state. This occurred particularly frequently in the border areas which were at that time Polish or Czech.

In any case, I consider it to be an *absolutely* essential prerequisite that all these cases should be submitted first of all to the Chief Reich Public Prosecutor of the People's Court for penal prosecution. If he considers that *article 153, Code of Penal Procedure* can be made to apply, then the People's Court will be able to give its consent to this in nearly all cases. Then the accused would be put at the disposal of the Security Police with the injunction that he be placed in a concentration camp for a certain period of time.

I start from the principle that the conception of minor guilt in the sense of article 153, Code of Penal Procedure is naturally not the same in cases which are suitable for the People's Court, as in those cases in which the official judge has to decide. Even if this conception is relative and depends on the nature of the offense, a *legal extension of article 153, Code of Penal Procedure* should surely be made in order to presume insignificance of guilt for an act which can be characterized as a crime, as, e.g., crimes in the nature of high treason in the territory of Bohemia and Moravia.

[Signed] THIERACK

TRANSLATION OF DOCUMENT NG-540
PROSECUTION EXHIBIT 260

LETTER FROM MEISSNER* TO DEFENDANT SCHLEGELBERGER, 22 APRIL 1941, CONCERNING TRANSFER OF CONVICTED PRISONERS TO THE GESTAPO

Berlin W 8, 22 April 1941
Voss-Strasse 4

The Minister of State
and Chief of the Presidential
Chancellery of the Fuehrer
and Reich Chancellor

RP 83/41 Secret
02/312

* Otto Meissner was Chief of the Presidential Chancellery of the Fuehrer and Reich Chancellor. He was a defendant in Case 11, United States *vs.* Ernst von Weizsaecker et al. See volumes XII–XIV, this series.

Personal

Confidential

Dear Herr Schlegelberger!

In the matter of the transfer of convicted prisoners to the Secret State Police, Reich Leader Martin Bormann has meanwhile informed me by order of the Fuehrer that the Fuehrer does not consider it necessary to procure opinions from the Reich Ministry of Justice on sentences which are submitted to him for reviewing. The question remained unsettled of whether the Fuehrer wants to request the transmittal of sentences himself or to hear your opinion in cases in which no sentence is submitted. At present, however, I do not consider it expedient to pursue the matter by sending another letter to Reich Leader Bormann. I would, however, leave it to your discretion to inform me briefly and with the utmost speed prior to the transfer of the prisoners to the Secret State Police about the factual and legal situation of all those cases in which you think that essential details for the evaluation of the perpetrator's character or of the crime have not been brought to the Fuehrer's attention. I shall then inform the Fuehrer of the details I learn from you as far as the case requires this. The transfer of the convicted prisoners to the Secret State Police may be postponed in these cases for a short period until you hear from me again.

Heil Hitler!

Yours very truly
[Signed] DR. MEISSNER

To State Secretary Dr. Schlegelberger
Reich Ministry of Justice
Berlin W 8
Wilhelmstrasse 65

TRANSLATION OF DOCUMENT 648-PS
PROSECUTION EXHIBIT 264

DIRECTIVE ON BEHALF OF THE REICH MINISTER OF JUSTICE TO PUBLIC PROSECUTORS, 22 OCTOBER 1942, CONCERNING THE "TRANSFER OF ASOCIAL PRISONERS TO THE POLICE"

Reich Minister of Justice
IV a 1665/42 g.

Berlin W 8, 22 October 1942
Wilhelmstrasse 65
Tel. 11 00 44
Long Dist. 11 65 16

To the Attorneys General

For information [Stamp] *Secret*

A. Chief Reich Prosecutor at the People's Court

B. Presidents of the District Courts of Appeal,
Graz
Innsbruck
Linz
Vienna

Subject: Transfer of asocial prisoners to the police

I. In agreement with the Reich Leader SS, the following group of lawfully sentenced prisoners confined to penal institutions will be transferred to the custody of the Reich Leader SS.*

1. Jews—men and women — detained under arrest, protective custody, or in the workhouse.

2. Gypsies—men and women—detained under arrest, protective custody, or in the workhouse.

3. Russians and Ukrainians residing in the Reich as non-refugees (excluding Latvians, Esthonians, and Lithuanians) detained under arrest, protective custody, or in the workhouse.

4. Poles residing in the former Polish state territory on 1 September 1939, men and women, sentenced to penal camps or subsequently turned over for penal execution, if sentence is over 3 years, or includes subsequent protective custody, (including Kriegstaeter [perpetrators of crimes during war time] and persons in protective custody).

5. Men *only*, in protective custody (except those sentenced by Austrian Law to workhouse according to sec. 1, par. 2, Reichsgesetzblatt, No. 165, dated 10 June 1932).

6. Convicts sentenced to subsequent protective custody—men *only* (including Kriegstaeter). Excepted from this transfer are—

a. Those sentenced by an armed forces court and by an SS and police court.

b. Prisoners of war.

c. Those sentenced by Dutch courts.

d. Those sentenced by former Yugoslav courts.

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* Concerning the relation of the extermination program to transfers of certain groups to the Reich Leader SS, two documents written by Thierack, Reich Minister of Justice, are especially enlightening—Thierack's memorandum concerning his conference with Himmler and others on 18 September 1942, which mentions "special treatment" (654–PS, Pros. Ex. 39), reproduced below in section V C 3 a; Thierack's letter of 13 October 1942 to Bormann, which mentions "the extermination of members of these nationalities," referring to Poles, Russians, Jews, and gypsies (NG–558, Pros. Ex. 143), reproduced below in section V D 2.

e. Foreigners, not coming under groups 1–4. People from the Protectorate and stateless persons are considered natives.

Until further notice, the transfer is to be postponed for—

a. Those sentenced by former Polish courts or by the present courts of the Government General. Poles, sentenced by former Polish courts in the Occupied Eastern Territories can however be transferred.

b. Germans sentenced by German courts in the Occupied Eastern Territories, in the Government General, in Holland, in Norway, Alsace, Lorraine or Luxembourg.

c. Those sentenced by the courts of Alsace, Lorraine, and Luxembourg.

d. Nationals of the Protectorate.

Those in protective custody and in the penitentiary with subsequent protective custody are to be selected for special screening by the [department] concerned, Department XV of the Reich Ministry of Justice, and, therefore, are also not to be transferred immediately if the institution is convinced that release from protective custody would enter into the question within a predictable time. On account of their favorable development during the execution of punishment (not merely because of old age or similar reasons). Those who are sentenced to additional protective custody upon completion of punishment for high treason and sedition are generally to be selected for this special screening. Department XV of the Reich Ministry of Justice will decide which of the prisoners who are not to be transferred according to this shall be excepted permanently from the transfer.

The director of the institution is personally responsible for the selection of prisoners to be transferred.

If doubt arises in individual cases whether the transfer shall be made, the decision of the Reich Ministry of Justice has to be requested. The same applies if a prisoner who is considered for transfer is still needed as a witness, etc., in other proceedings or in cases of additional sentence by a court.

II. The decisive day fixed for lawful sentence is 1 November 1942. Only prisoners lawfully sentenced before 1 November are liable for transfer. Further directives concerning arrest, confinement in special institutions, and so forth, of those legally convicted later, are reserved.

III. Sick prisoners are not exempted from transfer, they are to be transferred as soon as they are transportable. Final decision on insane prisoners is reserved, transfer at the present is postponed.

IV. In preparation for transfer of prisoners belonging to groups I, 1–6, excluding cases of postponement, lists bearing name and current number of each prisoner, separate for each group, and 1–4 for men and women, are to be executed by the institutions. Four copies have to be sent directly from the institution to the Reich Ministry of Justice for the attention of President of the Senate *Hecker*. The first lists are to be executed according to the status existing on 1 November of this year. Supplementary lists, compare II, also, on the status at 1 December of this year and 1 January 1943, and are to be submitted up to the 8th day of the month in question. Institutions having over 100 prisoners for transfer, submit partial lists for 100–200 prisoners, whenever completed.

The lists must be divided as follows:

1. Number of list.
2. Surname and Christian name.
3. Date of birth (day, month, and year).
4. Place of birth.
5. Last residence.
6. Nationality.
7. Institution number.
8. Sentence or measure of security and improvement.
9. *a.* Acting court.
   b. Executing authority and its reference number.
10. Start and completion of sentence—in case of ex-servicemen, note that term has not yet started.
11. Offense—main offense only.
12. Able to work—yes, no.

V. Prisoners not yet consigned to the proper institution, or temporarily consigned to other institutions, will be specified by the competent institution, to which they are to be delivered as soon as possible.

VI. Slowdown of production in vital armament factories, is to be avoided during transfer of prisoners. Therefore, the transfer has to be effected gradually with distribution over several months, as deemed necessary by the individual institutions, in consideration of the factories. At the same time, the institutions most affected are already filled up because of changes in the execution plans. The number of prisoners and the time of transfer for the different districts, will be announced here from time to time.

VII. With completion of the transfer to the police, the penal term is considered interrupted. Transfer to the police is to be reported to the penal authority, and in cases of custody to the superior executive authority, with the information that the in-

terruption of the penal term has been ordered by the Reich Ministry of Justice.

VIII. Preparatory to examinations of all male penitentiary prisoners, sentenced to terms over 8 years, the directors of institutions concerned received verbal instructions at the Reich Ministry of Justice. These instructions are valid correspondingly for persons in protective custody and penitentiary prisoners with additional protective custody, whose transfer has been postponed until examination of case by department XV of the Reich Ministry of Justice (compare I, par. (4)).

IX. The information of this statute is to be given exclusively to such directors of institutions, for whom its knowledge is an absolute necessity in consideration of the incarcerated prisoners. The number of these directors is to be kept as small as possible, by concentration of the prisoners concerned, in some cases in agreement with the adjacent districts. Concerning convicts with a sentence of more than 8 years, such concentration has already been ordered from here.

X. I request that special care be taken for the apprehension of all prisoners, including those not delivered to the competent institution, or those transferred to other institutions for industrial reasons.

BY ORDER:
[Typed signature] Dr. Crohne
Certified: [Signed] KIRSTEN

[Seal]
Reich Ministry of Justice
Office of the Ministry

As Administrative Assistant
[Ministerialkanzleiobersekretaer]

TRANSLATION OF DOCUMENT 701-PS
PROSECUTION EXHIBIT 268

DIRECTIVE OF 1 APRIL 1943, ON BEHALF OF THE REICH MINISTER OF JUSTICE ANNOUNCING THAT POLES AND JEWS RELEASED FROM PRISONS PURSUANT TO A DECISION OF THE REICH SECURITY MAIN OFFICE, ARE TO BE TRANSFERRED TO CONCENTRATION CAMPS

The Reich Minister of Justice
4410 *b* Vs *1* 379/43g

Berlin W 8, 1 April 1943
Wilhelmstrasse 65

To the Public Prosecutors of the Courts of Appeal,
To the Commissioner of the Reich Minister of Justice for the penal camps in Emsland Papenburg, Emsland

Subject: Poles and Jews who are released from the penal institutions of the department of Justice*

Additional copies for the independent penal institutions.

I. With reference to the new guiding principles for the application of article 1, section 2 of the decree of 11 June 1940 (Reichsgesetzblatt I, p. 877), enclosure I of the decree of 27 January 1943–9133/2, enclosure I–III a*2* 2629, the Reich Security Main Office has directed by the decree of 11 March 1943, II A 2 number 100/43—176—

a. Jews who, in accordance with number VI of the instructions are released from a penal institution, are to be committed by the State Police (Regional) Office competent for the district in which the penal institution is located, for the rest of their lives to the concentration camps Auschwitz or Lublin, in accordance with the regulations for protective custody that have been issued.

The same applies for Jews who in the future are released from a penal institution after serving a sentence of confinement.

b. Poles, who in accordance with number VI of the instructions are released from a penal institution, are to be taken by the State Police (Regional) Office competent for the district in which the penal institution is located, for the duration of the war to a concentration camp in accordance with the regulations on protective custody that have been issued.

The same applies in the future to Poles, who after serving a term of imprisonment of more than 6 months, are to be discharged by a penal institution.

Conforming to the request of the Reich Security Main Office, I ask that in the future, (a) all Jews to be discharged, (b) all Poles to be discharged, who have served a sentence of more than 6 months be designated for further confinement to the State Police (Regional) Office competent for the district and are to be placed promptly at its disposal, before the end of sentence for conveyance.

II. This ruling replaces the hitherto ordered return of all Polish prisoners undergoing imprisonment in the Old Reich condemned in Incorporated Eastern Territories. The decree of 28 July 1942–4410 *b* Vs*′ 1* 1731, has lost its validity. Imprisonment up to 6 months imposed within the Incorporated Eastern Territories, excluding exceptions, is to be carried out in these territories, and not in the Old Reich.

* See related documents in section V D, below, concerning the treatment of Poles, Jews, and others.

BY ORDER:
[Typed] Dr. Eichler
Certified: [Signed] FREYER

[Seal] Clerk

Reich Ministry of Justice
Office of the Ministry

EXTRACTS FROM THE TESTIMONY OF DEFENDANT SCHLEGELBERGER CONCERNING TRANSFERS OF PERSONS TO THE POLICE[1]

DIRECT EXAMINATION

* * * * * * *

DR. KUBUSCHOK (counsel for defendant Schlegelberger): I should like to refer to another complex of questions. Witness, in the course of this trial you have often heard that persons against whom prosecution was pending or who had already been sentenced were turned over to the police. How did these transfers to the police come about?

DEFENDANT SCHLEGELBERGER: These transfers are a very sad chapter for anybody who has a sense of justice. They came shortly after the beginning of the war in 1939. From publications in the press Guertner found out that the police had killed people. Guertner made notations about these notices in the press, had them filed and gave a compilation of these notices through Lammers to Hitler together with his compiled notes, and he explained the situation in detail. The purpose was clear. Hitler should be made to discontinue these things. Lammers actually submitted these compilations to Hitler, but told Guertner later that Hitler had said that he had not given a general directive to carry out these shootings but in individual cases he could not do without these measures, because the courts, that is, military courts as well as the civil courts, were not able to take care of the special conditions created by the war. At the same time Lammers announced that Hitler in a further case had already ordered the execution by shooting.

Q. I refer to Document NG–190, Prosecution Exhibit 284.[2]

A. I am certainly not making a mistake in saying that that decision on the part of Hitler was probably the most serious thing

[1] Other extracts from the testimony of defendant Schlegelberger are reproduced above in section IV E, and below in sctions V C 2a, V D 2, V D 3, V E.

[2] Reproduced earlier in this section.

which ever happened to this man Guertner, whose main intention was to serve justice. It was an order which Hitler had given through administrative channels to the police, and the execution of it was assured on the basis of the means of power then prevailing. The attempt on the part of Guertner to reinstate the respect for court decisions therefore had failed; but he was not satisfied with that. He wanted to insure that the administration of justice should be given the authority to intervene in time and to attempt at least to thwart the execution of the order given to the police. That, of course, was only possible if the administration of justice was informed in time about the order that had been given to the police, and that request by Guertner was actually granted. Subsequently the administration of justice as a rule was informed by Hitler's adjutant, Schaub, wherever an order of that kind was given to the police.

The question, therefore, as to how after one has been informed, one can make an attempt to prevent the execution of Hitler's order involved great difficulties particularly because the police had a time limit of 24 hours after which it had to report to its superiors that the order had been executed. Guertner then was of the opinion that for these matters he had to assign the one official in his ministry whom he could use as a capable man with the police —who shared Guertner's opinion in these matters—and from whom one could expect, on the basis of previous experience, that he would show sufficient cleverness. Guertner therefore charged my codefendant Joel with that mission.

When the information about such an order was received, feverish work started. First one had to try to extend the police time limit; that is, to persuade the police to delay the report. That alone brought great difficulties, because the police official incurred considerable risk. But in some individual cases it succeeded. At the same time, the files of the case were called to Berlin and all other bits of information which probably had caused Hitler to order the transfer of the person concerned to the police. Then a detailed report was made of the act and the culprit which justified the sentence, and telephone calls took place with various agencies whenever that seemed to have chances for success. Some individual cases were successful. But if it could not be achieved that the order turning over the individual to the police was rescinded, although everything had been tried, then there was no other alternative than to issue a directive to the authority which was about to carry it out, telling them that they should no longer resist but should turn over the man to the police.

If the Reich Ministry of Justice had failed to give the man up, the police would have broken the resistance by force; the con-

demned person could not be saved. During the war, civilian and military command offices in numerous cases were seriously charged with the fact that through a defense which they had to consider as useless, they had sacrificed many lives. Such a useless sacrifice it would have been if the Reich Ministry of Justice had instructed the prison authorities, via the executive office, to resist the police. The subject of this sacrifice would have been not only threats to officials or civil servants, but to the entire administration of justice, which would have been eliminated and its opponents would have triumphed. The acting official in the ministry would have been eliminated as a saboteur; and already at that time he would have been replaced by a person who would willingly and without exception have put the administration of justice in the service of the Party. The individual cases of transfer which the prosecution has described have to be evaluated from these points of view. I myself, after taking charge of the Ministry of Justice, immediately established contact with Minister Meissner in order to determine basically that no order for transfer made by the police was to be executed as long as the administration of justice did not have a report. This intention of mine was again foiled by Bormann. A letter from Meissner to me makes this apparent. Hitler had me informed by Bormann that the obtaining of the opinion of the Ministry of Justice was not necessary. Meissner, who shared my opinion, asked me in spite of that, in those cases where the ministry believed that Hitler was not properly informed, that a report should be sent to Meissner. I did that in all cases.

* * * * * * *

Q. What do you have to say about the Markus Luftglas case, a case of transfer to the Gestapo, Document NG–287, Prosecution Exhibit 88?*

A. This case, too, I no longer remember even though the name recalls certain memories. In my statements I have to refer to the documents that have been submitted, and by referring to them I would like to determine the following: the Fuehrer order to the police was given to the Reich Ministry of Justice on 24 October 1941, through the usual channels by the Presidential Chancellery. That nothing happened in this case is absolutely impossible. It would have been inexplicable why my letter to Lammers in which I informed him of the release was written only 4 days later, on the 29th, for letters of that kind were answered immediately in our office as a matter of course. The fact that our letter is dated

* Reproduced below in section VC2a.

only the 29th shows me rather that in the meantime unsuccessful interventions had taken place.

Now I notice that in this letter to Lammers I informed him that Luftglas had been transferred to the police for the purpose of execution. That is noticeable because the information about the orders given by the police never said anything about executions, but merely stated "transfer" as the subject of the order. If in this letter to Lammers, I therefore informed him that Luftglas was transferred for the purpose of execution, this can only be based on the information we received from the police, and I am quite sure that I formulated the letter in that way in order to inform Lammers how the direct Fuehrer order—that is, the order to the police—was actually worded and in order to point out to him the effects of such transfer orders.

In conclusion, in regard to this question of transfer I would like to say that the Hitler order went to the police through administrative channels. The police had legally and by authority the possibility to execute the order. The Ministry, on the other hand, had only one weapon, and that was the word. If this weapon remained without success, the Ministry was defenseless and had to submit to force.

* * * * * * *

C. Measures to Influence or Avoid the Judicial Process

I. DEVELOPMENTS PRINCIPALLY DURING THE PERIOD WHEN GUERTNER WAS REICH MINISTER OF JUSTICE (1933–JANUARY 1941)

a. Example of relations of officials of the Reich Ministry of Justice, judges, and public prosecutors with officials of the Nazi Party, the Gestapo, the SD, the SS, and the SA

TRANSLATION OF KLEMM DOCUMENT 20
KLEMM DEFENSE EXHIBIT 20

LETTERS FROM GUERTNER, REICH MINISTER OF JUSTICE, TO HITLER'S DEPUTY RUDOLF HESS AND TO THE SA CHIEF OF STAFF, VIKTOR LUTZE, 5 JUNE 1935, CONCERNING INTERFERENCE IN THE TRIAL OF CAMP HOHENSTEIN PERSONNEL

1. Letter from Guertner to Hess

Copy
The Reich Minister of Justice — Berlin, 5 June 1935
Z.F.g[10] 1696.34
Letter to the Deputy of the Fuehrer Reich Minister Hess

Secret!

Personal!

Subject: Criminal proceedings against the merchant and SA Obersturmbannfuehrer Jaehnichen and 22 party members for causing bodily injury in the performance of their official duties (protective custody camp Hohenstein/Saxony)

Dear Colleague!

With reference to the indictment which I submitted on 20 March 1935 in the above-mentioned criminal case I wish to state the following:

On 3 May 1935, after a trial lasting approximately 6 weeks, the prosecutor, and public prosecutor, Dr. Walther, proposed the following sentences:

Against—

Jaehnichen (camp commander), 5 years, penitentiary.
Zikera, 1 year 6 months imprisonment.
Heinz Meier, 3 years imprisonment.
Herbert Meier, 3 years 2 months imprisonment.
Tuerke, 3 years imprisonment.
Volkmar, 2 years 3 months, penitentiary.
Leuschner, 2 years 3 months imprisonment.
Romkopf, 2 years 6 months imprisonment.
Karche, 1 year 8 months imprisonment.
Hausch, 1 year 4 months imprisonment.
Lehmann, 3 years 3 months imprisonment.
Kuehnel, 1 year imprisonment.
Stachowski, 1 year imprisonment.
Ude, 1 year imprisonment.
Friedrich, 1 year 3 months imprisonment.
Schmeling (police), 1 year imprisonment.
Konitz, 1 year imprisonment.
Uhlmann, 1 year imprisonment.
Sturzkober, 10 months imprisonment.
Schupp, 1 year 6 months imprisonment.
Hensel, 2 years 3 months imprisonment.
Heinicker, 1 year 6 months imprisonment.
Putzler, 3 years 9 months, penitentiary.

Liebscher, 7 months imprisonment.

Heeger, quashed by reason of the amnesty.

On 15 May 1935 the 12th Great Criminal Panel of the District Court [12. grosse Strafkammer des Landgerichts] in Dresden pronounced sentence according to which the following were sentenced for violation of Article 340* of the Criminal (Penal) Code:

Jaehnichen to 6 years imprisonment.

Zikera to 1 year 6 months imprisonment.

Heinz Meier to 3 years imprisonment.

Herbert Meier to 3 years imprisonment.

Tuerke to 3 years imprisonment.

Volkmar to 2 years 3 months imprisonment.

Leuschner to 2 years 6 months imprisonment.

Romkopf to 2 years 6 months imprisonment.

Karche to 1 year 8 months imprisonment.

Hausch to 1 year 4 months imprisonment.

Lehmann to 3 years imprisonment.

Kuehnel to 1 year imprisonment.

Stachowski to 1 year 6 months imprisonment.

Ude to 1 year imprisonment.

Friedrich to 1 year 3 months imprisonment.

Schmeling to 1 year imprisonment.

Konitz to 1 year imprisonment.

Uhlmann to 1 year imprisonment.

Sturzkober to 1 year 10 months imprisonment.

Schupp to 1 year 6 months imprisonment.

Hensel to 2 years imprisonment.

Heinicker to 1 year 6 months imprisonment.

Putzler to 3 years 9 months imprisonment.

The proceedings against Liebscher and Heger were quashed by virtue of the law concerning exemption from punishment [Straffreiheitsgesetz].

After the sentences had been proposed, but before they had been actually pronounced, the president of the 12th Great Criminal

* Article 340 of the Reich Criminal (Penal) Code provides as follows: "An Official who in the exercise of or in connection with the exercise of his office intentionally commits or causes to be committed a bodily injury shall be punished by imprisonment for not less than 3 months. If there are extenuating circumstances, the punishment may be reduced to 1 day imprisonment or to a fine.

"If the bodily injury is serious, confinement in a penitentiary for not less than 2 years shall be imposed. If there are extenuating circumstances, the punishment shall be imprisonment for not less than 3 months." (Taken from Klemm Doc. 26, Klemm Ex. 26.)

Panel received the following communication from the Reich Governor in Saxony:

Office seal
The Reich Governor in Saxony
II 84/35

Dresden–A, 1. on 8 May 1935
Post Office Box: 78
Telephone: 24 371

To the President of the District Court, Dr. Roth
Dresden—A.
Pillnitzer Strasse 41

Dear President:

I have been informed that a sentence of 3½ years penitentiary has been proposed for the defendant Standartenfuehrer Jaehnichen. Without wishing to interfere in the proceedings nor wanting to influence you as judge in any way, I should like to point out to you again before the passing of the sentence that the circumstances created by the revolution in 1933, which—no doubt—were still affecting conditions at the beginning of 1934 should not be disregarded when passing sentence.

Another point which seems to me worthy of consideration is the fact that one cannot accuse Jaehnichen of a villainous disposition and, above all, that the scum of the earth were to be guarded in Hohenstein. In view of these facts I leave it to you to examine whether the offenses actually demand a punishment of such great severity or whether an acquittal might be considered.

As Gauleiter I consider it my duty to point once more to the exceptional circumstances.

Heil Hitler!

[Signed] MARTIN MUTSCHMANN.

Furthermore news was received here that the two lay judges who acted as judges during the trial, Regierungsamtmann Helbig and the merchant Pesler, were expelled from the NSDAP after the sentence had been pronounced. I do not know who was responsible for this expulsion.

Finally, the prosecutor, Public Prosecutor Dr. Walther, an SA man, was approached by his Obersturmfuehrer after the sentence had been passed, suggesting that he withdraw from the SA.

The fact that these measures coincided with the passing of judgment suggests some internal connection. This, however, would mean that very dubious and most unwelcome consequences have

resulted from the proceedings which were legally perfectly correct. If, from the communication of the Reich governor, which is reproduced above, the receiver was apt to gain the impression that here his decision as a judge was being influenced by high quarters, the same might be said, only to a larger degree of the measures taken against the two lay judges. Such action as was taken against lay judges after the verdict was returned, would naturally leave them under the impression that they are responsible before a certain authority for all their actions, carried out in their line of duty while acting as judges. This would destroy judicial independence, a factor which until now had been considered the basis of an orderly administration of justice. Apart from that the lay judge who when commencing his duties is made to take an oath that he will vote to the best of his knowledge and belief will in this way be subjected to great inner conflicts. The consequences resulting from such measures against the prosecutor would be no less serious. This official also would be faced by great conflicts in the performance of his duty. Thereby the orderly unbiased work of the legal authorities would be endangered to such an extent that I would feel it my duty to examine, whether under these circumstances it is at all possible for public prosecutors and judges to be party officials or members of the SA.

It therefore seems necessary—

1. That in the above case the perplexity caused by these measures should be removed by some suitable countermeasures, and
2. That provisions be made to avoid the renewal of such occurrences which are incompatible with the administration of justice and therefore with the security of legal right guaranteed by the State.

I beg to let me have your opinion concerning this matter and to inform me of the measures taken over there. In view of the importance of the case I should welcome a speedy settlement.

Heil Hitler!

[typed] signed: DR. GUERTNER

---

2. Letter to the Chief of Staff of the SA of the NSDAP with the copy of the indictment attached

insert page 1 — Secret!

Enclosure: 1 separate document — Personal!

Dear Chief of Staff:

In the above-mentioned criminal case, where severe ill-treatment of prisoners in protective custody at the Hohenstein/Saxony internment camp is the subject of the indictment, the trial took place before the 12th Great Criminal Panel of the District Court in Dresden between 20 March and the middle of May 1935. Regarding the details of the incidents on which proceedings were based, I beg to refer to the enclosed copy of the indictment, dated 25 October 1934, and particularly to page 21 of the result of the inquiry.

On 3 May 1935 the prosecutor, Public Prosecutor, Dr. Walther, proposed the following sentences:

insert page 1 and 2 up to

News was received here that the prosecutor, Public Prosecutor Dr. Walther, an SA man, had been approached by his Obersturmfuehrer after the sentence had been passed, suggesting that he withdraw from the SA. The fact that this measure coincided with the passing of judgment suggests that there might be some internal connection between the two. This, however, would represent a very dubious and most unwelcome result of the procedure, which was legally perfectly correct. As a result of such measures the officials would be faced by the greatest of conflicts in the performance of their official duty. This would endanger the orderly unbiased work of the legal authorities to such a degree that I consider it my duty to examine whether under these circumstances it is at all possible for public prosecutors and judges to be also party officials or members of the SA.

It appears therefore necessary—

1. That in the above case the perplexity caused by these measures should be ended by some suitable countermeasures, and
2. That provisions be made to avoid the renewal of such occurrences which are incompatible with the administration of justice and therefore with the security of legal rights guaranteed by the State.

May I ask you to let me have your opinion regarding this matter and to inform me of the measures taken over there. In view of the importance of the case I should welcome a speedy settlement.

Heil Hitler!

[typed] signed: DR. GUERTNER

3. To the Minister, secret
4. 2 weeks

907802—51——25

TRANSLATION OF DOCUMENT NG–323
PROSECUTION EXHIBIT 32

LETTER FROM THE REICH MINISTRY OF JUSTICE TO PUBLIC PROSECUTORS, 10 MARCH 1937, CONCERNING COLLABORATION BETWEEN PUBLIC PROSECUTORS AND THE GESTAPO AND ENCLOSING A CIRCULAR DECREE OF HIMMLER ON THE SAME SUBJECT

D.RM.d.J.
[The Reich Minister of Justice]
4606—IIa[3] 146/248

Berlin, 10 March 1937
Metallblatt [offset printing]

To the
Chief Public Prosecutor
at the Kammergericht[1] and
to the Chief Public Prosecutors
at the Courts of Appeal
(with———* copies for the Public Prosecutors)

[Handwritten]* insert figures from distribution plan below.

[Stamp] received at office 11 March 1937
[illegible handwritten notes]

[Handwritten] according to distr. plan forwarded 17 March 1937

Concern: Collaboration between the office of the public prosecutor and the Gestapo.

[Handwritten] (Copy Circular letter Reich Leader SS of 18 March 1937)

1 Enclosure forwarded 17 March 1937

For your information I forward the enclosed copy of a circular decree of the Reich Leader SS and Chief of the German Police in the Reich Ministry of the Interior of 18 February 1937.[2]

In order to have this decree fulfill its purpose and in the interest of the closest possible collaboration between the office of the public prosecutor and the authorities of the Gestapo, I hereby issue this supplementary order that in future public prosecutors routinely address all requests for investigations to be conducted on the basis of reports of political nature received by them directly, to the local and district police authorities *via the competent State police offices*. When in cases based on such reports the necessary interrogations of the accused or the witnesses are procured by the court itself or by the expert of the prosecution, and the police authorities are not at all involved in the proceedings, I request that

[1] Highest court in Berlin.
[2] The enclosure is reproduced following this letter.

State police offices be informed of the proceedings as soon as possible. If, because of the urgency of a matter, the transfer of files is deemed inadvisable, the State police office is to be informed when the proceedings are instituted and if the occasion warrants, a copy of the indictment is to be submitted.

The enclosed circular decree was issued with my approval; but I also made it known that I expect this interpolation of the competent State police offices not to cause any great delay in the forwarding of the proceedings to the public prosecutor, and that the State police offices are merely transit agencies during this part of the proceedings. They will be exclusively concerned with information on the proceedings and not with the decision about the necessity of further inquiries or perhaps even the question as to whether proceedings are to be turned over to the public prosecutor at all.

With these aspects in mind, I request that the effects of this circular decree for the police be carefully noted, and that I be informed in the event of any considerable delays.

BY ORDER:

[Signature] CROHNE

10 March

[Handwritten]

Distributed [Signed] ECK 19/3

1(a) copies of circular decrees distributed to all Dept. Chiefs and assistants.

1(b) copy with enclosure to Depts.
3262, 4026, 4007/1 taken care of [Initial] E. 19/3

2. resubmit
(notice to Reich Leader SS)
to 2: Submitted
Gsta [signed] ECK 19/3
[Initials] KLE [Klemm]
9 March

Draft
Dept. IIa[3] 323/37
Copy of circular decree to Reich Leader SS, for information

2. Request for copy of circ. decree.
E 22/3

3. Illegible
[Initial] KLE [Klemm] 22/3
[Illegible initials] 20/3

Plan for distribution

Bamberg	7	Kassel	3
Berlin	8	Kiehl	3
Braunschweig	1	Koeln	7
Breslau	16	Koenigsberg	7
Celle	11	Marienwerder	3
Darmstadt	3	Muenchen	10
Dresden	7	Naumburg	10
Duesseldorf	6	Nuernberg	7
Frankfurt	4	Oldenburg	1
Hamburg	3	Rostock	4
Hamm	9	Stettin	5
Jena	11	Stuttgart	8
Karlsruhe	9	Zweibruecken	4
	95		72

TOTAL 167

[Signed] BEHRENS, 11 March

Political dept. chiefs *Political assistants**

* * * * * * *

[Handwritten:]
A few surplus copies are available. Distribution completed.

Gsta [Initial] E. [ECK], 8 May

to 4606—IIIa^3———248

Berlin, 18 February 1937

The Reich Leader SS and Chief of the German Police in the Reich Ministry of the Interior

S V 1 No. 341/36

To:

a. The Gestapo Office in Berlin,
for forwarding to all Regional State Police Offices and
State Police Offices

b. for information of:
State Governments in Prussia:
to the Regierungspraesidenten

Concerning: The forwarding of Gestapo affairs to the office of the public prosecutor.

It is the Gestapo's task, *to investigate and to combat all seditious movements,* and to collect and evaluate evidence of such

* Here follow the names, followed by initials, of 23 department chiefs and assistants, including the names of defendants Klemm and Mettgenberg.

investigation. These tasks can only be accomplished by the State police offices, if all political police-affairs dealt with by the local and district police authorities within their district are submitted to them promptly. As auxiliary organs of the Gestapo, it is the duty of the local and district police authorities to do so.

Thus, *all matters in the affairs of the Gestapo are on principle to be submitted to the office of the public prosecutor via the competent State police office.* In urgent matters of arrest, records may be submitted directly to the office of the public prosecutor after notifying the State police office previously by telephone. In such a case, a copy of the interrogation record is to be forwarded at once to the State police office.

The Reich Minister of Justice will instruct the office of the public prosecutor to direct the requests for investigations of reports of political nature, received directly by him, to local and district police authorities via the competent State police office.

It is the responsibility of the State police offices to speedily evaluate the proceedings channeled through their offices and to forward them without delay.

BY ORDER:

[typed] signed: DR. BEST

[Stamp] The Reich Leader SS and Chief of the German Police in the Reich Ministry of the Interior

Certified:

[Illegible signature]

Assistant

to IIIa[3]———248/37

PARTIAL TRANSLATION OF KLEMM DOCUMENT 33 KLEMM DEFENSE EXHIBIT 33

PARTY CHANCELLERY INSTRUCTIONS TO PARTY OFFICIALS, 31 AUGUST 1937 AND 9 FEBRUARY 1938, CONCERNING THE EXCLUSIVE CONCERN OF JUDICIAL AUTHORITIES IN PROSECUTING PUNISHABLE OFFENSES AND PROCEDURES WHERE PARTY MEMBERS MAY HAVE COMMITTED THEM*

Administration of Penal Law

Imposing of Fines by Party Offices

A. 108/37
31 August 1937

* Both directives were taken from "Ordinances, Regulations, Announcements," pages 377 and 378, issued by the Chancellery of the Nazi Party and published by the Central Publishing Office of the NSDAP, Frz. Eher Successor, G.m.b.H., Munich.

For special reasons, I draw your attention to the fact that the prosecution of punishable offenses is exclusively the concern of the judicial authorities.* All cases, where persons have committed a punishable offense, must be turned over or reported to the appropriate authorities.

It is not admissible that sentences, especially fines, are imposed on punishable persons by offices of the NSDAP or its affiliated organizations. Party members disregarding this warning, who demand from the person who has committed an offense e.g., the payment of a fine, possibly with an additional hint that this would settle the affair, will run the risk of a criminal prosecution.

* * * * * * *

A. 15/38

9 February 1938

The question of prosecuting or not prosecuting punishable offenses committed by Party members, is exclusively a matter of decision by the public prosecutor's office or by the Reich Minister of Justice.

It has been noted, that Party offices have frequently approached the regional State police office or other State police offices with the request not to prosecute punishable offenses committed by Party members, or not to submit their investigations to the public prosecutor's office. Since the officials of the Secret State Police are at the same time assistant officials of the public prosecutor's office, and as such are obliged to prosecute all punishable offenses without respect to the person of the offender and without any special invitation from the public prosecutor's office, unpleasant discrepancies would result if such wishes were satisfied. Nobody but the public prosecutor's office or the Reich Minister of Justice can decide whether or not a punishable offense shall be prosecuted. The public prosecutor's office therefore has always the opportunity to make investigations of its own, concerning incidents which, by the Party's request are not prosecuted any longer by the Gestapo, or to have investigations made by the police authorities or by the constabulary, which would not exactly be in the interest of the Party. In the future, the lawful duty of the Secret State Police to prosecute all punishable offenses must be respected, and all cases of doubt with regard to such prosecution have to be reported directly to the appropriate Chief Public Prosecutor through the appropriate Gauleiter, or to the Reich Minister of Justice through the chief of the Party Chancellery, the aim being to

* Concerning the later establishment of special jurisdiction in criminal proceedings against members of the SS and members of police formations on special tasks, see the decree of 17 December 1939, (Klemm Doc. 29, Klemm Ex. 29), reproduced above in section IV B.

accomplish an administration of criminal prosecution which will comply with the interests of the Party.

However, this procedure must be adopted sparingly since the same, and under certain circumstances more severe, principles will be applied to Party members as to non-Party members.

TRANSLATION OF SCHLEGELBERGER DOCUMENT 34
SCHLEGELBERGER DEFENSE EXHIBIT 92

LETTER FROM THE CHIEF OF THE FUEHRER'S NAZI PARTY CHANCELLERY TO DEFENDANT SCHLEGELBERGER, 30 JANUARY 1938, STATING THAT HITLER HAS DIRECTED THAT SCHLEGELBERGER BE ACCORDED MEMBERSHIP IN THE NAZI PARTY

Berlin W 8
Vosstrassel
30 January 1938

The Chief of the Chancellery of the Fuehrer of the NSDAP

To Under Secretary Dr. Schlegelberger
Berlin

Dear Mr. Under Secretary,

The Fuehrer has directed [verfuegt], on the occasion of the 5th anniversary of the National Socialist rise to power, that you be accorded membership in the NSDAP.

I take pleasure in bringing this to your attention while requesting that you submit to me your personal data such as your first name, last name, place and date of birth, and correct address.

Heil Hitler!

[Signed] BOUHLER

PARTIAL TRANSLATION OF DOCUMENT NG-901
PROSECUTION EXHIBIT 436

TWO ORDERS SIGNED BY DEFENDANT SCHLEGELBERGER FOR THE INITIATION OF CRIMINAL PROCEEDINGS AGAINST NOTARIES BECAUSE OF THEIR ATTITUDE TOWARD THE NATIONAL SOCIALIST STATE, 19 MAY 1938 AND 6 DECEMBER 1938

Copy

Order for the Initiation of Criminal Proceedings

In accordance with article 38, paragraph 3 of the Reich Notary's Code, and article 71, paragraph 2, German Civil Service Law, I initiate an inquiry against notary Karl Walbaum of Goettingen.

Notary Walbaum can no longer be relied upon to lend his active support to the National Socialist State at all times. This suspicion is proved by his general attitude, for instance—

(1) The notary joined the German National People's Party [DNVP] towards the end of 1932 in order to help in preventing the National Socialist German Workers' Party from taking over exclusive State leadership.

(2) In 1933 he was expelled from the Stahlhelm,[1] because he worked openly against the affiliation of the Stahlhelm to the National Socialist State.

(3) He did not adopt the German Salute in Court until fall 1937, and in the streets he fails to use it even today. On the occasion of his interrogation by the president of the district court on 13 April 1938, he referred to the German salute as the ancient salute given by German gladiators to the Roman emperor.

(4) He is opposed to the existence of the National Socialist Party and its union with the National Socialist State, and he expressed this attitude not only in a letter to the Kreisleiter of Goettingen, dated 11 April 1938, but also during his interrogation on 12 April at the branch office of the Secret State Police, and on 13 April 1938 by the president of the district court.

(5) In the plebiscite and general election on 10 April 1938 he voted "No." I appoint District Court Judge Weissgerber of Goettingen head of the inquiry.

Berlin, 19 May 1938

The Reich Minister of Justice
As deputy

[typed] signed: DR. SCHLEGELBERGER

Carbon copy

Order for the Initiation of Criminal Proceedings

By request of the deputy of the Fuehrer[2] I initiate an inquiry against notary Dr. Kurt Prelle of Naumburg (Saale) in accordance with article 38, paragraph 3 of the Notary's Code; article 71 of the German Civil Service Law and with the Executive Decree to article 71 of the German Civil Service Law.

It has become doubtful whether notary Dr. Prelle can still be relied upon to lend his active support to the National Socialist

[1] Stahlhelm (Steel Helmet), an organization of German Veterans of World War I.

[2] Rudolf Hess, one of the defendants before the International Military Tribunal. See Trial of the Major War Criminals, op. cit., volumes I–XLII.

State at all times. These doubts are based on the following occurrence:

Since 1 August 1932, Dr. Prelle had been a member of the National Socialist German Workers' Party, Membership No. 1 255 200. In the course of a Party court proceedings he was accused of having made a purchase from the Jew Max Cohn in Naumburg (Saale) on 24 December 1935. On 18 February 1936, during the proceedings he submitted a questionable justification in which he explained that not he himself but his wife without his knowledge had bought picture postcards from the Jew Cohn for a total of 10 Reichspfennig. He continued, however, to explain that in view of the speech made on 18 August 1935 by the president of the Reich Bank, Dr. Schacht, and in view of the fact that the Reich government was using Jewish banks for raising Reich loans, every State citizen was entitled to buy as much as he wanted from Jews. As a result of this, Dr. Prelle was expelled from the Party by a decision of the Party's Kreis Court at Naumburg (Saale) dated 30 June 1936, because he had not made the Party's fight against Jewry his concern and did not even support it.

The right to commission someone with the establishment of these facts is being reserved.

Berlin, 6 December 1938

The Reich Minister of Justice
As deputy

[typed] Signed DR. SCHLEGELBERGER

(Seal)

TRANSLATION OF DOCUMENT NG–825
PROSECUTION EXHIBIT 433

REPORT ON A CONFERENCE, 22 AUGUST 1939, BETWEEN DEFENDANT ROTHENBERGER AND SS MAJOR ECKHARDT, SD CHIEF IN HAMBURG, CONCERNING COOPERATION OF THE JUDICIARY WITH THE SD IN HAMBURG

Conversation between Senator Dr. Rothenberger, SS Sturmbannfuehrer Eckhardt, SD Subsection Hamburg and SS Oberschar [oberscharfuehrer], Amtsgerichtsrat Moeller.

Subject: Cooperation of the Administration of Justice in Hamburg with the SD Subsection Hamburg

1. There prevails agreement that it would be purposeless to appoint special informants in the various branches of the administration of justice to inform the Liaison Officer, Amtsgerichts-

rat Moeller. The already existing circle of informants, to which Moeller should from now on belong, is abundantly sufficient to inform the senior president [of the court of appeal] about wishes and difficulties, views on the reaction to new laws, moods of the judges, etc. If from this circle things are brought forward which cannot be settled directly by the senior president, Sturmbannfuehrer Eckhardt is prepared to put his SD apparatus at their disposal on instructions from Moeller.

2. Senator Dr. Rothenberger expressed the wish to be able to fall back on the information apparatus of the SD in necessary cases, e. g., to ascertain whether there is any truth in rumors which by repetition have become the subject of a criminal procedure. Sturmbannfuehrer Eckhardt consents to this.

3. Senator Dr. Rothenberger declares that he is prepared to put at the disposal of the SD subsection current copies of such sentences as are significant on account of their importance for the carrying-out of National Socialist ideas in the field of the administration of justice, and which are being collected in the appellate court. Sturmbannfuehrer Eckhardt considers a current transmission of important judicial sentences in this way to be particularly valuable for the work of the SD.

4. Sturmbannfuehrer Eckhardt requests that employees of the judicial authorities be reminded before they travel abroad to keep their eyes open in foreign countries and to record their experiences and impressions in a report on foreign opinion. Senator Dr. Rothenberger points out that he has been kept informed up to now as to essentials, of one employee's impressions on journeys abroad. In future, each employee of the judicial authorities is to make a report on foreign opinion at the close of his journey, a carbon copy of which will be forwarded to the SD subsection for information.

5. Up to now, informants who are at the disposal of the SD have not been nominated for the local court districts Harburg and Wandsbeck. Senator Dr. Rothenberger wants to seek out suitable individuals and to nominate them to the SD subsection.

For the rest, the parties concerned are in agreement that cooperation, with the wide consideration for the importance of the sphere of work on both sides, is best guaranteed by any debatable questions being dealt with directly by the liaison officer Moeller, either in writing or orally.

Hamburg, 22 August 1939.

EXTRACTS FROM THE TESTIMONY OF PROSECUTION WITNESS FRIEDRICH ELKAR*

MR. KING: Will you please state your name?

WITNESS ELKAR: Elkar.

Q. Will you tell us briefly what your educational background and training has been?

A. I was born in July 1911 in Altenberg. Then, for 14 years I went to elementary school, and I went to the Oberrealschule, Fuerth, and there in the year 1931 I made my final examination. Then I studied for four terms each at the Universities of Erlangen and Munich. In the year 1935 I made the first state examination, the so-called Referendar Examination. Then for about 3 years I was at the Nuernberg-Fuerth court as a legal clerk in the administration for training. Then, in July 1939, I made the second state examination, that is, the assessor examination, at Munich. Thereafter, for a short time, I worked for a Nuernberg lawyer. Then, due to wartime conditions, I was unemployed for a while. In October I was taken into the Security Service at Nuernberg. That was on 16 October 1939. I was there at the SD during the entire war. In 1945 after the collapse I worked for some time as an agricultural worker.

Q. After you had passed your first state examination and prior to the time that you had taken your second examination were you at any time assigned, while you were in Nuernberg, to the defendant Rothaug?

A. Yes, first I had two cases when I was appointed defense counsel before the Special Court, and that is where I met Rothaug. And then for 2 months I was there for my legal training. That was at the end of my legal training period in February or March 1939.

Q. You said that in October of 1939 you became a member of the SD.

A. Yes, on 16 October 1939.

Q. Before I put several questions to you concerning your activities with the SD, will you explain briefly the relationship between the SD, (Security Service) of the Reich Security Main Office (RSHA) and the SS?

A. Relations between the Reich Security Main Office and the SS—well, the Security Service, SD, belonged to Office III of the Reich Security Main Office. That was the central office of the SD

* Complete testimony is recorded in the mimeographed transcript, 30 April, 1 May 1947, pages 2884–2938.

at Berlin. A large number of the employees of the SD, had been taken into the General SS. To that extent a rather loose connection existed between the SS and the SD. In particular, the Supreme Chief of the Reich Security Main Office was first Heydrich and after his death, Kaltenbrunner, whereas the chief of the SD who was under Heydrich and Kaltenbrunner was Ohlendorf.* Is that sufficient?

Q. Tell me how the SD was organized at Gau level?

A. At Gau level principally every Gau had an SD department. That, according to the Gau level, was the SD sector, and the extent of this SD sector was usually the same as that of the Gau.

Q. How were these SD organizations which were attached to each Gau organized? Were there departments in each SD organization within each Gau, and if so, what were these departments?

A. In the SD districts there were departments [Referate], as we called them. Essentially there were four—III was the designation of the SD office in general; III–A, law and administration; III–B, folkdom and public health; III–C, cultural fields, including education; and III–D, economy.

Q. When you were assigned to the Gau here in Nuernberg for the SD, to which one of these four departments were you assigned?

A. I was assigned to the department of law and administration.

Q. And what was your position in that department?

A. I was in charge of it. That is to say, for quite some time there was only one man in it, really. There was only one person.

Q. Can you tell me in general—I will later ask you some specific questions, but now tell me in general what your duties were as head of law and administration of the SD in the Franconia Gau.

A. The SD as home information service, in our case through the Reich Security Main Office had to inform about all developments in various fields of German life. I personally had to report about all developments in the field of law and administration, positive and negative developments which occurred in that field of law and administration, to investigate and to report about them.

Q. Being assigned to the law and administration section, did you confer with the defendant Rothaug in connection with your official duties?

A. Yes. On the basis of an instruction received from the inspector of the Security Police and SD at Munich who was our

* Otto Ohlendorf, defendant in the Einsatzgruppen Case, United States *vs.* Otto Ohlendorf, et al., Case 9, volume IV, this series.

administrative superior, from an instruction through him we had to take up in connection with the prosecution of the Special Courts in order to inform the inspector, and in the last event, the Reich Security Main Office, about the pending criminal cases, that is to say, the activity of the Special Courts. In the course of this action, it came to a conference of my chief with the president of the court of appeal, and in the course of that conference Doebig, the president of the court of appeal, stated that he was not competent for any agreement that had to be passed here, because as the Public Prosecutor, the prosecution was under his control. For that reason on the same day, practically at the same hour, a conference was brought about with the General Prosecutor Dr. Bens. On that occasion, the presiding judge of the Special Court, Rothaug, was present. Bens justified that by saying that the first hand information about pending criminal cases before the Special Court could best be obtained from the presiding judge himself, because it was he who was in charge of scheduling the cases and therefore could give the best information, and for that reason Rothaug was drawn into that conference. The oral agreement came about to the effect that from time to time if my superior office was interested, I should get the appropriate information from Rothaug.

Q. In connection with this series of conferences, when did you first see Rothaug?

A. Well, the conference in question you mean?

Q. No. As I understood the answer to the previous question, after you had seen Doebig and Bens, you were finally told that you would confer in connection with your official duties with Rothaug. When then did you have your first conference with Rothaug concerning your official duties?

A. The first short conference took place immediately after that conference with Bens and Doebig on the same day in Rothaug's office. On that occasion, Rothaug stated that he was quite ready to work together with the SD, as far as information was concerned.

Q. And thereafter, did you see him at regular intervals, and if so, how often did you see him?

A. At that time, an agreement was reached between Rothaug and myself that principally I should come into his office every Saturday, and there he would inform me about matters which in his opinion were interesting for me—criminal cases—and give me all the information. On that occasion, we were also able to discuss any other legal questions of interest that actually came up; and particularly during the first half year I met Rothaug pretty regularly on Saturdays.

Q. Now after these Saturday conferences with Rothaug, did you make a report to your superiors on what was said?

A. I sent reports to the Reich Security Main Office about everything in the way of information which I received from Rothaug.

Q. And these reports which you sent to the Reich Security Main Office went first to your superior located in Nuernberg, and then, as far as you know, to Berlin and possibly to the head of the SS? Is that right?

A. It really occurred that way, that whatever Rothaug considered important he reported himself. I took stenographic notes, and I had them transcribed at my office, and on the basis of this information, I wrote my report to Berlin—of course without any opinion on my part and without making essential changes which would not have been within my duties.

Q. In these conferences with Rothaug, which occurred fairly regularly every Saturday morning, can you tell the Court in general what was discussed? Later on, I want to ask you several specific questions, but now, if you will, please tell us in general what Rothaug discussed on these occasions with you?

A. Mostly the information which he gave me was in a form of instructions about developments of criminality which he explained with examples of individual cases. He informed me, for instance, that mail robberies or black-out crimes were increasing and that they constituted most of the criminal cases at that time. Then he explained to me in what manner criminal procedure had to be developed in order to present effective measures against that undesirable development of criminality and to manifest that in the way of jurisdiction. On that occasion, of course, individual cases were also discussed. In addition to that, he also mentioned matters of legal and political development; also in the field of substantive law, matters which came to his attention in the course of these proceedings, sometimes in the form of short dictation or of handwritten slips which he prepared. It was not only that the current cases were explained to show the development in criminality but also anything that occurred in the field of law and had to be corrected by higher offices, be it that it needed a negative or positive decision that he wanted to have written down and reported to higher offices.

Q. Rothaug knew, I take it, that these notes and reports which he handed to you were passed on by you in line with your official duty—passed on to higher authorities in the Reich Security Main Office and in the SS?

A. That he knew for certain, and in my opinion that was what he wanted. It could be seen from remarks to the effect that such

matters had to be reported to higher offices so that from these higher offices appropriate countermeasures could be taken.

Q. Did Rothaug discuss in these conferences with you the sentences he expected to give in cases that were to be heard in his court in the near future?

A. Yes, the proceedings in the next period of time which were to be tried sooner or later, as far as they were important, were discussed partly on the basis of the files, partly on the basis of his knowledge of the files; he gave me a short explanation of the facts and also his opinion about the legal procedure, the legal dealing with the cases as far as the application of the facts was concerned in consideration of the sentence to be expected.

Q. What in general was Rothaug's attitude, so far as he reported it to you, on the interpretation of criminal law?

A. Rothaug, in principle, was of the opinion that particularly in times of war on account of a certain laxity of security measures, be it due to shortage of personnel or other things, criminality would increase; that not only an increase of serious criminal cases would occur, but also of so-called political criminality; and that the activity of the Special Courts should be conducted in such a manner that an increase of serious criminality of that kind should be forestalled; that any attempt against the State in a political, criminal, or other manner would have to be wiped out by severe penalties.

Q. Can you tell us what Rothaug's apparent attitude was toward foreigners, especially Poles, so far as the application of criminal law to them was concerned?

A. In my opinion, Rothaug's position was that particularly toward foreigners—Poles and others—that no clemency should be applied; that especially these elements had to be met with severe measures in order to assure that attempts which would be made to counteract the successes of the armed forces should be choked off at the outset. It may be that he would have used more clemency towards German criminals than to foreigners.

Q. Can you tell us whether you are familiar with the decree against Poles and Jews promulgated in 1941?*

A. Yes, that is a concept for me.

Q. You are in general familiar with the provisions of this decree, are you not?

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* "Decree concerning the administration of Penal Justice against Poles and Jews in the Incorporated Eastern Territories" of 4 December 1941. It is reproduced below as a part of NG–715, Prosecution Exhibit 112, page 632.

A. Well, in detail—of course today I couldn't say—but in general, yes.

Q. What was Rothaug's attitude toward Poles and Jews prior to the time that this decree was promulgated so far as you know from the conversations that you had with him and from the reports that you passed on from him?

A. I believe that it was clear to Rothaug that here, if I may say so, there was a gap in the law; that that gap should be bridged; but that a judge with the right political attitude should be in a position, in spite of this gap, to sentence accordingly. He found the juridical way to pronounce the sentences which he considered appropriate.

Q. In other words, would you say that Rothaug achieved, without a decree, and prior to the time that it was promulgated, the same legal effect that later could be achieved under it?

A. That is correct, beyond doubt. As a Special Court judge in Nuernberg, he achieved the same success. I should only think that perhaps measured by conditions all throughout the Reich, he thought that a formulation of these principles was needed.

Q. Is it your feeling that Rothaug's outspoken comments on the need for such a decree, as was later formulated, was influential in the final promulgation of that decree?

A. Well, as far as the various things are concerned that finally led to the decree, I am not well informed about that; but that Rothaug's information may have contributed, that I believe.

Q. In any event, prior to the time that that decree was formulated in 1941, you had sent up in line with your official duty many of Rothaug's comments on what the law, or what the situation lacked at that time?

A. That was certainly the case.

Q. In discussing the cases with Rothaug in these Saturday morning conferences, do you recall any particular case to which Rothaug referred?

A. You mean in a particular category of a criminal act?

Q. No, I do not refer to that. Perhaps my question was not clear. I meant in spectacular cases which were to be tried by Rothaug, or other judges in his court. In other words, did you discuss, or did he discuss with you the more spectacular cases at any time?

A. Yes, he did. I remember, for instance, the case of the Dachau criminal, I think it was Poelmann.

Q. One moment. I did not get that name.

A. Poelmann. That man Poelmann, if I remember correctly, had taken a large quantity of lard from a barn in Fuerth, I believe at night. There may have been several hundred pounds and also other things. If I remember correctly, Poelmann was sentenced to death by Rothaug. The verdict I believe was not executed, but through a pardon was commuted into a long prison term, I think 8 years of hard labor. Rothaug talked to me at that time about that pardon, which technically reduced the death sentence, which in Rothaug's opinion was a correct sentence, to a prison term.

Q. Do you remember any other cases that you discussed with Rothaug?

A. Yes, one typical case, the case of Katzenberger. That case Rothaug and I discussed also once, and I expressed my opinion that on the basis of information I had received, and also on the basis of opinion on what was known of the criminal, that the sexual relationship was not an accomplished fact, because the law, insofar as I knew, required the act of sexual relation between a German and a party of non-Aryan descent.

DR. KOESSL: May it please the Tribunal, I object against the examination. I object to the examination in this manner, because the opinion which is stated by the witness, the legal opinion which is stated by the witness shows that he is not an expert, and furthermore, he has not been called as an expert witness.

PRESIDING JUDGE MARSHALL: We see nothing in the answer in the nature of which shows anything other than he was just stating a conversation, the way we get it.

WITNESS ELKAR: I do not in any way wish to give an expert opinion here. I only wanted to explain why I came to speak about the case of Katzenberger, because I was asked whether he spoke of any other case, and particularly this case is one which was mentioned as the case of Katzenberger. Therefore, may I continue with my statement? At the time the facts were not complete, because it was not proved so far as I know that the German woman was doing anything more, according to the proof, other than that she was sitting on his lap, and Rothaug—I remember that quite clearly here—said that one had to take the human facts into consideration and could hardly expect that a man of that kind, he meant the man Katzenberger, would act otherwise once the girl had been sitting on his lap, and that consequently, he considered the proof as given.

MR. KING: Now may I for a brief moment digress to another subject. In your position with the SD you undoubtedly had an

opportunity to observe the political influence that various people with whom you came in contact exercised?

A. Yes.

Q. What do you know about Rothaug's influence with the Party men who ran the Gau Franconia. What are your impressions?

A. Rothaug had some close connections to the Gau Inspector Haberkern. Haberkern as Gau Inspector could gain an insight in all matters going on in the Gau, and in my opinion for a discussion of such matters, particularly in the legal field, he took the advice of Rothaug, so that, since the Gauleiter depended on Haberkern, Rothaug certainly could have his opinion go to the Gauleiter on legal matters.

Q. What men besides Haberkern were influential in directing the affairs of the Gau Franconia?

A. Well, first, Streicher was Gauleiter. After he left, there were several staff office chiefs who were acting, and then Holz became acting Gauleiter. Then Holz went to the army, and at that time the Kreisleiter Zimmermann was in charge of the official business of the Gauleiter and as far as I know, the relationship between Zimmermann, Haberkern, and Rothaug was very close.

Q. May I at this point ask you to clarify one matter. You say that Streicher, Haberkern, Holz, and Zimmermann, as leaders of the Gau, were, of necessity, members of the Party Leadership Corps?

A. Yes.

Q. Now in your opinion from what you were able to observe, did Haberkern's reliance on Rothaug, and Rothaug's influence over him result in Rothaug having a very great influence on the Party Leadership Corps here in the Franconia Gau?

A. Insofar as Haberkern could indulge in the influence as to the Leadership Corps, Rothaug through Haberkern had the same influence, and I should like to assume that in the question of law Rothaug certainly was the man who was the higher authority so far as the Gau was concerned.

Q. Do you know whether Rothaug had ever taken an oath of secrecy as a collaborator with the SD?

A. Yes, he did.

Q. Do you know when that happened?

A. That must have been in 1940, because in May 1940, approximately in the spring of 1940, that is before the French campaign, the conference of prosecutors which I had mentioned took place, and I believe a short time afterward Rothaug was drafted for the SD and was put on oath by the SD.

Q. What was the higher, more responsible position in the SD, the position of informer [Nachrichtenmann], or the position of collaborator [Mitarbeiter]?

A. May I correct that? There were no official informers. You mean the confidential agent [Vertrauensmann]? Then there was also the term of honorary collaborator [ehrenamtlicher Mitarbeiter]. The confidential agent was the man who in a certain field of law, penal law or the administration of justice, occasionally was used for information that had to be kept secret. On account of the shortage of men, which existed during the war, it had become necessary to bring in also honorary staff members [ehrenamtliche Maenner] who had certain functions, and who in a definite special field, also had the function of rendering information; the informative material which had come from other places was digested by them and put together in reports. All such people in the special field, that is the field of penal law, were a source of information. The honorary collaborator I would like to put on a higher level than the confidential agent.

Q. I think I did use the wrong term in referring to the confidential agent as informer, but in any event, you understood my question, and I think I understand your answer.

Did you ever attend a trial which was presided over by Rothaug?

A. Yes.

Q. From your observation, can you tell us briefly how Rothaug conducted his trials?

A. Once it was the case Heller and Muendel, well known highway trap-setters [Autofallensteller]. Then the case Feldstengel. There were several others. These were cases of burglary during the black-outs, black-out crimes.

May I pick out here the principal matters such as they presented themselves to me after my experiences as an SD man. I think I am not mistaken in assuming that Rothaug considered the trial before the Special Court as a means of direction and education and that accordingly he conducted the main trial on a broad basis and facts which constituted transgressions against the program of the Party, the directives of the political leadership, such facts were developed to such an extent that the illegal elements which were contained in the opposition against the political leadership were brought to the foreground. I would like to say that he rather disregarded other circumstances concerning the defendant, his office, his position. He wanted to remove those circumstances, to leave them aside, in order to develop clearly the criminality of the act of the defendant, and just because he considered the trial as

a means for the direction and education of the people, he used every means to make it possible for as many people as possible to attend and underline matters which offered possibilities for the political education in order to exert influence on the listeners in that manner.

Q. In your conferences with Rothaug did he express the view that trials were to be used as a means of political education?

A. Yes, of course.

Q. From your observation of Rothaug's conduct of trials where he was the presiding judge, your answer is that in practice they actually were conducted that way, as a means of political education; that was the purport of the answer to the next to the last question, I believe.

A. Yes, that was my personal impression, which I gathered from the comparatively few trials which I attended myself and also from information on the basis of the material about the trials. From those reports, it could be seen that Rothaug had the intention to use the many trials as a means for political education.*

* * * * * * *

CROSS-EXAMINATION

DR. KOESSL (counsel for defendant Rothaug): Witness, your position was that of chief of a department?

WITNESS ELKAR: No, in an Abschnitt. May I point out that there was no such expression as Abteilung; there were special departments, Referate.

Q. So it was Referat III–A?

A. Referat III–A.

Q. Referat III–A was part of the home forces?

A. Yes.

Q. Your work with Rothaug was based on general directives, on the basis of which the SD groups had to get in contact with the Special Courts; is that correct?

A. The real cause for the contact with Rothaug as presiding judge of the Special Court was, as I explained yesterday, the desire of the inspector of the Security Police and the SD in Munich to be informed about the decisions of the Special Courts, or to remain currently informed about their decisions, because

* The opinion and judgment in the Katzenberger case, one of the trials in which defendant Rothaug was presiding judge, is reproduced below in section D 2, (NG–154, Pros. Ex. 152).

the inspector of the Security Police and the SD in Munich was, at the same time, supposed to send reports to the Reich defense commissar who, at that time, was in Munich, but whose field was all of Bavaria. A measure of that kind was of a local nature, at first only for Bavaria, an internal instruction, let us say, from the RSHA, because a contact of that kind did not exist at that time.

Q. But it was a contact which was taken up all over Bavaria?

A. Yes.

* * * * * * *

Q. Do you still know what the purpose of the visit of the SD leaders with Doebig and Bens was and what considerations, what principal considerations were discussed on that occasion?

A. As I have already explained, subject at first on the occasion of that official contact, taking up of contact, was that from an authoritative source the reports should be received about pending criminal cases, and of course also about legal problems in connection therewith. The SD through all its reports from the outside, received information about the consequences of court decisions on morale. It is clear to us today that the layman's point of view frequently deviates quite essentially from the facts established in court. And in order to provide a correction, a possibility of checking our reports, it was necessary that we establish the official connection to the court authorities.

Q. Therefore, it was intended that this contact should correct mistakes in the reports received from other sources, which mistakes were based on reports from laymen and frequently caused misunderstandings of the facts?

A. That is essentially true.

Q. Now, you discussed at first the conferences. You came to Rothaug first on Saturday mornings in order to get information?

A. Yes.

Q. Did you stick to that in the course of the following period, or were there larger intervals between these meetings?

A. If I should indicate a period first—

Q. I asked only, was that regularly on Saturdays?

A. In the beginning yes, the first half year.

Q. And later?

A. Later, either if an inquiry had been sent to us from some other source or when, on the basis of reports which we had re-

ceived from other sources we had questions to put before him, or when Rothaug on his part had to report anything on the basis of his activity, and I emphasized yesterday that he was very productive for us, that in the field of political law, not only in the field of general law, but beyond that and also in the field of civil law, he brought to us experiences and inspirations.

Q. If I understand you correctly, Rothaug dealt with matters of principle of a general nature not, for instance, the treatment of individual cases, the manner in which individual cases were handled.

A. You have to distinguish here between the—you have to start here from the assignment which the SD had as information sources for the whole country. As I emphasized yesterday, the purpose was to eliminate wrong developments first, to point them out. In case of these developments in the wrong direction it could only be matters of principle in the beginning. According to the instructions we had received, it did not suffice to point out a principal wrong, that is to say a gap in the law, but it was necessary that on the basis of concrete examples of definite individual examples that gap be proved, and if possible at the same time in this case, of course, by the expert, recommendations had to be made for modifications. And on the basis of this activity individual cases were the subject of discussions and conferences. Frequently, as far as I remember, it occurred that at times the individual case itself was discussed as, for instance, the case of Katzenberger and another case which I still remember.

Q. So it was a matter of justifying opinions if individual cases were mentioned?

A. Yes.

Q. It was not a matter of interfering into an individual case on the part of superior offices, an interference into a pending, into an actual proceeding?

A. Well, of course it was possible that the individual case itself, through the leadership office, became known to the Ministry and caused individual measures. I can give you an example. In the directives concerning files there is a provision according to which wills are to be attached to the files of the court. Furthermore, there is some directive of some sort according to which last letters of soldiers who have been killed could be considered, under certain circumstances, as having the force of a "last will." That was particularly customary in the air force, that, in case a flier died, these letters were considered, and if there were any provisions in these letters concerning the heritage, and there was no

other proof of any will existing, they were considered to represent the will. That happened, for instance, in one case. There was a soldier by name of Schneiderbanger. The woman who had lost her husband in the First World War, and I believe already one son in this war, lost her last son. It was in air combat over London, I believe. She presented to the court the letter in which some provisions were included about his luggage, I believe. The court considered that letter to represent his will, and asked for the original from the woman—asked that the original be put in the files. Since for sentimental reasons she objected to that, she was threatened with a fine or a prison term. That affair raised a lot of discussion. Various offices of the Party intervened, and it came before us. I reported that case. In the opinion of the RSHA it was not a rare case, but a development which would have to be taken into account either by law or by directive from the Ministry. It was strange that in this case the reaction of the Ministry of Justice was not the issuance of a general instruction, but an order through channels that the woman in this particular case be permitted to keep the letter.

PRESIDING JUDGE MARSHALL: One moment, please. The witness answered, some little time ago, that these reports to the RSHA and the answers from them were for the purposes of justifying the opinions of the lower court. At that point, Dr. Koessl asked the question whether it was intended as an interference of those opinions. I couldn't observe that the witness answered that question, and I should like to know whether it was an interference and not merely an attempt to justify.

WITNESS ELKAR: In as much as we discussed these cases at our level, one could not speak of interference in the individual cases. How far the RSHA, through conferences with the various ministries—in this case, the Ministry of Justice—could interfere, I am not in a position to estimate.

Q. I am not so much concerned as to how much they could do, but I am very much interested in knowing what they did do, if anything, in the matter of interference.

A. Well, of course we reported with the intention that a wrong development in individual cases should find correction occasionally, but I am not so familiar with that in the legal field. We received instructions from superior offices that in this one or the other case a measure from the Ministry or the respective superior office was caused by the report.

DR. KOESSL: Wasn't it so that at that time the fact had become apparent and noticed that offices which were outside the adminis-

tration of justice were frequently concerned with matters of justice; for instance, offices of the NSDAP, Kreisleiters, and so on?

WITNESS ELKAR: Yes.

Q. Were the conferences also concerned with the attempt of preventing such interference?

A. I can hardly remember that when speaking to Rothaug that problem was ever discussed to any extent. Occasionally, when mention was made from the outside, that question was touched too; but if I remember correctly, Rothaug was of the position that the Party, for instance, was definitely justified to make its intentions known to the court; he said in the same manner which, for instance, the administration of mail service—in case of a fraud on the part of one of the officials—gives its expert opinion about the case, then in the same manner that right should be conceded to the Party. For that reason, he offered at all times information to the Party and gave also advance information about pending cases and an opportunity to state its—the Party's—point of view.

Q. That was originated by law, if I remember correctly, Witness. Wasn't it provided that in penal cases against members of the Party, on the basis of a legal decision, the Party had to be informed?

A. Yes, that of course.

Q. That is what I mean. Was there more involved?

A. For instance, in cases of insidious attacks[1], a directive by the Ministry of Justice was required. That directive, as far as I know, came about in cooperation with the Party Chancellery.[2] It is true that the Party Chancellery, certainly before it rendered its decision, received information from the Gauleitung concerned with that case. But I believe that I am not mistaken to assume that Rothaug, even beyond that in local cases of political significance, tried to get the opinion of the Gauleitung concerned.

Q. You told us yesterday that you discussed pending cases on the points of view of the general development of criminality. Was that the basis of your conferences on Saturdays and later on at more frequent occasions?

A. Perhaps I can make the answer a little clearer by emphasizing the circumstances under which this more intense cooperation with the Special Court under Rothaug, in particular, came about. The conference between Doebig and the others was concerned

[1] Reference is made to cases under the "Law on Insidious Acts Against State and Party and for the Protection of Party Uniforms," 20 Dec. 1934, (1393-PS, Pros. Ex. 508), reproduced above in section IV B.

[2] The role of the Party Chancellery in connection with legal matters is discussed in the extracts from the testimony of defendant Klemm reproduced below in section V D 2.

with the official agreement, as I have said. The position and the tasks of the SD are known to you. I assume that the SD was in a position to obtain these official informations and opinions from the official sources, but we had to try to find out about the matters which were, for instance, in the more detailed files—matters about which information cannot be obtained through regular channels—or to find out about matters which went beyond the pattern of an official opinion about a penal case; that is to say, as we have explained before, a particular experience or an opinion about another court. The obtaining of that information could only be the case if as an SD man I had a closer connection to Rothaug beyond the official character of my mission. And Rothaug, after that first official conference with Doebig—in a conference between himself and myself—stated that he was prepared to do so.

Q. Did you take up contact with other officials of the administration of justice in your position at that time?

A. Here again I have to deal with the administrative organization. As you have heard yesterday, the Abschnitt, after the SD Main Office, was the next lower echelon. It was not our task as such in all fields, let's say of law and of administration, to obtain and to collect material of information. That task remained to the so-called field offices. I believe we had five in Nuernberg. These field offices as far as I am informed had their confidential agents again; and that there were legal men—members of the court—among those, is quite known. As far as my mission was concerned, that is to say, in order to appraise and evaluate the material which came from the field offices, I needed of course a qualified person, an expert, who had a wider field of experience; and for that purpose I needed Rothaug. He agreed, and he also had the right attitude.

Q. Yesterday you spoke about the slackening of the security machinery during the war. Could you remember that preventive measures against danger arising through conditions of war was part of the discussions and conferences with Rothaug?

A. You mean measures to be taken by leadership offices?

Q. In order to prevent possibilities of dangers arising from special conditions, arising from emergencies of war.

A. Of course.

* * * * * * *

Q. Witness, I want to go over to another point. What concrete reasons do you have for judging what influence Rothaug had on Haberkern in regard to the leadership of the Gau; what influence was exerted through Haberkern on the Gau leadership?

A. I know that Rothaug was at the Hotel Haberkern, at the so-called Stammtisch [club table] that he was seen there frequently; I know, furthermore, partly from having been present there myself, in the "Blaue Traube" restaurant [Hotel Haberkern] that other leading men of the Gau were also present there. For example, the Kreisleiter Zimmermann occasionally; also the Higher SS Police Leader Dr. Martin and several other people; and I know furthermore that, at this Stammtisch, matters concerning the Gau were discussed. I can further say with quite a good deal of certainty that Haberkern, especially in legal questions, based himself on the advice and actions of Rothaug, since Haberkern, as I believe I emphasized already yesterday, as Gau Inspector, at any time could have insight into any matters which were of interest to the Gau and what was going on inside the Gau; he could, of course, on the basis of this insight inform the competent Gauleiter.

Q. Did the Gau not have a definite office for handling legal questions?

A. Yes, the Gau had a legal office, the Gaurechtsamt.

Q. Was Rothaug in charge of this office?

A. No. Rothaug was in the National Socialist Legal Workers Association [NSRB] the head of which in Gau Franconia, at times was also the head of Gaurechtsamt, namely Oeschey. In the NSRB, Rothaug had the position of a Gau group leader of the [group] judges and prosecutors; you know that the NSRB was composed of [several] groups.

As Gau group leader of [group] judges and prosecutors, Rothaug was in the Gau Franconia, the judge, the leading jurist, politically; who also from the political point of view, especially the personnel policies of the Party had the primary influence on it—the most important influence, that is, on the Gau leadership. The Gau leader depended a great deal on its own initiative or due to the questions by the Party Chancellery, who had to advise and give opinions on certain personnel policies, questions of personnel policy. The Gau leader and the Gaurechtsamtsleiter had to find out Rothaug's attitude.

Q. But, Witness, is it not evident already from the fact that the Gau leadership had to turn to Rothaug via the Gaurechtsamtleiter that the Gaurechtsamtleiter was the decisive man, the advisor of the Gau leadership?

A. One should suppose that from the outside, just from looking at the organization, but actually I should suppose—I think I can say that with certainty, that the Spiritus Rector, shall we say

the guiding and thinking spirit even under the leadership of Oeschey, was Rothaug.

Q. Now, did you have an insight into the attitude of Rothaug with his associates from the political point of view?

A. Do you mean the association on the Special Courts?

Q. Yes.

A. In order to do so it is necessary—

Q. Please, did you have an insight or not?

A. Yes.

MR. KING: May I ask if the witness wants to expand his answer or not. I think the witness should be permitted to if he so wishes. What is the ruling of the Court on that?

PRESIDING JUDGE MARSHALL: Yes, he may answer it further if his answer requires an explanation. Sometimes a question calls for a direct answer; sometimes that answer is not fair to the witness unless he explains why. In this instance he may answer.

WITNESS ELKAR: Rothaug was operating on the principles from the National Socialistic point of view, that was correct; that a judge in a Special Court had to fulfill a certain minimum requirement from a political point of view; that it was not enough for Rothaug that Special Court judges were appointed who, from the technical point of view, met the requirements, but they must also have, politically, a certain maturity—shall we say, a certain political maturity.

DR. KOESSL: Are you finished?

A. Yes.

Q. Insofar as the political maturity of the associate judges goes, did Gross and Ferber fulfill that and Hoffmann—were all of those taken from the Special Court by Rothaug removed from the Special Court, or am I correct?

A. It was so, the basic attitude of Rothaug toward the requirements of judges in the Special Courts was that he emphasized occasionally, again and again, that these requirements were, of course, not fulfilled in all the points of the requirements, because in his opinion the political orientation did not exist to the extent he desired it. He said, however, that under his leadership, weaker judges would, shall we say, fall in line.

Q. Did the associate judges of Rothaug suffer politically in any way, such as through the SD, because they had different legal opinions and different conceptions of law, because they had voted differently in the discussions?

A. By the SD? Do you mean to say by that that steps were taken from the higher authorities?

Q. Did Rothaug report about the unfavorable comments about his associate judges in order to have them reprimanded?

A. That was not the case, for Rothaug stated again and again that under his leadership the judges followed the corresponding course.

* * * * * * *

Q. Can you remember whether it was Rothaug who made efforts to have the severity of wartime legislation explained to the people —whether these efforts of his were successful?

A. You mean to say that the hints upon the enlightening form of these sessions brought it about also that the population would understand it better now?

Q. Understanding on the part of the population, of the severity as well as a warning.

A. As far as I remember, the material that was reported was not sufficient in order to judge this—in order to draw such summary conclusions.

Q. Did you, yourself, make observations that the people, the population, felt that they had been warned?

A. That there was a fear of the Special Court is a matter of general knowledge. That this was in connection with the efforts of Rothaug, I cannot judge whether this was so.

* * * * * * *

Q. You, yourself, were SS Hauptsturmfuehrer or SD Hauptsturmfuehrer, how was that called?

A. During the course of the war I came to the rank of SD Hauptsturmfuehrer, in 1942.

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EXTRACTS FROM THE TESTIMONY OF DEFENDANT KLEMM*

DIRECT EXAMINATION

DR. SCHILF (counsel for defendant Klemm): I shall now ask you to describe to the Tribunal the work you performed at the

* Further extracts from the testimony of the defendant Klemm are reproduced below in sections V C 3, V D 2, and V F. His entire testimony is recorded in the mimeographed transcript, 3, 7, 8, 10, 11, 14, 15 July and 23 September 1947, pages 4784–4822; 4891–5025; 5027–5090; 5094–5199; 9383–9396.

Reich Ministry of Justice. First of all, how was it that you got into the Reich Ministry of Justice?

DEFENDANT KLEMM: That happened in the course of the centralization [of the administration of justice in Berlin]. The Minister of Justice, Dr. Guertner, appeared to have the desire that the Reich Ministry of Justice, which comprised the administration of justice of 16 states [Laender], have the Laender represented at the agencies of the Ministry approximately according to their size and their importance. That is how it happened that on 1 April 1935, officials from every former Ministry of Justice in the states were at that time, I believe, transferred to Berlin. From the Ministry of Justice for Saxony, four officials were transferred to Berlin. I never expressed the wish to be transferred to Berlin. The fact that I too was transferred to Berlin is probably due to the fact that negotiations had been held between Thierack and Guertner. I don't know though. About my being transferred to Berlin, I heard at the middle of March 1935. A fortnight later, I was due to start work in Berlin.

Q. What was this sphere of work which was transferred to you at the Ministry in Berlin?

A. Because from 1929 I had worked for the prosecution, and also because at the Ministry of Justice for Saxony, I had dealt with special measures concerning penal law, I was given at the Ministry of Justice a position in Division III at that time, which later became Division IV. I was appointed auxiliary advisor on high treason cases, and as district Referent [Bezirksreferent] for several districts of district courts of appeal, both in political and nonpolitical cases.*

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Q. As an expert on political penal cases in those days, that is in 1935 and 1936, did you have close connections with the Gestapo?

A. The Referent for political penal cases for district courts of appeal entertained no relations with the Gestapo. When general questions, questions of particular importance arose, they were dealt with by the Special Referat, or if there was just one question, it was handled by the one Referent charged as the SS liaison officer to the police.

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* The defendant Klemm held a number of different official positions during the Hitler regime, the last of which was Under Secretary in the Reich Ministry of Justice. Extracts from his testimony reproduced later in this volume deal with his activities during periods when he held other positions.

Q. The prosecution submitted a document, which is Exhibit 31, NG–266. Unfortunately, I can only quote the pages of the German text. In the German document book, page 44, following. Mr. Klemm, I suppose you have Exhibit 31 before you?

A. Yes, I have.

Q. You know the contents?

A. Yes, I know the contents.

Q. This is a letter of 13 June 1936 from the Reich Minister of Justice to the chiefs of the various agencies, particularly the Oberlandesgerichtspresidenten, and general public prosecutors, informing them that in September or October of the same year, that is 1936, a discussion with experts of the Gestapo was to be held, I ask you now whether that document is suitable to confirm your personal statement that you never had anything to do with the Gestapo?

A. That conference was a conference of prosecutor generals and of the Presidenten of Oberlandesgerichte. They were to be informed about stopping crimes, particularly concerning high treason and treason. For that reason police experts discussed the subjects. I did not attend this conference, but the speeches made there dealt purely with technical matters. They were speeches by experts from the central organization of the police, which had the most comprehensive view of these matters. I know that it has been tried to find out a little more about this exhibit.

Q. Mr. Klemm, in this connection the prosecution has submitted another exhibit, that is, Document NG–323, Exhibit 32.* The first part of the document is a letter from the Reich Leader SS, Himmler, of 18 February 1937 to the Gestapo office in Berlin; and on that subject the Reich Ministry of Justice stated his opinion on 10 March 1937 giving instructions to the general public prosecutors concerning the collaboration between the office of the public prosecutor and the Gestapo.

I ask you whether what you have said before is to be changed by this Exhibit 32?

A. No, I do not have to change it. That circular instruction by the Ministry of Justice, as one can see from the file note, was drafted in Department II, not in Department III to which I belonged. Besides, this regulation is a purely technical one as to how the files are to be handled during the investigation made by the police.

DR. SCHILF: May it please the Tribunal to refer to the fact that the file note which the witness mentioned is to be found on

* Reproduced earlier in this section.

the letter of 10 March 1937, left upper corner. It is IIA and then there are some Arabic numbers. In this connection, the prosecution has not submitted any further documents against you.

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EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHENBERGER[1]

DIRECT EXAMINATION

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DR. WANDSCHNEIDER (counsel for defendant Rothenberger): Now [beginning in 1933], a great change occurred in your career. Could you tell the Court when and on the basis of what considerations you decided to give up this quiet and secure life?

DEFENDANT ROTHENBERGER[2]: The year 1933 came. On 5 March 1933, there were parliamentary elections in Hamburg, as everywhere throughout the Reich. In these elections the National Socialist Party obtained about 40 percent of the votes. Therefore, it was ordered to form a new government, because it was the strongest Party in the Parliament.

Until that time Hamburg had the government majority which consisted of Social Democrats and Democrats. The NSDAP, which was ordered to form a new government, formed a coalition government with the Democratic Party, the German People's Party, and the German National People's Party.

The day after the election, that is on 6 March, the Reich Governor and Gauleiter of Hamburg Kaufmann, called me up. Until that time I had not known him personally. He asked me whether I would be willing to assume the position of the acting mayor in this new government of Hamburg. He told me that he had heard about me, and therefore he was making this offer to me. I requested him to give me one day to think the matter over, and then I refused his offer. I gave as a reason that I considered that my task lay in the administration of justice, that I wasn't inclined for representative nor for political tasks, and these were connected with the position of mayor of a city like Hamburg. Thereupon, he asked me whether in that case I would be willing to take over the administration of justice of Hamburg as its chief, and I answered that I would.

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[1] Further extracts from the testimony of the defendant Rothenberger are reproduced below in sections C 2 b, C 3 a and D 2. Rothenberger's entire testimony appears in the mimeographed transcript, 16–18, 21, and 22 July, 24 September 1947, pages 5324–5381; 5400–5484; 5495–5581; 9438–9478; 9512–9515.

[2] In the preceding part of his direct examination, defendant Rothenberger testified that he had previously held the following positions, among others: judge from 1925–1927; government counselor (Regierungsrat and subsequently Oberregierungsrat) in the justice administration of Hamburg from 1927–1930; and district court director in Hamburg after 1931 (tr. 5327–5331).

Q. In the subsequent time did you again refuse leading positions in the Reich? Perhaps you can mention that in this connection here now.

A. In March 1933 I thus became Justizsenator, as he was called, in Hamburg, chief of the administration of justice. And the Tribunal already knows that these Ministries of Justice of the individual states, of which there were, I believe, 18 at the time, in 1935, were dissolved by the so-called centralization of the administration of justice. Therefore, toward the end of 1934, the Reich Minister of Justice, Dr. Guertner, approached me in Kiel where we met on the occasion of a university festival, and asked me whether I would be willing to become presiding judge of the People's Court, which at that time was being created. I rejected that offer, even though this was the second position of a judge in Germany next to the president of the Reich Supreme Court. But for administration of criminal law I had neither the experience nor the inclination. The political development of the People's Court, of course, one could not predict in any way at that time. But I remained in Hamburg and when in 1935 the administration of justice was incorporated into the Reich and my office as chief of the administration of justice, Justizsenator, was eliminated. I became president of the Hanseatic District Court of Appeals. That is a position of judge which, however, at the same time also includes administrative jurisdiction. I believe that the Tribunal is already familiar with the fact that, from 1935 on, Germany was divided into, I believe, 35 or 37 areas of district courts of appeal, and at their top there was each time a president of the district court of appeal. In 1936 to 1937 the Reichjustizfuehrer [chief of NSRB] Frank* approached me through a representative and asked me if I would like to be his representative in Berlin in his capacity as Reichjustizfuehrer. It was not difficult for me to reject that offer, because during the course of those 2 years I got to know Frank. The personal characteristics of Frank have repeatedly been emphasized in this trial, but I want to add one more attribute, that he was extraordinarily vain and that he never forgave me that I could refuse to become his assistant.

Q. In conclusion, in regard to this question, would you please state something about your additional positions in Hamburg which you had in addition to your position as president of the district court of appeals?

A. In Hamburg I had several extra duties during the years when I was still in Hamburg, that is, from 1935 on. That is in

* Later Governor General of German occupied Poland. Frank was tried and sentenced to death by the International Military Tribunal. Thierack later succeeded Frank as leader of the NSRB, and in 1944, Thierack appointed the defendant Klemm as his deputy in this organization.

addition to my main duty. I was Honorary Professor at the Hamburg University for civil law, and there I, in a certain sense, continued my activity as repetitor, that is, tutor, so to say. That is, I held lectures for students. From 1938 on I was president of the Reich Maritime Office. That was the final authority in decisions about collisions at sea and about the litigations regarding the withdrawing of a license which resulted from this for captains who were found guilty in case of a collision. From the beginning of the war I was president of the Prize Court [Prisenhof] in Hamburg. The Tribunal probably knows the functions of such a Prize Court. Until August 1942 I remained at Hamburg, and from August 1942 until December 1943 I was in Berlin as Under Secretary. In December 1943 I again left there, returned to Hamburg, and was a notary in Hamburg.

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Q. We now come to the question as to why you became a Party member and a Gau Leader [Gaufuehrer] of the NSRB. Those are phases of your political life during which you participated actually and formally in the NSDAP. Can you explain why you first became a Party member?

A. For reasons of full conviction I became a Party member in 1933, because at that time this party appeared to me to be more united and less split up than the other, earlier parties; and in 1934 or 1935 when Gauleiter Kaufmann approached me and asked me to take over the Gau leadership of the NSRB, I had already gained my first impressions and experiences in the struggle between the administration of justice and the Party. It has been emphasized here time and again how, during the first period, after the revolution of 1933, every Kreisleiter attempted to interfere in court proceedings; the Gestapo tried to revise sentences, and it is known how the NSRB tried to gain influence with the Gauleiter and Reichsstatthalter in order to act against the administration of justice. In this respect I gained very bad impressions in Hamburg with the Gaufuehrer at this time of the NSRB, Dr. Haecke. The Reichsstatthalter removed him from office and asked me to take his place, and I do not regret having taken that step because only owing to the fact that I myself held that office, I was in a position to eliminate attacks on the part of the Party against the administration of justice from the outset. And that may only have been possible because I had a Reichsstatthalter in Hamburg who was smart enough and objective enough to realize pretty soon that any fight against the administration of justice can only lead to the destruction of the state itself. I gained influence on the man particularly by two events. First, because at the

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first opportunity when the attempt was made to put an incapable man in charge of a penal institution, I refused to do so. I asked to be sent on leave and asked him to assure me that that man would be removed. The case was mentioned here again—a man by the name of Laatz.

Q. I shall submit an affidavit about that case.

A. To describe the attitude of the Reichsstatthalter in Hamburg, it is important also to stress that the mayor of Hamburg today, who, after the surrender in 1945 was appointed officially and publicly expressed his gratitude for the calm and objective attitude displayed by Reichsstatthalter Kaufmann during all these years in Hamburg. It belongs to the same field that 2 years later I took over the Gau legal office and thereby excluded any competition; and it belongs to the same complex of questions that during the same year my membership in the Party was put down as 850,000, which gave me a possibility to stand up more strongly against the so-called "old fighters" [Alte Kaempfer—earliest Nazi Party members]. On account of the identity, of course, between president of the district court of appeals and Gaufuehrer, I was envied by all other district court of appeals because they continually had to struggle against the Party while I was saved this struggle.

Q. How long did you hold these offices?

A. I held these offices until August 1942 when I was transferred to Berlin; then the Gau legal office was dissolved; and the office of the Gaufuehrer of the NSRB, I gave up.

Q. Then, you became deputy [Under Secretary in the Reich Ministry of Justice] in Berlin.

A. Yes, I became deputy in Berlin until December 1943.

Q. What was your attitude toward the SD in Hamburg; could you tell us something about that? I am referring to Document NG–825, Prosecution Exhibit 433,* in that connection.

A. The SD in Hamburg during the first few years had a bad selection of personnel. There was the usual system of informers; I was spied upon; the Reichsstatthalter was spied upon and that led to their removal. The Reichsstatthalter, when he found out about that, removed the entire personnel from office from Hamburg. The new men whom he appointed, as far as they were concerned with matters of administration of justice, came to me in 1939. In the meantime, the directive had been sent down from the Reich Ministry of Justice to the effect that the SD should be

* This is a report of a conference on 22 August 1939 between defendant Rothenberger and the SD chief in Hamburg. It is reproduced earlier in this section.

considered and used as a source of information of the state by agencies of the administration of justice; and here also I was independent to nominate individuals who would not submit reports intended to go against the interests of the administration of justice, but who themselves were in favor and sympathy with the principles of the administration of justice, and that is the basis for the conference with the SD Fuehrer in Hamburg which is contained in NG–825, the fact that I made suggestions to nominate men who were judges and whom I knew would never submit reports which were against the administration of justice. Since that time, also in Hamburg, no SD informer appeared in court proceedings, and, as far as I know, no reports were submitted which were against the administration of justice.

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EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHAUG*

DIRECT EXAMINATION

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DR. KOESSL (counsel for defendant Rothaug): In what places and what official positions were you employed before you became presiding judge of the Special Court of Nuernberg?

DEFENDANT ROTHAUG: I have already mentioned that after the result of the state examination had become known, I was soon called into the Bavarian administration of justice. My appointment was first with the public prosecutor's office in Ansbach for the so-called post-practice [Nachpraxis]. This post-practice was supposed to last for about 3 months. In my case, however, it was interrupted after only 3 weeks. Perhaps I had proved myself a good student, and after that I was first transferred to the local court in Weissenburg. I want to mention that I was called to the prosecution in Ansbach on 1 May 1926. Until approximately August 1926, I was working at the local court at Weissenburg. Subsequently I came to the local court at Pfaffenhofen on the Ilm.

Q. You just mentioned Pfaffenhofen on the Ilm. Where were you living at that time?

A. I would consider it more to the point if I would first describe my official positions now, up to the Special Court in Nuernberg. That's what you asked me, isn't it?

I believe I have already mentioned that I came to the local court at Pfaffenhofen on the Ilm. There I was employed until the

* Further extracts from the testimony of defendent Rothaug are reproduced later in this section and in sections V D 2, V E, and V F.

Complete testimony is recorded in the mimeographed transcript, 11–14, 18–22, 25, and 26 August 1947, pages 6754–6917, 6928–7016, 7179–7395, 7406–7470, 7474–7636, 7640–7648.

turn of the year 1926–1927. Subsequently I came to the local court at Ingolstadt on the Danube. I was court assessor during all this time up till 1 June 1927. At that time I became public prosecutor in Hof. In the late fall of 1929 I became Amtsgerichtsrat at the local court of Nuernberg. In the middle of 1933, I became first public prosecutor at the public prosecutor's office of Nuernberg-Fuerth; in the late fall of 1934, district court judge at the Schweinfurt District Court; and on 1 April 1937, district court director at the District Court Nuernberg-Fuerth, and there I was, among other positions, employed as presiding judge of the Special Court of Nuernberg.

Q. You mentioned Pfaffenhofen on the Ilm. With whom were you living at the time?

A. In Pfaffenhofen on the Ilm I was looking for a room. I was advised to take a room with a family who were from Franconia because I myself was from Franconia. This family had a small meat factory outside of Pfaffenhofen on the Ilm. The family's name was Haberkern. That was in 1926.

Q. Is that the later Gau Inspector Haberkern who was the owner of the "Blaue Traube" where the club table [Stammtisch] was that was supposed to have been the basis for your political position of power?

A. That is correct. That is the same Haberkern who later on became Gau Inspector of Nuernberg or more correctly was working with Gauleitung of Nuernberg.

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Q. On 1 May 1947 [30 April 1947], the witness Elkar* called you, and I quote, "the highest authority on legal questions in the Gau of Franconia." (*Tr. p. 2896.*) A little later he calls you "the Spiritus Rector in the NSRB."

Doebig says you had been the leading spirit in the NSRB. (*Tr. p. 1775.*)

What influence did you exert on the NSRB as a whole?

A. First of all, may I say in general, particularly to the introductory question, that I consider that those opinions expressed about me are considerable exaggerations. As for having been an authority on legal questions, that is out of the question. I have always found that other people found it a great deal easier; they always dealt with problems far more quickly, particularly those who passed these opinions. In effect, the way with us was that questions which concerned my Gau group, that is to say, the

* Extracts from the testimony of the prosecution witness Elkar are reproduced earlier in this section.

judges and prosecutors' groups, were passed on to me. I then gave my opinion on those questions. My opinion was passed on to the Gauwalter and he then passed the matters on in the routine way which is the custom in every state; it was just passed on then to the next authority.

I really don't think that at any time or at any place I had to cope with a problem of world importance.

Q. Did you receive immediate instructions from the NSDAP and the Gauleitung concerning your work in the NSRB?

A. I never received such direct instructions from the Gauleitung.

Q. What were your duties as Gaugruppenwalter in the NSRB for the judges' and prosecutors' groups?

A. In part, that question has already been answered. All problems which fell within the scope of that professional organization, the Jurists' League, all problems which reached that organization could come to us from any quarter, as they could come from the population itself. All those problems were passed on to the Gaugruppenwalter to deal with, and they were forwarded to that group, the members of which were in some way affected by the event under discussion.

On the other hand, naturally, we also had to cope with the particular difficulties and problems of our members and we had to take care of their affairs because, after all, they had joined a professional organization like ours for that purpose.

I should like to give a practical example to explain this matter, and I will give an example of an event which actually occurred, an event with which we had to deal.

When the administration of justice was centralized, certain offices of judges were downgraded. Here at the district court of Nuernberg, for example, the department chiefs who had had the rank of local court directors [Amtsgerichtsdirector], overnight, and only because the administration of justice was being centralized, were downgraded by one grade. That was done without it being their fault in any way. Naturally that caused a tension, and naturally the people whom it effected were very much annoyed. They came to see me and told me about the matter. As far as I remember they were not Party members, they were of the older generation, and they said that they had been treated in a way in which people should be treated only if they had violated service regulations. I then gave a precise account of the occurrence, made a report, and drew attention to the fact that such treatment of officials was untenable. To begin with, Berlin was against taking any interest and they used the well known slogan, "The interests

of the people have to take precedence over the interests of the individual." However, by again and again digging away at the matter, we succeeded in solving the problem in a way which was satisfactory to everybody concerned.

That was, for example, one of the duties with which we had to deal.

Q. As Gaugruppenwalter for the judges' and prosecutors' groups, did you have an office of your own?

A. I neither had an office of my own nor a staff of my own. I merely had my chair and my two hands. The work that I had to do there I did as an individual, and as a rule I wrote it out with my own hand. I then submitted the matters to the Gauwalter.

Q. Did you wear a uniform in that capacity?

A. Except when I was in the army, all my life I have never worn a uniform.

* * * * * * *

Q. What offices were asked about the political attitude of a judge and a prosecutor, and who made out the final qualifications?

A. Political qualifications were exclusively made under the responsibility of the competent bearer of the sovereignty, that is, the Kreisleiter or the Gauleiter. For these questions they had a so-called Kreis personnel office, or Gau personnel office. When a so-called political qualification of a civil servant was to be made, these offices addressed inquiries to offices where the civil servant or official concerned was known; that is to say, if he was a member of the NSRB, they addressed an inquiry to the Gauwalter of the NSRB, or in another instance to the competent office of the Civil Service League, or to the Ortsgruppe, local group of the Party, or to the SA, or SS. The answers to these inquiries were then gathered at these offices and from there, if necessary, by reviewing or examining the facts that were reported the so-called political qualifications report of an official was made out. This political qualification report was made out because the supervisory offices of this civil servant by provisions of the law were obligated to form a judgment on this question with the intervention of the Party.

Q. How did this develop in your case, and according to what principles did that proceed?

A. That was an affair which caused the least difficulty. The Gauwalter gave the slip that had been sent in by the competent Party office to the Gau group administrator who was competent for that official. That was I, myself, in the case of inquiries regard-

ing judges and prosecutors, as long as I was entrusted with that function. I then returned the slip after it was filled out to the Gau administrator again, who on his part then reported to the Party office.

It is important to know here that according to an express order a man who was a Party member was not permitted to be judged as politically unreliable as long as a Party disciplinary proceeding had not been carried out against him because of some established facts.

During the time of my activity in regard to that function, it is of significance that at that time almost all judges and prosecutors were members of the Party on account of the well known action on 1 May 1937.

Q. Did you hear of a case in which a judge or a prosecutor was described as politically unreliable? And if so, what happened to that man?

A. In my time I did not hear of such a case. The declaration which we made in every case had the following stereotyped contents: "Circumstances which could raise doubts as to the political reliability of the person concerned did not occur."

* * * * * * *

Q. The witness Elkar said literally, and I quote, "As far as I know, the relations between Zimmermann, Haberkern, and Rothaug were very close." (*Tr. p. 2896.*) [Page 374, herein.]

How did you come to know Zimmermann, and what were your relations with him?

A. I have already pointed out that it was only in the course of 1940 that I met Zimmermann by accident when he was at the Blaue Traube.

Q. How often did he attend sessions of the Special Court when you were presiding judge, and do you know why he attended those sessions?

A. I cannot remember one single case when Zimmermann attended one of my sessions. However, it is possible that he attended at the case of Schmidt-Fasel, which has been discussed here several times.

Q. As to Haberkern, you have already testified that quite by accident, as a young assessor, you met him in 1926 and that for many years you had no contact with him. How and when did you hear that Haberkern was in Nuernberg?

A. That was in connection with the National Socialist changeover in 1933. In those days his name often appeared in the news-

papers, and that was how I discovered that he was in Nuernberg and that he played a political role.

Q. You have already said that you did not resume contact, not even when against your will you were transferred to Schweinfurt. You have also given us your reasons. When and how was it that you renewed your relations with Haberkern?

A. It was in 1938 as far as I recollect. One day Haberkern rang me up and asked whether I was that Rothaug who in 1926 had stayed in his home. I told him that I was that man, and he was very pleased and asked me to come to see him and his wife. They were the owners of the Hotel Blaue Traube, Nuernberg. I told him that I would go to see him some day, and one day I did go to see him. That was how I came to the Blaue Traube.

Q. What were Haberkern's offices in Nuernberg and the Gau Franconia?

A. He was Gau inspector, the leader of the Hotel and Restaurant Association, and he was also an Ortsgruppenleiter. I believe he was the Ortsgruppenleiter of the old city.

Q. Through this function did he have any contacts with your official position as judge?

A. No. The Gau inspector, according to his official duties, has to take care of internal matters of the Party. As a leader of the Hotel and Restaurant Association all he could have done was to find me some rooms for my summer holidays. I had nothing to do with his local group [Ortsgruppe] because I belonged to a different group.

* * * * * * *

Q. Witness, did the Party offices in Party affairs have their own legal consultants?

A. In this connection, one must point out that every Party office, even the Ortsgruppenleiter, the leaders of the local groups, had their own legal offices. I had nothing to do with that matter.

Q. When were matters concerning legal questions brought to you?

A. Only if simultaneously they affected the interests of the NSRB, and even then only if they affected the interests of the Gau Group for judges and public prosecutors.

Q. Did the Gauleitung take any interest in the general administration of justice?

A. I never noticed that the Gauleitung of Franconia ever took any interest in the development of the legal situation.

Q. Did the legal situation play a decisive part in the Gauleitung?

A. I never noticed anything of that sort.

Q. At the table at the Blaue Traube that has been mentioned here so often, were there ever any discussions which have been laid down previously?

A. May I summarize my statement and perhaps say for the last time that I went to the Blaue Traube with the same intentions that other people had when they went there, and with which other people are in the habit of going to other pubs. As for conferences with agendas, they weren't held there for the simple reason that that would have been parliamentary. I met other people there, too, but I didn't meet anybody who went there with any political aims.

Q. Were official matters discussed there?

A. Not official, though Party matters were discussed there; but there, as I think happened in those days at every table in every pub, political things were discussed, and the war was discussed. If somebody were to ask me today what we talked about, I would not be able to give an account of even one trend of ideas that we discussed there.

Q. Did you ever go to Haberkern with your own affairs, that is to say, to get any of your own wishes of a personal nature fulfilled?

A. I never bothered Haberkern on any matter of that kind.

Q. Do you know whether other people from your entourage asked Haberkern for his help on their own behalf?

A. I heard that they did.

* * * * * * *

Q. When the witness Ferber* mentioned the doubts which the Reich leadership harbored for your political reliability, he said that the SD took an interest in your remaining at Nuernberg. From the account of the witness Elkar, English transcript, page 2888, [page 369, herein,] we know that approximately in May 1940, you were called to a conference which was attended by Doebig, Bens, and the SS section leader, Friedrich, and that in that way you got into contact with the SD. What was the topic of those discussions when you joined in?

A. That matter was rather different. To begin with, Elkar came to me at my office. Then Obersturmbannfuehrer Friedrich called and also a Standartenfuehrer whose name I no longer remember.

* Testimony of Dr. Karl Ferber, a prosecution witness, is not reproduced herein.

All those three men belonged to the SS. Those three men told me that they had come to call on me because they wanted to introduce themselves to me, and they wanted to try and establish good relations between their office and the administration of justice authorities.

Conditions in general were then discussed, in particular the fact that the administration of justice in certain press organs, above all the Schwarze Korps, was being subjected to continuous attacks. They considered that state of affairs undesirable, all the more so as they also knew that those articles were generally written on the basis of one-sided information. They also asked for my opinion as to what I would think of all questions which arose here in Nuernberg concerning the administration of justice, if they were to be dealt with to start with on a lower level before a report was made on a higher level. I thought that was a good idea. They asked me whether I would care to be the mediator. I suggested district court of appeals and the general public prosecutor since as it was, they had told me that they intended to call on those officials, too.

I would like to point out that the three of them had only called on me because Elkar had brought them along. As you know Elkar had been with me for training as a Referendar. At that time I had no idea what the SD was about, and what its functions were. The conference with Doebig and Bens was along the same lines and both men saw the point and agreed that it was quite a reasonable plan which had been submitted to them. They suggested that it might be a good thing to let these matters be dealt with through me because the cases which occurred with me were cases which were to be treated later.

I would subsequently be asked to attend that conference. I, myself—and I think it would have been the same with every human being—couldn't imagine, or anyway, couldn't imagine very well what was going to happen at that conference. That was the basis on which developments went along.

Q. What was Doebig's attitude to Friedrich's wishes?

A. I believe I have already answered that question. As usual, he was in favor of cooperation.

PRESIDING JUDGE BRAND: May I ask you a question. It wasn't entirely clear what you meant in your testimony. You suggested that investigations on a lower level should take place before the higher level. Investigations of what—what kind of matters?

DEFENDANT ROTHAUG: Investigations is not the word I meant to say. I wanted to say that by negotiations, matters which con-

cerned the administration of justice were to be settled on a lower level.

Q. What kind of matters—which concerned the administration of justice?

A. What we had in mind was attacks which within the sphere of the Party were made against the administration of justice. I can illustrate that by an example.

Q. It is not necessary now. No, I understood you to act under this suggestion as an intermediary. Was that your word?

A. That I was to become the intermediary?

Q. Yes, between what parties or what groups?

A. Between the SD and the administration of justice.

Q. Yes, and then you said since these matters are all matters to be dealt with by me afterwards, it was reasonable that you should be the intermediary. Did you refer to legal matters?

A. That concerned matters—cases which might be brought before me or which were already pending before me. Matters in which those agencies were interested for reasons of criminological developments, but they were not interested in the individual case as such, in its treatment, or in the decision.

Q. And what was the lower level where the matters were to be first discussed?

A. The main difficulties which arose and which gave cause to discuss this matter at all were made from up above—from a higher level. A report was made on some occurrence or other to the SD; the SD passed the matter on to Berlin; from there it was passed on as a rule without having been settled or even examined to the press where it caused a great deal of sensation.

Q. Was this lower level, to which you refer, the local representatives of the SD?

A. Yes, naturally.

PRESIDING JUDGE BRAND: Go ahead.

DR. KOESSL: Now, Witness, tell us please, what was to be prevented by the discussions, the report to the higher level; what was it—was it that things were to be clarified after the higher level had dealt with it?

DEFENDANT ROTHAUG: One cannot state all that in one reply in such a general way. With these questions it always depended on what the individual case was like; what the attending circumstances of the individual case was like; and it depended upon

what the aims and object of the participants were. Without going into the matter of the individual case, it is impossible to give an objective answer.

Q. The witness Doebig said, "It was only a great deal later after I had left Nuernberg that I heard for certain that Rothaug worked in the SD." * Later, Doebig stated that he remembered that the SD Leaders Friedrich and Elkar paid him a visit, but that he could not remember the subject which was discussed. Anyhow, he had never given an inference that the administration of justice would cooperate with the SD. (*Tr. pp. 1865–1866.*) What position did Doebig take?

A. I have already answered that question when I said that Doebig was altogether in favor of settling matters in that way.

Q. How often would Elkar call on you in the subsequent periods?

A. He said on Saturdays, and that makes it sound as if he had come every Saturday, but that is quite out of the question. He came on some Saturdays, but sometimes weeks passed or months until he came to see me again about some matter or other. As was the case with many other things that were organized within the sphere of the Party, they dragged on and finally nothing much was done.

Q. What did Elkar tell you during these discussions about the functions of the SD, regarding the state of the Party?

A. He told me, and I think that was probably right, that the SD as we saw it was an institution of the nature of an official agency; that is to say, it was an organization of the police type; its activities and functions can best be described as an agency that gathered the opinions of the people; one intended to find out what the people really thought on official measures taken by the government, that is to say what they thought about laws, about judgments, about other administrative measures, etc. Those reports were then to be evaluated and passed on the competent Supreme Reich Authorities to enable them in their governmental transactions and measures, to remain aware of the thoughts of the people. In all these reports therefore, what mattered was not to find out who the people were who were critical and undesirable, but on the contrary, the intention was to find out what people were really thinking; and therefore, it was undesirable and prohibited to prosecute in any way an individual who stated his opinion in this connection. That was roughly the scope of the functions of the SD.

* Doebig was a prosecution witness. His testimony is recorded in the mimeographed transcript 9, 10 August 1947, pages 1750–1872.

Q. In the English transcript at page 2912, the witness Elkar mentioned the official character of the SD. I am showing you a book, and would ask you to tell the Tribunal what the title is.

A. The book is entitled Ministerial Gazette [Ministerialblatt]; it was issued by the Reich Minister of the Interior; it was published in 1938.

Q. Please turn to page 1906. At the right hand corner you will find a circular decree by the Reich Leader SS and Chief of the German Police at the Reich Ministry of the Interior, dated 11 November 1938. Please read out section 1 of that circular decree.

A. Under the heading police administration, it says, "Collaboration of the authorities of the administration with the SD was the subject of the Reichsfuehrer SS (SD) circular decree by the Reich Ministry of Interior, dated 11 November 1938." Then, there is a file note. Then—"one: The SD of the Reichsfuehrer SS (SD), as information organization, intelligence organization for Party and State, has to work in particular in support of the security police and has to fulfill important duties. The SD thereby acts on the instructions of the State. That necessitates close understanding and cooperation between the SD and the authorities of the general and internal administration. In reply to inquiries by the SD, information has to be imparted therefore to the same extent as if inquiries had come from a government authority. The official agencies of the SD, in the same way, are under obligation to reply to inquiries of the general and internal administration."

Q. Witness, what were the motives for which you met with Elkar and discussed matters with him?

A. The main cause was that he knew me from his former training period.

Q. You may continue.

A. I said Elkar knew me since the time when he was in training, because he was assigned to me. He was by nature a very faithful person, and at the time when he was not yet with the SD, I was connected with him by purely human relationships. That is how it came about that at that time, after he had taken up service with the SD and a connection with the administration of justice and the SD was sought, he came to me first for I was known to him; and that is how in the subsequent period the entire relationship was purely a matter of comradeship. This is shown best perhaps by the fact that one day Elkar informed me that he would probably be transferred to the RSHA in Berlin for further training. Thereupon, I told him that in that case I would also

discontinue my activity because I would not start all over again with a new man.

Q. What descriptions did Elkar give you about the further handling of the SD reports in Berlin?

A. He said that the information which I gave him—which was usually an opinion on problems which were connected with the collection of comments from the people—he would incorporate into his reports. These reports in Berlin would then be divided according to whichever participating Reich agency was interested and put at the disposal of those offices.

Q. Did you have an insight into questions and tasks which were outside of the administration of justice?

A. I did not gain any insight into those questions.

Q. Did Elkar tell you anything about the activity of the SD Einsatzgruppen in the east?

A. No. I only found out about that now.

Q. Did Elkar speak to you about the so-called final solution of the Jewish problem by extermination, execution, or gassing?

A. No word was ever spoken about this. I do not believe that Elkar was informed about matters of that kind either.

Q. Did Elkar tell you about individual SD Fuehrers being entrusted with special tasks, as for instance, the feigned attack on the Gleiwitz radio station, or similar undertakings which were the subject of the IMT Trial?

A. Matters of that kind were not discussed among us. The examples you have cited became known to me only here in Nuernberg in the course of this trial.

Q. What was the basic line of your conversations with Elkar, or the basic topic?

A. As I have already stated, the conversations were mainly on problems which were raised by opinions which were gathered from the population. That then led to problems of a general nature, for example, the general development of wartime criminality in one field or another.

In general, that was the direction in which our conversations developed and that was also the aim of such conversations.

Q. Could everything be said in such conversations without restrictions?

A. I believe that that was the only possibility at that time in Germany where a person could say exactly what he was thinking; and the reason for that is because, in this connection in particu-

lar, only the truth was at stake for they were interested in finding out what the population was actually thinking in regard to certain events, measures, laws, speeches, judgments, etc.

Q. Do you know in what form these reports were forwarded?

A. That is not known to me; I never read such a report.

Q. According to Elkar's testimony you directed your attention to the development of criminal and penal proceedings. (*Tr. p. 2890.*) What ideas did you represent?

A. I believe I have already stated my position on that question. I do not remember a great deal in detail regarding what was discussed at that time. One question, for example, which interested us and which demonstrates how we came to speak about these matters and what opinion we represented is the question which was frequently discussed in this trial, and that is the contact of the prosecution during the trial with the court because of the application for penalty. Opinions from circles of lawyers and judges and from the prosecution were gathered for this purpose at that time. I myself represented the opinion that this problem grew into a problem only because it was treated in a wrong manner on the part of the administration of justice. The entire question could be solved by a small remark in the "Deutsche Justiz," namely, by pointing out that the law does not provide that a formal application has to be made, and therefore it would have been sufficient to instruct the prosecutors to refrain from a formal application for penalty and to be satisfied with adducing the evidence and then stating the reasons which spoke for and against the defendant. With that, the entire excitement and fuss which was caused by the formal application for penalty could have been avoided.

Q. What reason did you give for this suggestion?

A. The reason which I have just explained.

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Q. Elkar alleges that you had also talked about pending trials and had discussed also the facts as well as the legal situation and future judgment. (*Tr. p. 2891.*) Was the name of a defendant ever mentioned as long as trial was still pending?

A. The names of defendants never played any importance in these conversations. The manner of expression was general. The individual cases, as such, were of no importance at all and their outcome even less so. It is possible that in the most infrequent cases—as an example of a definite criminal deed, in order to demonstrate, for example, the method of the consequences of this

crime and to use it in the discussions of general questions, that an individual case was mentioned, but not in a single case was it like this that Elkar ever was interested in a certain pending trial or even wanted to get information about the final outcome in advance; such an evaluation was not possible in practice at all for the decision could be given only on the basis of the trial after it was concluded. Thus, Elkar's activity was not aimed at such a goal.

Q. By mentioning an individual case, did you ask for the opinion of the RSHA in order to find a basis for the political evaluation of the offense?

A. Never. I had no connections whatsoever to the RSHA. Moreover, such a method even in the Third Reich would have been an absolute impossibility, and it was never alleged that this occurred.

Q. Did you, in any individual case, receive an instruction from the RSHA or a recommendation to direct the trial in a certain direction under a certain point of view, or to pronounce a certain definite penalty?

A. This, too, was never alleged so far. Such a procedure, too, would have been an absolute impossibility. No office would have dared to suggest anything of that nature even.

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Q. We started with your relationships to the SD. On what formal basis were your relationships with the SD? Were you a member of the SD?

A. I was never a member of the SD; I don't know either whether there was such a thing as a membership in the SD; or, whether the people were assigned to the SD from the SS. Only during this trial did I hear that there was such a thing as an actual membership in the SD. At that time I assumed that it was an institution of the nature of an official agency, the personnel for which was appointed by the SS. I never made any application for any membership in this institution; I never signed anything.

Q. Elkar says that in 1940 you had taken an oath as collaborator of the SD; that is in the English transcript at page 2896. Did you take an oath?

A. I can say this with absolute certainty, that I never took an oath in that connection. The possibility exists that it was called to my attention that matters which I found out in connection with such conversations were supposed to be kept secret. However, I do not have the slightest recollection of this either, so I cannot imagine that I was approached on this matter in a solemn cere-

mony. It is a fact, in any case—and this is why the people who worked for me also knew about these occurrences—that the matters which were discussed there, without exception, I believe, I had also discussed with them and among them. Thus, I had no thought of violating any secrets or any pledges of secrecy.

Q. What was the status called that you had with the SD?

A. In former times I never worried about that because for me it was not a question of practical importance as to what I would be designated as, since I had agreed to hold conversations of the type that I used to carry on with Elkar. Thus, in former times, there was no need to have some kind of a rank for that, or whatever you want to call it.

Q. Did you ever become a member of the SS?

A. I was never a member of the SS.

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b. New devices to change final court decisions—The "Extraordinary Objection" and the "Nullity Plea"

PARTIAL TRANSLATION OF NG–715
PROSECUTION EXHIBIT 112

EXTRACT FROM LAW, 16 SEPTEMBER 1939, AMENDING REGULATIONS OF GENERAL CRIMINAL PROCEDURE, MILITARY CRIMINAL PROCEDURE, AND THE PENAL CODE

1939 REICHSGESETZBLATT, PART 1, PAGE 1841

* * * * * * *

Part 2
Extraordinary Objection [Ausserordentlicher Einspruch]

Article 3
Extraordinary Objection to final judgments [rechtskraeftige Urteile]*

(1) Against final penal sentences the Chief Reich Prosecutor at the Reich Supreme Court can file an objection within 1 year after the sentence has become final, if, because of serious misgivings as to the justness of the sentence, he deems a new trial and decision in the case necessary.

(2) On the basis of the objection, the special penal senate of the Reich Supreme Court will try the case a second time.

* In German legal terminology a judgment or an interlocutory ruling is described as "rechtskraeftig" if all regular means of opposing or altering it (by such means as objection and appeal) have been exhausted, or if the period of time within which objection or appeal can be taken has lapsed. The term "rechtskraeftig" in this trial, Justice Case, was usually translated as "final."

907802—51——28

(3) If the first sentence was passed by the People's Court, the objection is to be filed by the Chief Reich Prosecutor at the People's Court, and the second trial is to be held by the special senate of the People's Court. The same applies to sentences of courts of appeal in cases which the Chief Reich Prosecutor at the People's Court has transferred to the public prosecutor at the court of appeal, or which the People's Court has transferred for trial and sentence to the court of appeal.

(4) If there is a connection with a case which is under the jurisdiction of the military courts, the proceedings can be transferred to the jurisdiction of the armed forces by agreement between the Reich Minister of Justice and the Chief of the High Command of the Armed Forces. On the basis of the objection the case will then be decided by the special senate of the Reich Supreme Military Court (art 410b of the Military Code of Criminal Procedure).

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Fuehrer Headquarters, 16 September 1939

The Fuehrer and Reich Chancellor
ADOLF HITLER

The Reich Minister of Justice
DR. GUERTNER

The Chief of the High Command of the Armed Forces
KEITEL

EXTRACTS FROM THE TESTIMONY OF DEFENDANT LAUTZ CONCERNING THE EXTRAORDINARY OBJECTION*

DIRECT EXAMINATION

* * * * * * *

DR. GRUBE (counsel for defendant Lautz) : When, in effect, did you assume your office as Chief Reich Prosecutor at the People's Court?

DEFENDANT LAUTZ: Due to illness, I only assumed office on 20 December 1939, in Berlin.

* * * * * * *

Q. * * * Witness, first of all what general remarks do you have to make on the subject of the extraordinary objection?

* Further extracts from the testimony of the defendant Lautz are reproduced below in section V E. His entire testimony is recorded in the mimeographed transcript (23, 24, 25, 28 July 1947, pages 5761–5775, 5781–6054).

A. The extraordinary objection, which was introduced in 1939, was based on a bill which had already been drafted. The purpose was to be able to correct obvious mistakes in judicial decisions, and thereby to effect uniformity in the practice of the courts.*

Q. In article 2, section 3 of the law of 16 September 1939, it says: "Against final criminal sentences, the Chief Reich Prosecutor at the Reich Supreme Court can file an objection within 1 year after the sentence becomes final, if, on account of serious misgivings against the justness of the sentence, he deems a new trial and decision in the case necessary." In paragraph 3 of the same section, it says, "If the first sentence was passed by the People's Court, the objection is to be filed by the Chief Reich Prosecutor at the People's Court, and the second trial is to be held by the special senate of the People's Court." According to this, one should assume that the two Chief Reich Prosecutors were those who had to decide whether an extraordinary objection was to be made or not. Please comment on this.

A. This assumption would be incorrect. According to all the regulations and the constitutional basis of this law, it was without doubt that such a far-reaching statement could be made only by the head of the State for the government, because the extraordinary objection repealed the sentence which had been pronounced, and returned the case to the stage at which it was before the trial. Thus, if an extraordinary objection was raised, a new trial had to take place as if nothing had happened before. Therefore, through internal instructions, it was assured that the two Chief Reich Prosecutors, the one at the People's Court and the other at the Reich Supreme Court, could raise an extraordinary objection only by virtue of an order of the Minister of Justice as the representative of the leadership of the State. And this is not expressed in the law because according to the German conception of a trial, the Minister of Justice cannot make any direct statements in a trial. The two Chief Reich Prosecutors, therefore, made these statements, as I said, only from case to case on orders of the Minister, which as a rule, were even issued so unequivocably that the statement which had to be made, with the reasons for it, was in each case prescribed to the Chief Reich Prosecutors. Thus, the Chief Reich Prosecutor just as the other authorities, for instance, the attorneys general or the presidents of the courts were not

* Concerning the purpose of the extraordinary objection, the defendant Schlegelberger stated the following in a letter to Hitler on 6 May 1942: "In order to accelerate the setting aside of such decisions [judgments not accomplishing the unrelenting punishment of criminals], you, my Fuehrer, created the extraordinary objection to the Reich Supreme Court. With the help of this legal resource the judgment against Schlitt, which you mentioned in the session of the Reichstag, was quashed within 10 days by sentence of the Reich Supreme Court. Schlitt was sentenced to death and executed at once." (See Doc. NG-102, Pros. Ex. 75, reproduced in sec. V C 2 a.)

prevented, if they thought that there was a cause for it, from suggesting on their own to the Minister of Justice that he should issue such an order.

Q. Witness, the material decision as to whether an extraordinary objection should be raised or not was thus made in the Ministry?

A. The material decision was made exclusively by the Minister of Justice. That is, only he personally made it on the basis of a report made to him by his Referent personally. In particular it was like that; in case of every decree issued by the Ministry it had been assured that either by the signature of the Under Secretary or the Minister, or the division chief, it was made clear that the decision had actually been made by the Minister in this case.

Q. Did you ever raise an extraordinary objection without having an order from the Minister?

A. That never happened.

Q. You just said that the two chief Reich prosecutors as the officials, as supervising authorities of the administration of justice, for example, attorneys general, presidents of the courts of appeal, etc., had the right to suggest to the Minister of Justice that he should issue an order to raise an extraordinary objection. Did you make use of that possibility?

A. I only did so very infrequently on my own initiative. I still remember a few cases in which sentences pronounced by the senate presided over by Freisler were concerned. We were *per se* not very much inclined to attack sentences pronounced by our own court by such a legal recourse. However, Minister Thierack, though not much inclined to admit objections, occasionally could be made to do so in cases presided over by Freisler. The cases which are pertinent here, I may perhaps describe briefly. The first Senate of the People's Court in one case had condemned a person to death because of treason. The facts were as follows: The defendant had transferred a model 38 machine gun into the hands of the enemy; he had obtained the machine gun and given it to an enemy agent. The enemy had known about this machine gun for a long time because they had captured many of these machine guns on the battlefield. Thus, only attempted treason could be the case, and the indictment was filed in that manner. Nevertheless, the Senate passed the death sentence. Here the extraordinary objection was permitted. A second case was a death sentence against a member of the Protectorate, the opinion of which consisted of three-quarters of a page by Freisler. In this case I suggested that this was not an opinion at all, since from the facts one could not find out at all what the defendant had done; and because of this

legal mistake the extraordinary objection should be allowed. This extraordinary objection, therefore, was permitted.

Q. Witness, could the defense suggest an extraordinary objection?

A. Yes, the defense counsel could do it, too. The contents of such petitions frequently showed that pure clemency reasons were used by them as arguments in favor of an extraordinary objection, and not basic legal questions. In such cases it was suggested to them that they make a clemency plea. But, if the extraordinary objection was based on such grounds that there was a hope that it might succeed, I submitted it to the Minister of Justice and supported it. However, and I have stressed that here before, it was very difficult to get Thierack to allow extraordinary objection to be made in favor of a defendant.

Q. May I interpolate a question? Were you, as chief prosecutor, the competent official who had to deal with such extraordinary objections?

A. No, no, that was the Chief Reich Prosecutor of the Reich Supreme Court at Leipzig.

Q. Can you tell us something as to whether extraordinary objection was made frequently?

A. During the early part of the war, when the extraordinary objection was introduced, that is, until approximately 1942, it was a very infrequent occurrence. It was altogether the exception that it was made. From that time onward, however, their number increased slowly, but I cannot even give a rough estimate as to the number of extraordinary objections that were ordered. Originally, the Ministry of Justice, if a report was made by me as to whether an extraordinary objection was to be made—for example, in the case of a sentence passed by the court of appeals—originally the ministry was agreeable to my using again and again the phrase that the sentence gave rise to misgivings on some points, but these points were by no means of such a serious nature that the unusual recourse of the extraordinary objection should be used. That became different only when the new chief of Department IV of the Ministry of Justice, Ministerialdirektor Vollmer, assumed office. I asked him about this one day, and inquired from him how it was that these days the Minister more frequently ordered an extraordinary objection to be made. In reply he said, since the Fuehrer decree of August 1942, Thierack had all authority in the field of the administration of justice and, therefore, in the sphere of the extraordinary objection, too, he had more scope than hitherto.

* * * * * * *

PARTIAL TRANSLATION OF DOCUMENT NG-715
PROSECUTION EXHIBIT 112

DECREE OF 21 FEBRUARY 1940 CONCERNING THE NULLITY PLEA

1940 REICHSGESETZBLATT, PART 1, PAGE 405

Decree concerning the jurisdiction of the criminal courts, the Special Courts, and additional provisions of criminal procedure of 21 February 1940.

* * * * * * *

Part V

Nullity Plea [Nichtigkeitsbeschwerde] of the Chief Reich Prosecutor

Article 34

Prerequisites of the Nullity Plea

The Chief Public Prosecutor may lodge a nullity plea with the Reich Supreme Court against a final judgment of the local court, the penal chamber of the district court, or the Special Court, within 1 year from the date of its becoming final, if the judgment is unjust because of an erroneous application of law on the established facts.

Article 35

Decision on the Nullity Plea

(1) The nullity plea is to be filed in writing with the Reich Supreme Court. This court will decide thereon by judgment based on a trial; with the consent of the Chief Reich Prosecutor it can also reach a decision without a trial.

(2) The Reich Supreme Court can order a postponement or an interruption of the execution. It can order a warrant of arrest already before the decision on the nullity plea. Outside of the trial, the penal senate, composed of three members including the president, decide thereon. Article 124, paragraph 3, of the Code of Criminal Procedure remains unaffected.

(3) If the Reich Supreme Court reaches a decision based on a trial, articles 350 and 351 of the Code of Criminal Procedure apply accordingly. The president can order the personal appearance of the defendant.

(4) If the Reich Supreme Court quashes the contested sentence, it can make its own decision on the case if the facts found by

the contested judgment are sufficient for this; otherwise it will refer the case to be retried and newly decided upon to the court whose sentence is quashed or to another court.

* * * * * * *

Part VI
Final Regulations

Article 40

Validity in the Protectorate

This decree is also valid for the German courts in the Protectorate of Bohemia and Moravia.

Berlin, 21 February 1940

The Plenipotentiary for the Administration of the Reich
FRICK

PARTIAL TRANSLATION OF DOCUMENT NG-677 PROSECUTION EXHIBIT 188

EXTRACTS FROM AFFIDAVIT OF DR. ESCHER, GERMAN ATTORNEY,* CONCERNING THE USE OF THE NULLITY PLEA

Dr. Ernst Escher, Attorney
Fuerth, 7 December 1946
Rudolf Breitscheidstrasse 8

Sworn Affidavit

As a result of questioning by the American prosecutors in the Nuernberg courthouse, I have the following declaration to make in connection with the questions set before me concerning the procedure of the so-called nullity plea by the Chief Reich Prosecutor:

1. Previous legal situation—It is true that the legal principle that a man cannot be tried twice for the same offense [*ne bis in idem*] is not clearly stated in the German Criminal Code, dated 22 March 1924, and since subjected to frequent editorial changes; this maxim, however, was repeatedly acknowledged in the so-called "motives" of that law. In all of the German legal terminology and literature, no doubt had ever occurred that an individual, once legally tried, could not be resummoned before a court for the same criminal act, without the introduction of additional evidence of

* Dr. Escher acted as a defense lawyer for a number of accused persons during the Nazi regime and executed a number of affidavits concerning his experiences which were introduced as exhibits by the prosecution. Extracts from Dr. Escher's cross-examination concerning his affidavit on the nullity plea appear immediately below.

proof. New proceedings against an accused who had been legally acquitted, could only be initiated in accordance with the rules concerning such a reconsideration of a once legally concluded trial (arts. 359 ff., in particular, art 362 of the Criminal (Penal) Code).

The accused was therefore assured that, once he had been legally acquitted, he would not be summoned a second time before the court on the same charge.

These principles were never repealed in the Code of Criminal Procedure itself; they remained unaltered until the present, and the Criminal Code of 1946, issued by the [Allied] Control Council also incorporated them.

2. During the war, Hitler's government, in a decree pertaining to the competence of the criminal and Special Courts and covering other regulations of criminal procedure, dated 21 February 1940 (Reichsgesetzblatt 1940, I, p. 405, in art. 5, pars. 34 to 37), created the procedure of the so-called nullity plea* by the Chief Reich Prosecutor and thereby annulled and destroyed this fundamental legal maxim. Within a year after a verdict became valid, according to this decree, the Chief Public Prosecutor at the Reich Supreme Court was empowered to use the nullity plea against the final sentences of the local courts of the criminal divisional courts and of the Special Courts if, due to an error in the application of the law to clearly established facts, the sentence could be regarded as unjust.

In a later decree, dated 13 August 1942, allowance was made for a further extension in the use of the nullity plea. Published in the Reichsgesetzblatt in 1942 (p. 508 ff.), this decree in article 7, paragraph 2, established the right of the Chief Public Prosecutor at the Reich Supreme Court to employ the nullity plea, if the decision due to an error in the application of the law was unjust, or if there were serious objections to the validity of the evidence on which the decision was based, or to the sentence itself.

By this decree, it became practically possible to employ the nullity plea against every final judgment and of summoning an accused man the second time before a criminal court despite the fact that his case had already been legally decided.

As is evident in the literature, and especially in the published decisions of the Reich Supreme Court, the nullity plea was not infrequently employed. I refer to the official collection of Reich Supreme Court decisions, volumes 74, 75, and 76 of the published decisions involving the nullity plea.

* * * * * * *

* This decree is reproduced in part immediately above.

I have been asked how the nullity plea of the Chief Public Prosecutor at the Reich Supreme Court was obtained legally. In this connection, I am only able to state that, according to regular procedure, the chief of the local prosecution—thus in Nuernberg, the Chief Public Prosecutor at the district court of Nuernberg-Fuerth —Chief Public Prosecutor Schroeder in the cases with which I was concerned—would send the documents with an appended suggestion to use the nullity plea first to the attorney general at the court of appeal (during the last years, Bens) and from there to the Chief Public Prosecutor at the Reich Supreme Court in Leipzig.

According to the text of the law, the nullity plea could also be employed to the advantage of the condemned. In one case, I myself filed a nullity plea with the Chief Public Prosecutor at the Reich Supreme Court. I was, however, informed that there was no justification for the instigation of the nullity plea.

[Signed] DR. ERNST ESCHER

Attorney

EXTRACTS FROM THE TESTIMONY OF PROSECUTION WITNESS ERNST ESCHER[1]

CROSS-EXAMINATION

* * * * * * *

DR. SCHILF (counsel for defendants Klemm and Mettgenberg): Now I am going to refer to the factual contents of your affidavit. (*NG–677, Pros. Ex. 188.*[2]) This statement concerns itself exclusively with the problem of the nullity plea. Therefore, Witness, I will ask you whether you consider yourself a particular specialist on this problem and held yourself to be such an expert when, on 7 December 1946, you made that statement.

May I point out that the first part—I should like to say one half, the first half, is concerned with theoretical matters, that is to say, with the interpretation of the law. The remainder is concerned with facts. Furthermore, you refer to literature and also to decisions made by the Reich Supreme Court. May I ask you to give me your point of view?

WITNESS ESCHER: On no account can I say that I am an expert or that I have special knowledge of the problem of the nullity plea. We defense counsels, generally speaking, do not have much time to devote ourselves to scientific problems. As a rule we deal

[1] Complete testimony is recorded in mimeographed transcript 23 May 1947, pages 3628–3641.
[2] Reproduced in part just above.

with problems only when they have been brought to us by our practical work. Concerning the theoretical aspect of the nullity plea, I have never in my practice studied it, in detail, but when the nullity plea, became topical, I examined the questions which a defense counsel has to investigate. When in December 1946 I was asked what I knew about the nullity plea, what I had to say about my knowledge of this matter, I mentioned the two cases which occurred in my practice. It seemed necessary to me, however, to give a brief introduction concerning the situation such as it was before the introduction of the nullity plea and such as I saw it after the introduction of the nullity plea. I read several decisions, but I would consider it conceit if I were to say that I possessed thorough knowledge of the problem of the nullity plea.

Q. Witness, in your practice you only came across two cases, isn't that correct?

A. Yes.

Q. In spite of your statement, Dr. Escher, I have to discuss one theoretical question with you. In your introduction such as you characterized it just now, on page 2 under 2 of your affidavit, you have drawn a conclusion, that is a conclusion as to what the introduction of the nullity plea led to. You said, and I am going to quote literally: "The so-called nullity plea of the Oberreichsanwalt was created and thereby the basic legal principle, *ne bis in idem,* double jeopardy, was revoked and destroyed." As you made such a far-reaching statement on that point, I would like to hear in brief as to what, at the time you deposited your affidavit, you understood by the legal principle *ne bis in idem,* double jeopardy. I noted you mentioned that principle twice. May I ask you to give a brief account to the Tribunal of your opinion as you held it at that time?

A. The principle of double jeopardy meant that a person on whom a legal verdict had been passed could not without new facts having emerged or without the condition of articles 359 and following of the Code of Penal Procedure applying, be retried by a court. Neither the prosecution nor the defendant after legal sentence had been passed could demand a new trial unless the conditions such as they are laid down in the law were fulfilled. That is, for example, perjury on the part of a witness, the finding of new documents or similar fundamental new aspects. By that principle the possibility of the nullity plea was eliminated. And that and not more is what I believe to have stated in my affidavit.

* * * * * * *

Q. Witness, concerning your opinion on the principle of double jeopardy, your view that that principle was eliminated by the

nullity plea, will you maintain your opinion in the face of what I am going to read to you now? It is a paper by Oberreichsanwalt Retzer, Leipzig, published in *Deutsche Justiz,* volume 1941, No. 20, page 562, I quote:

> "It is doubtful whether the nullity plea is possible if the violation of the law which occurred refers to a condition of the trial. It is undisputed in the case of a violation of the principle of double jeopardy. The Supreme Reich Court in a great number of cases revoked sentences where the principle of double jeopardy had been violated."

That is the end of the quotation. To make it clearer, the Supreme Reich Court revoked these decisions by way of the nullity plea, and four cases are quoted and the file numbers are given. My question—now that I have read this to you—do you maintain your opinion?

A. May I say briefly the nullity plea could only be made by the Oberreichsanwalt, but not only against the defendant but also in favor of the defendant. It was, therefore, altogether possible that the Oberreichsanwalt, if he considered a verdict unjust, should use the nullity plea in favor of the defendant. Such a case does exist, even if through certain circumstances or errors a man is sentenced twice for the same crime by different courts, which happened occasionally because, for example, it wasn't known in the case of a Nuernberg case that this man had already been sentenced in Berlin. When that was revealed, the Oberreichsanwalt naturally could make use of the nullity plea in favor of the defendant. Such cases evidently are discussed in the decisions which my colleague has just put to me. In those cases, the nullity plea was a blessing and worked in favor of the defendant, but in most cases, or at least in very many cases, the nullity plea was used without any new facts or conditions, according to article 359 by the Oberreichsanwalt against the defendant.

Q. Witness, the essence of what I put to you is this: You said, by the nullity plea, the principle of double jeopardy has been destroyed, and the other author says that the nullity plea was in fact to protect that principle. I wanted to ask you whether you maintain your opinion, and you have not answered that question as yet.

A. I am of the opinion that the question, the way it is put, contains a little misunderstanding insofar as Retzer deals only with one special case of the nullity plea where it was made in order to revoke decisions which had been made in violation of the principle of double jeopardy. Naturally, the principle of double jeopardy was not expressly eliminated by so many words, but the

effect of the introduction of the nullity plea was that a man, on whom a legal sentence had been passed without new facts or circumstances having come to light, could be retried by a court. Sometimes it could operate in his favor, but in the majority of cases it went against his interest, in my experience, that is.

* * * * * * *

EXTRACT FROM THE TESTIMONY OF DEFENDANT ROTHAUG CONCERNING A CASE WHERE, AFTER A NULLITY PLEA, THE REICH SUPREME COURT CHANGED A PRISON SENTENCE TO THE DEATH SENTENCE WITHOUT REFERRING THE CASE BACK TO THE SPECIAL COURT OF FIRST INSTANCE*

DIRECT EXAMINATION

* * * * * * *

DEFENDANT ROTHAUG: * * * In order to elucidate how severe, for example, the Reich Supreme Court, in particular, generally judged the situation in those cases [sabotage cases during wartime] is demonstrated by the case in the list of the death sentences of the Special Court Nuernberg in which the notation is made—Sentence of the Reich Supreme Court. I believe it was in 1941. The following were the facts:

A Pole had given a civilian pair of pants to a Serbian PW in order to enable him to flee into his home country. In fact, the Serbian prisoner did escape. The Pole confessed; however, he denied decisively that he had intended that the Serb should join the Tito forces; that he only did it out of compassion. Therefore, we sentenced him to a penal camp, 3 years in a penal camp. Thereupon, a nullity plea was filed, the Reich Supreme Court changed the sentence, did not even refer it back to us, but quickly sentenced the Pole to death by stating that, in their opinion the facts which we had already determined ourselves, as I have just told you in a few brief sentences now, were absolutely sufficient to pronounce the death sentence.

And I still recall that the important point of view was—and I remember it, because I was interested—that it could not matter in wartime what concrete intentions he had but that it was absolutely sufficient that the Pole could have counted upon the possibility that the Serb would join Tito's forces.

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* Tr. 6885–6886, (12 Aug 1947). Further extracts from the testimony of defendant Rothaug are reproduced earlier in this section, and below in sections V D 2, V E, and V F.

2. FURTHER DEVELOPMENTS PRINCIPALLY DURING THE PERIOD WHEN THE DEFENDANT SCHLEGELBERGER WAS ACTING REICH MINISTER OF JUSTICE (JANUARY 1941-AUGUST 1942)

a. The Influence of Hitler and Others upon the Administration of Justice

PARTIAL TRANSLATION OF DOCUMENT NG-152
PROSECUTION EXHIBIT 63

LETTERS FROM DEFENDANT SCHLEGELBERGER TO HITLER AND LAMMERS, MARCH 1941 AND MARCH 1942, CONCERNING JUDICIAL SENTENCES DISPLEASING HITLER AND PROPOSING PARTICIPATION IN CIVIL PROCEEDINGS BY PUBLIC PROSECUTORS

[Stamp]

Reich Chancellery 5197 B-4 April 1941
The Acting Minister for Justice

Berlin, 10 March 1941

My Fuehrer,

In continuing the work of the deceased Reich Minister Dr. Guertner, I will do my utmost to install the administration of justice with all its branches more and more firmly within the National Socialist State. In the course of the large number of verdicts pronounced daily there are still judgments which do not entirely comply with the necessary requirements. In such cases, I will take the necessary steps. In order that such judgments be dealt with rapidly you, my Fuehrer, have created the nullity plea and the extraordinary objection for criminal cases. For civil proceedings, the right of application by the Chief Reich Prosecutor at the Reich Supreme Court for the resumption of the procedure, could serve the same purpose as provided in an ordinance drafted by myself. So as to avoid all such wrong verdicts, the public prosecutor's office is called on, in this draft, to participate in civil proceedings, and should stress the right of the national community against the individual interests of the opposing parties.

Apart from this it is desirable to educate the judges more and more to a correct way of thinking, conscious of the national destiny. For this purpose it would be invaluable if you, my Fuehrer, could let me know if a verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of this responsibility and are firmly resolved to discharge their duties accordingly.

I feel that it is my duty to you, my Fuehrer, to bring it to the attention of the judges if a decision does not conform to the opinion of the State leadership.

Heil, my Fuehrer!
[Signed] DR. SCHLEGELBERGER

[Stamp] 3868 B
[Handwritten] 1508/1

The Acting Reich Minister of Justice

Berlin, 10 March 1941
[Initial] L. [Lammers]
[Handwritten] 11 March 2 enclosures

Dear Reich Minister Dr. Lammers:

In connection with our telephone conversation of today, I am sending you a copy of my letter addressed to the Fuehrer.* I consider it of great importance that the Fuehrer receive this letter as soon as possible. It has come to my knowledge that just recently a number of sentences passed have roused the strong disapproval of the Fuehrer. I do not know exactly which sentences are concerned, but I have ascertained for myself that now and then sentences are pronounced which are quite untenable. In such cases I shall act with the utmost energy and decision. It is, however, of vital importance for the administration of justice and its standing in the Reich, that the head of the Ministry of Justice should know to which sentences the Fuehrer objects; for nothing is more dangerous than the creation of a so-called atmosphere, of the causes of which the Minister of Justice is unaware. That is the reason for my request to the Fuehrer in the last paragraph of my letter. I repeat, this attempt to establish a direct contact between the Fuehrer and the Minister of Justice must be made at once if irreparable damage is to be avoided.

In explanation of the first paragraph of my letter, I enclose the mentioned draft of the decree, which is to be provisionally discussed here on the 17th of this month with the Reich Chancellery. Basic approval has already been received from the Reich Finance Minister, the Reich Minister of the Interior and the Reich Minister of Economics. Participation by the prosecuting authorities in civil cases was already known in Roman law. Nowadays, in the recently published Italian code of civil procedure, this participation has been extended, following the general line of my draft, because, as is indicated in the report to the king, a purely platonic participation is no longer sufficient.

* The letter to Hitler is reproduced immediately above.

The deceased Reich Minister Dr. Guertner, during the last days he was still in office, advised me to examine the question of whether an extraordinary objection should be created for civil as in criminal cases. I have adopted the right of the Chief Reich Prosecutor to ask for the reopening of a case but deliberately with such limitations, that by human standards no offense can be created thereby; this special reopening will only be put into practice in so-called secular cases.

With best regards and Heil Hitler!

Yours very truly
[Signed] DR. SCHLEGELBERGER

Enclosure to the Letter of 10 March 1941 from Defendant Schlegelberger to Lammers

Draft of a Decree Concerning Participation by the Public Prosecutor in Legal Proceedings of matters of Civil Law

dated.....1941

The Ministerial Council for the Defense of the Reich issues the following decree with force of law:

Article 1

(1) The public prosecutor is authorized to participate in civil law proceedings in order to plead the circumstances which have to be considered from the point of view of the national community and for the final judgment. For this purpose, the public prosecutor may be present at all proceedings and may give his opinion regarding the judgment which is to be passed. He may submit facts and evidence insofar as this does not affect the rights of either party with regard to the disagreement.

(2) Regulations which already provide for participation by the public prosecutor in matters of civil law, are not affected.

Article 2

In matters of civil law where a valid final judgment has been passed, the Chief Reich Prosecutor at the Reich Supreme Court may, within a year after the decision has become valid, file an application for reopening the proceedings if there are serious legal and factual objections against the justness of the decision, and if he considers new proceedings and a new judgment to be necessary because of the special importance of the judgment to the national community.

Article 3

(1) The high senate for civil matters at the Reich Supreme Court makes a decision by writ, on application.

(2) The participants in the previous proceeding may be heard.

Article 4

(1) If the Reich Supreme Court grants the application of the Chief Reich Prosecutor, it will again take up—as far as this is necessary—the previous proceedings and the judgments passed, and will order new proceedings and a new judgment.

(2) The Reich Supreme Court determines whether the new proceedings and judgment will be dealt with by the court previously concerned with the case, or will be replaced by another court of the same standing, or whether it will be dealt with by a senate of the Reich Supreme Court.

Article 5

(1) The new proceedings will be considered a continuation of the previous proceedings.

(2) The court is bound by the legal and factual judgment on which the Reich Supreme Court based its writ.

(3) No court fees will be charged for the new proceedings and judgment.

Article 6

The president or a member of the high senate for civil matters, appointed by him, may issue temporary orders regarding the execution of judgments concerned in the application of the Chief Reich Prosecutor at the Reich Supreme Court.

Article 7

The Reich Minister of Justice is authorized to issue supplementary regulations and regulations for the implementation of this decree.

Article 8

In the Protectorate of Bohemia and Moravia, this decree is only valid for proceedings before German courts.

The Acting Reich Minister of Justice

Berlin, 24 March 1942

My Fuehrer:

When I took office, I asked you to inform me whether, if a sentence did not meet with your approval, you would allow me to correct it. I ask permission to consider the telephone call made on Sunday, 22 March, concerning the case of Schlitt at Wilhelmshaven as granting my request, and I express my sincerest thanks for this.

I entirely agree with your demand, my Fuehrer, for very severe punishment for criminals [Verbrechertum], and I assure you that the judges have honest will to comply with your demand. Constant instructions in order to strengthen them in this intention and the increase of threats of legal punishment have resulted in a considerable decrease of the number of sentences to which objections have been made from this point of view, out of a total annual number of more than 300,000.

I shall continue to try to reduce this number still more, and if necessary, I shall not shrink from personal measures as before.

In the criminal case against the building technician Ewald Schlitt from Wilhelmshaven, I have applied through the Chief Reich Prosecutor for an extraordinary objection against the sentence at the special senate of the Reich Supreme Court. I will inform you of the verdict of the special senate immediately it has been given.

Heil my Fuehrer!
[Signed] DR. SCHLEGELBERGER

To the Fuehrer and Chancellor of the Greater German Reich, Adolf Hitler

TRANSLATION OF DOCUMENT NG-280
PROSECUTION EXHIBIT 70

CORRESPONDENCE BETWEEN THE REICH CHANCELLERY AND DEFENDANT SCHLEGELBERGER, MARCH AND APRIL 1941, AFTER HITLER HAD EXPRESSED DISPLEASURE AT A SENTENCE GRANTING EXTENUATING CIRCUMSTANCES TO A POLE

Berlin, 28 March 1941

Pertaining to Reich Chancellery 4729
Subject: Sentences against Poles

1. Memorandum:

According to information from Reichsleiter Bormann a sentence of the Lueneburg District Court (apparently in a rape trial)

907802—51——29

against a Polish farm hand has been submitted to the Fuehrer, in which the defendant is granted extenuating circumstances because it was felt that he did not have the same restraint in his relations to female co-workers as German farm hands have. The Fuehrer rejected this view of the court as totally misleading. Under Secretary Schlegelberger is to take the necessary steps to preclude a repetition of this view.

[Initial] F [FICKER]

The Reich Minister and Chief of the Reich Chancellery

Berlin, 29 March 1941
Dispatched 30 March

Reich Chancellery 4729 B
[Handwritten] See Reich Chancellery 5021 B

2. To: Under Secretary Dr. Schlegelberger
Reich Ministry of Justice

Dear Mr. Schlegelberger:

The sentence of the Lueneburg District Court of 21 October 1940 on the Polish farm hand Wolay Wojcieck from Rolfsen has been transmitted to the Fuehrer. In it the court states:

"The defendant is granted extenuating circumstances in respect to the crime. The court considered in the defendant's favor that, as a Pole, he does not have the same restraint in his relations with female coworkers as the German farm hand would have."

The Fuehrer rejected the view of the court as totally misleading. The Fuehrer urges you to take immediately the steps necessary to preclude repetition in other courts of the view of the Luneburg court. I should be obliged if you would inform me what steps you have taken in the matter.

Heil Hitler!

Yours very truly,
(Name of the Reich Minister)
[Handwritten] with final copy

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3. To Reichsleiter Bormann

Dear Mr. Bormann:

I transmitted the instruction of the Fuehrer as contained in your letter of 26 March 1941, concerning the consideration of

extenuating circumstances in crimes committed by Poles, to Under Secretary Dr. Schlegelberger with the request for information about what steps he has taken in the matter.

Heil Hitler!

Yours very truly,
(Name of the Reich Minister)

[Initial] L
(with original copy)

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4. [to be submitted again] on 28 April

[Initials] Ri 29/3
F 28/3

Reich Chancellery 5021 B—2 April 1941 Kri-Fi Record RH 4729 B 1b, 392 B
The Acting Reich Minister of Justice

Berlin, 1 April 1941

[Initial] /L. [LAMMERS]
1. Office: 2 April
[Stamp] Enclose previous records
2. Miss Frobenius:

See Reich Chancellery 5194

[Initial] L. [Lammers]
2 April

Dear Reich Minister:

Upon receipt of your kind letter of 29 March 1941 I immediately consulted the files of the criminal case against the Polish farm hand *Wolay Wojcieck*. In the statement of the court the passage quoted in your letter is indeed to be found. By means of a *circular letter* with the order for immediate transmittal to all judges and public prosecutors I brought the mistake in the viewpoint, as it is shown in this passage of the court's statement, to the attention of the administration of penal justice [Strafjustiz] without delay. *I consider it impossible that such an incident will occur again.*

I also had the responsible president of the Appellate court and the judges concerned ordered to report here tomorrow with the intention of changing responsibilities at the Lueneburg district

court with a view to excluding the judges who cooperated in issuing the sentence from further employment in criminal jurisdiction.

Heil Hitler!

Yours very truly,
[Signed] SCHLEGELBERGER

1. Reported to the Fuehrer. Also reported on the letter of Under Secretary Schlegelberger of 3 April 1941.

2. Office—The above letter is to be filed.

3. To be submitted to me again.

Berlin, 3 April 1941

[Handwritten]

1. Schl. has been provisionally informed by phone.

2. [Illegible] above Count 2

3. Min. Counsellor Kritzinger [illegible] L 4 April

[Stamp]
Reich Chancellery 5914 B—4 April 1941
[Handwritten] submitted with File Reich Chancellery 5021 B

The Acting Reich Minister of Justice

Berlin, 3 April 1941
[Initial] L [Lammers] 3 April

Your Excellency, Herr Reich Minister:

In addition to my letter of 1 April 1941 I beg to inform you that the presiding judge of the penal chamber which passed the sentence in the case against the Polish farm hand Wolay Wojcieck is no longer presiding and that the two associate judges have been replaced by other associate judges.

Heil Hitler!

Yours very truly,
[Signed] SCHLEGELBERGER

[Handwritten]
Reich Chancellery 5021, 5194 B

1. No further steps will be taken.

2. The Reich Minister of Justice is going to transmit the [Illegible].

3. To be submitted again on 24 April.

[Initials] KR [Kritzinger] 10 April

See Reich Chancellery 5929 B
Justice 11

TRANSLATION OF DOCUMENT NG-611
PROSECUTION EXHIBIT 64

CORRESPONDENCE BETWEEN BORMANN, LAMMERS, AND DEFENDANT SCHLEGELBERGER, 25, 29 MAY AND 28 JUNE 1941, CONCERNING A SUGGESTION OF HITLER TO CONVERT A PRISON SENTENCE INTO A DEATH SENTENCE

[Handwritten] Reich Chancellery 7593 B
Reich Leader Martin Bormann
To Reich Minister Dr. Lammers,
Berchtesgaden
Reich Chancellery

Fuehrer Headquarters, 25 May 1941
Bo/Si.
[Initial] L [Lammers] 26 May
1 enclosure

Personal
By messenger

[Handwritten]

1. [stamp] Miss Frobenius: (Reich Chancellery)
2. To Ministerialrat Ficker

[Initial] L [LAMMERS] 26 May
[stamp] See document of 29 May

Dear Mr. Lammers:

In yesterday's edition of the "Voelkischer Beobachter" the Fuehrer read the enclosed report according to which the Special Court of Munich in a trial in Augsburg *sentenced the 19-year-old Anton Scharff to 10 years' hard labor for theft under cover of the blackout;* the public prosecutor had asked for the death sentence.

In the Fuehrer's opinion this sentence is entirely incomprehensible. The Fuehrer believes that in such cases capital punishment must definitely be given if crimes committed under cover of the blackout are to be kept to a minimum from the outset. The Fuehrer has also emphasized time and again that the criminals should receive severe punishment considering the heroic fighting of our soldiers.

The Fuehrer requests you to inform Under Secretary Schlegelberger again of his point of view.

Heil Hitler!

Yours very truly,
[Signed] M. BORMANN
[Typed] (M. BORMANN)

1 enclosure
[Handwritten] War 12

[Enclosure]

JUST MISSED THE SCAFFOLD

10 Years' Hard Labor for a Pickpocket—Death penalty demanded

Augsburg, 23 May

The 19-year-old Anton Scharff was tried for theft under cover of the blackout before the Special Court of Munich in session in Augsburg. On the evening of 18 April in the Jesuitengasse in Augsburg, the perpetrator snatched the handbag from a young woman as she was going to unlock the door of her house. Upon the woman's screams for help, the perpetrator was pursued and caught by passers-by. He was sentenced to 10 years' penitentiary and corresponding loss of civil rights.

The public prosecutor had asked for the death penalty.

The Reich Minister and Chief of the Reich Chancellery
Reich Chancellery 7593 B

Fuehrer Headquarters, 29 May 1941

1. To Under Secretary Dr. Schlegelberger

[Handwritten] Charged with the management of the affairs of the Reich Minister of Justice.

Subject: Crimes committed under cover of the blackout
Enclose copy of enclosure of Reich Chancellery 7593 B

Dear Mr. Schlegelberger:

The Fuehrer took from the Munich edition of the "Voelkischer Beobachter" dated 24 May, a report, a copy of which is enclosed, according to which the Special Court of Munich in a session in Augsburg sentenced the 19-year-old Anton Scharff to 10 years' penitentiary for theft under cover of the blackout; the public

prosecutor had asked for the death penalty. The Fuehrer considers this sentence entirely incomprehensible. The Fuehrer believes that in such cases the death penalty must definitely be given, if crimes committed under cover of the blackout are to be kept down to a minimum from the outset. The Fuehrer has also emphasized time and again that the criminals should receive especially severe punishment considering the heroic fighting of our soldiers.

The Fuehrer requested that I reiterate his point of view to you.

Heil Hitler!

Yours very truly,
(Name of the Reich Minister)

2. To Reich Leader Martin Bormann

In reply to the letter of 25 May 1941—Bo/Si—
Enclose copy of 1

Dear Herr Bormann:

Enclosed please find a copy of my letter of today to Under Secretary Dr. Schlegelberger for your information.

Heil Hitler!

Yours very truly,
(Name of the Reich Minister)

3. After dispatch to Ministerial Director Kritzinger for his information.

[Initial] KR [Kritzinger] 2 June

4. To be filed.

(Name of the Reich Minister)
[Initial] L [Lammers]
[Initial] F [Ficker] 27 May

Berlin, 28 June 1941

Reich Chancellery 9687 B/29 June 1941
The Acting Reich Minister of Justice
III secret 23 1548/41

[Initial] KR [Kritzinger] 20 June
[Initial] F [Ficker] 30 June

To: The Reich Minister and Chief of the Reich Chancellery
Berlin W 8
Voss Strasse 6

Submitted to the Reich Minister for his information.

[Initial] KR [Kritzinger]

1 July

Subject: Crimes committed under cover of the blackout
Reference: Letter Reich Chancellery 7593 B dated 29 May 1940.*
[Handwritten]: To be filed. [Initial] L [Lammers]

Dear Reich Minister Dr. Lammers:

I am very much obliged to the Fuehrer for having complied with my request to take the sentence of the Special Court in Munich against Anton Scharff as an opportunity to have me informed about his views as to the proper expiation for crimes committed under cover of the blackout. I shall again inform the presidents of the district courts of appeal and the attorneys general of this view of the Fuehrer as soon as possible.

The short notice in the Munich edition of the "Voelkischer Beobachter" dated 24 May, which was enclosed in your letter of 29 May, does not make the sentence comprehensible in my opinion either. In the judgment the following facts are stated. Scharff, who was not quite 19 years old when he committed the crime, is the only child of a painter's family and comes from a very poor home. On account of an infection of the lungs his father is unable to work as a painter and his only occupation is in the office of the Nazi Party Public Welfare Organization in Pfaffenhofen on the Ilm. The parents have barely the necessaries of life.

Since the middle of 1937 the defendant was thrown on his own resources and gained his living without parental help and away from home on poorly paid jobs, first by agricultural work and recently as an unskilled worker with a firm in Augsburg. His conduct and efficiency were satisfactory. As the defendant, whose wages amounted to 50 pfennig per hour, could not make both ends meet and contracted harassing debts, he absented himself from work several times in order to get better earnings through odd jobs, such as helping in the loading of wagons at the railroad station and also in this way to obtain dismissal from his employers who would not discharge him.

Around Easter 1941 he left his job after having spent his last wages. He reckoned with his early drafting into armed forces, since he had volunteered for an antitank unit and, with consent of his father, had enlisted for 12 years in order to bring his financial troubles to a final stop. This time he did not find work at the railroad station. Thus, it happened that he soon found himself

* 1940 appears in the original, but obviously 1941 was intended.

without means, and hit upon the idea of getting money by stealing a handbag. After having watched the district in question, he thought that on 18 April 1941 at about 2200 hours he had found a fitting opportunity and snatched the handbag from under the arm of a young woman whom he had followed for some time when she was about to unlock the door of her house. When the woman, a war widow, called for help and people approached, the defendant fled and threw away the handbag but was arrested a short time later without offering resistance.

On the basis of these facts which help to elucidate the peculiarity of the offense and the character of the perpetrator, the court was induced to pass a mild sentence. Since no violence could be proved, the defendant was not convicted of robbery, but only of theft. As extenuating circumstances, the clean conduct sheet, satisfactory work, his youth and immaturity, as well as the hard life, full of deprivations, led by defendant, were put to his account by the court and for these reasons the death penalty was dispensed with.

I ask you to assure the Fuehrer that my unwavering attention is directed to the safeguarding of the protection of the people against public enemies through the severe punishment of criminals.

Heil Hitler!

Yours very truly,
[Signed] DR. SCHLEGELBERGER

TRANSLATION OF DOCUMENT NG-287
PROSECUTION EXHIBIT 88

CORRESPONDENCE BETWEEN LAMMERS, SCHAUB, AND DEFENDANT SCHLEGELBERGER, OCTOBER 1941, CONCERNING TRANSFER OF MARKUS LUFTGAS TO THE GESTAPO FOR EXECUTION*

The Reich Minister and Chief of the Reich Chancellery
Rk/ 15506 B

Fuehrer Headquarters
25 October 1941
[Handwritten] 393A

1. To: Under Secretary, Professor Dr. Dr. h.c. Schlegelberger, charged with the management of the affairs of the Reich Minister of Justice

* Testimony of defendant Schlegelberger concerning this document (Tr. p. 4462) is reproduced above in section V B where Schlegelberger discusses the question of the transfer of persons to the Gestapo.

Berlin W 8
Welhelmstrasse 65
[Handwritten] Refer to newspaper

Dear Mr. Schlegelberger:

The enclosed newspaper clipping about the sentencing of the Jew Markus Luftgas to imprisonment for 2½ years by the Special Court of Bielitz has been submitted to the Fuehrer.[1] The Fuehrer wishes Luftgas to be sentenced to death. May I ask you urgently to instigate what is necessary and to notify me about the measures taken so that I can inform the Fuehrer.

Heil Hitler!

Yours very truly,
(Signature of the Reich Minister)

[Handwritten] Justice 11

---

2. To: SS-Gruppenfuehrer Julius Schaub[2]

Fuehrer Headquarters

Subject: Markus Luftgas

Dear Mr. Schaub:

After receiving your letter dated 22 October 1941 I got into touch with the Reich Minister of Justice and asked him to instigate the necessary measures.

Heil Hitler!

Yours very truly,
(Signature of the Reich Minister)

3. Copy of the newspaper clipping to be filed.

4. After dispatch—For the attention of Ministerial Director Kritzinger for information.

5. After 1 month.

(Signature of the Reich Minister)
[Initial] L [Lammers]

Copy
[Enclosure] to Rk. 15 506 B

[1] The newspaper clipping is reproduced on following page.
[2] Schaub was Hitler's adjutant.

"Berlin Illustrated Night Edition"
No: 246, Monday 20 October 1941

Jew hoarded 65,000 eggs and allowed 15,000 of them to spoil

By wire from our reporter

Breslau, 20 October—The 74-year-old Jew Markus Luftgas from Kalwarja removed a huge number of eggs from the controlled economy and had to answer for it at the Special Court in Bielitz. The Jew had hidden 65,000 eggs in containers and in a lime-pit, 15,000 of which had already spoiled. The defendant was sentenced to 2½ years' imprisonment as a just punishment for a crime against the war economy regulations.

Berlin, 29 October 1941

The Acting Reich Minister of Justice
III g–14 3454/41

To the Reich Minister and
Chief of the Reich Chancellery
in Berlin W 8, Vosst. 6

[Initial] L [Lammers]

[Handwritten] 3/11

1. Submitted to the Minister for his information

2. To be filed.

[Initial] KR [Kritzinger]

Subject: Case against the Jew Luftglass (not Luftgas) Sg 12 Js 340/.41 of the Chief Public Prosecutor in Katowice —Rk. 15506 B dated 25 October 1941.

Dear Reich Minister Dr. Lammers:

In accordance with the order of the Fuehrer and Reich Chancellor dated 24 October 1941, transmitted to me by the Minister of State and Chief of the Presidential Chancellery of the Fuehrer, I have handed over to the Gestapo for the purpose of execution, the Jew Markus Luftglass who was sentenced to 2½ years' imprisonment by the Special Court in Katowice.

Heil Hitler!

Very truly yours,
[Signed] SCHLEGELBERGER

TRANSLATION OF DOCUMENT NG-508*
PROSECUTION EXHIBIT 72

CIRCULAR LETTER FROM DEFENDANT SCHLEGELBERGER TO PRESIDENTS OF DISTRICT COURTS OF APPEAL, 15 DECEMBER 1941, QUOTING FROM A SPEECH BY HITLER AND STATING THAT JUDGES AND PUBLIC PROSECUTORS MUST KEEP HITLER'S WORDS IN MIND

The Acting Reich Minister of Justice
33/2–IIa2 3024/41

Berlin W 8, 15 December 1941
Wilhelmstrasse 65
Tel. 11 00 44
Long distance: 11 65 16

To: The Presidents of the District Courts of Appeal and the Attorneys General

An important factor in keeping up the morale of the German people on the home front is the prompt and purposeful administration of penal justice.

The Fuehrer was referring to this when, in his speech before the German Reichstag on 11 December 1941, he said:

"The memory of those who died for the existence and greatness of the German people even before our time makes us realize the extent of our duties.

"He who tries to escape this duty, however, has no right to live among us as a member of the German national community.

"We shall be equally unrelenting in our fight for the preservation of our people as we were in our fight for power.

"At a time when thousands of our best men, fathers and sons of our people, are being killed in battle, nobody shall hope to live who attempts to depreciate at home the sacrifice which is made at the front. No matter under which disguise the attempt is made to disturb this German front, to undermine the resistance power of our people, to weaken the authority of the regime or to sabotage production on the home front; the culprit shall die! But there is this difference—while death brings highest honor to the soldier at the front, the other who depreciates this sacrifice shall die in shame."

Every judge and every public prosecutor while doing his duty must keep these words of the Fuehrer in mind. This will enable him to fulfill his task in such a manner as is demanded by the Fuehrer.

* Extracts from this document were also submitted as Document Petersen 2, Petersen Exhibit 5.

I beg to give this outline immediately to all judges concerned with the administration of penal justice and to all public prosecutors, and to bring it to the notice of all judges who will in future be concerned with the administration of penal justice.

[typed] Signed: DR. SCHLEGELBERGER
Certified: [Signed] MASSMUNDT
First Secretary at the Ministerial Chancellery

[Stamp]

Reich Ministry of Justice,
Office of the Minister

TRANSLATION OF DOCUMENT NG-445
PROSECUTION EXHIBIT 73

LETTER FROM THE PRESIDENT OF THE BERLIN COURT OF APPEAL TO DEFENDANT SCHLEGELBERGER, 3 JANUARY 1942, COMMENTING UPON "INFLUENCE EXERTED UPON THE JUDGES"

The President of the Berlin Court of Appeal
File number—3130.—A. 522/36

Berlin W 35, 3 January 1942
Eltzholzstrasse 32
Phone No. 27 00 13

To: Under Secretary Dr. Schlegelberger
in Berlin W 8,
Wilhelmstrasse 65

Subject: Report about the general situation in the districts.
Reich Ordinance of 9 December 1935—Ia 11012.

1. When I paid a visit to the criminal court a few months ago in order to attend proceedings of the Special Court, I heard from the representative of the president of the district court in Moabit that "the Reich Ministry of Justice was expecting two death sentences" in the criminal case which was on the docket. My investigations produced the fact that the competent public prosecutor had informed the president of the Special Court prior to the session that he had received a directive from the Reich Ministry of Justice to ask for a death sentence in two cases. The president of the Special Court had informed me the representative of the president of the district court hereof. I consider it undesirable that officials of the public prosecutor's office pass on prior to the proceedings such directives given them by a higher authority to the president of

the court, as it has been done here. For I am afraid that judges, including those sitting in the Special Court, are in some cases much more easily inclined to pronounce a given penalty, especially the death penalty, if they hear that "the Reich Ministry of Justice" has given a directive to the public prosecutor's office to ask for such a sentence or that "according to the views of the Reich Ministry of Justice" this penalty is necessary. I consider such a communication, given to the court by the public prosecutor, as undesirable, also because the "opinion of the Reich Ministry of Justice" conveyed by the public prosecutor, might possibly, in an individual case, but represent the personal views of a minor official of the Reich Ministry of Justice, about which he had informed the competent official of the public prosecutor's office.

2. The president of the Berlin district court, according to what he reported to me recently, in the course of a visit to a criminal trial in Moabit observed the following:

The trial was set for 0900 hours. Punctually at 0900 the president of the district court had taken a seat on the witnesses' bench. The judges did not show up at first. Instead, loud voices could be heard from the conference room behind the courtroom. The president of the district court got the impression of a heated debate in which one voice could be heard above the others. According to what the president of the district court could observe, the defendant's attention was aroused, and he listened in the direction of the conference room. No actual words could be understood by the president of the district court, but he thought it quite possible that the defendant who was very much nearer to the conference room could hear details. Therefore, the president sent a marshal to the conference room with the order to inform the court about that. Shortly afterward the public prosecutor appeared first in the courtroom, then the members of the court. They all came through the same door which leads directly to the courtroom from the conference room. After the beginning of the proceedings the president of the district court soon could undoubtedly recognize that the extraordinarily loud voice he had heard before had been the voice of the public prosecutor's representative for that trial.

3. Recently I learned from an official complaint [Dienstaufsichtbeschwerde] that immediately prior to the session the president of a Special Court had conferred with the public prosecutor. Thereby the punctual beginning of the session was prevented, and the final results were that all other people involved in the trial had to wait unnecessarily for the beginning of the session. The president of the district court told the judge that if such talks seemed necessary they should be timed in such a way that the punctual beginning of the session would not be delayed thereby.

4. It has been reported to me that repeatedly, even after the beginning of the session, especially after the end of the producing of evidence and prior to the beginning of the pleadings, the public prosecutor's representative repeatedly got in touch with members of the court in the conference room, during an intermission in the proceedings. In these talks, as I have been told, the question of guilt, but above all the sentence, had been discussed.

5. I have been informed confidentially that a Gau office for legal affairs [Gaurechtsamt] has conveyed the following information to the Reich Office for Legal Affairs of the NSDAP:

"According to a confidential instruction of the Reich Ministry of Justice, details of which I do not know, the public prosecutors have been requested to contact the judges about the sentence to be asked for before the pleadings take place. This request has caused extraordinary surprise, especially among lawyers. The pleadings of the defense counsel have practically become a mere formality. Prior to the pleadings of the defense counsel the court and the public prosecutor have already agreed upon the penalty. In practice, the court in almost every case always agrees to the penalty asked by the Chief Public Prosecutor.

"Naturally, this does not only strike the defense counsel, but gradually also the population.

"In this connection, a change must take place immediately. If a conference between the public prosecutor and the court concerning the degree of the penalty is considered necessary at all, at least it can be asked that the defense counsel, too, be present at these talks and be permitted to clearly state his point of view."

It is my opinion that, as soon as the trial has begun, any contacts between the public prosecutor and members of the court are undesirable, because, as the events discussed above prove, misunderstandings are provoked thereby.

The public prosecutor's getting in touch with the court, as requested in the decree of 27 May 1939—4200. IIIa–4–758, and as it was also suggested in the concluding speech of the late Reich Minister of Justice at the conference held in the Reich Ministry of Justice on 24 October 1939 (condensed report, pp. 50 and 51), therefore, will have to be limited to the time before the beginning of the trial. It seems practical to have it take place already the day before the trial or even earlier. At any rate I do not think it desirable that the contacts are made immediately before the beginning of the trial and that, in addition, they happen in the conference room of the court, because then occurrences such as

I have described under 2 and 3 of this report cannot always be prevented. I consider it an illicit contact when the latter takes place after the end of the producing of evidence or, even more, after the pleadings have been concluded. Therefore, the president of the district court in Berlin, upon my request, has conferred with the attorney general of the district court. The latter has instructed the public prosecutors within his area of jurisdiction to get in touch with the president of the court—as far as this is necessary—already the day before the trial or still earlier, at any rate, however, to refrain from making contacts after the beginning of the trial. The presidents of the courts have been notified by the president of the district court accordingly, and have been instructed to refrain under all circumstances from any getting in contact in the conference room immediately prior to the beginning of the session. The prevention or limitation of discrepancies between the penalty demanded by the public prosecution and the sentence passed in court, which was the purpose of the decree of 27 May 1939 and of the detailed arguments of the late Reich Minister of Justice, should be safeguarded by a timely and comprehensive contact prior to the trial.

Moreover, and as stated above, I consider it as undesirable in the interest of the administration of justice, and in order to remove any fears concerning influence exerted upon the judges, that officials of the public prosecutor's office communicate "the opinion of the Reich Ministry of Justice" in the case on hand, or any orders which may have been issued to them concerning the penalties to be asked, to the court outside of the proceedings.

In view of the general importance of the matter, I thought it advisable to report about it.

[Typed] Signed: HOELSCHER

Certified.

[Signed] R. OTTILIE

[Seal] Berlin Court of Appeal Clerk

PARTIAL TRANSLATION OF DOCUMENT NG-752 PROSECUTION EXHIBIT 24

EXTRACT FROM HITLER'S SPEECH TO THE GERMAN REICHSTAG, 26 APRIL 1942, REQUESTING CONFIRMATION OF THE RIGHT TO KEEP EVERYONE AT HIS DUTY AND EXPRESSING HIS INTENTION TO INTERVENE WHERE JUDGES "DO NOT UNDERSTAND THE DEMAND OF THE HOUR"*

* * * * * * *

I do expect one thing—that the nation give me the right to intervene immediately and to take action myself wherever a per-

* This extract is taken from the speech as reported in the "Voelkischer Beobachter," South German Edition, page 3, for 27 April 1942.

son has failed to render qualified obedience and service in the performance of the greater task, a matter of to be or not to be. The front and the homeland, the transport system, administration and justice must obey only one idea, that of achieving victory. In times like the present, no one can insist on his established rights, but everyone must know that today there are only duties.

*I therefore ask the German Reichstag to confirm expressly that I have the legal right to keep everybody to his duty and to cashier or remove from office or position without regard for his person or his established rights, whoever, in my view and according to my considered opinion, has failed to do his duty.** And that just because among millions of decent people, there are only a few exceptions. For, today, one single common duty takes precedence over all rights, even the rights of these exceptions. It does not interest me therefore whether, in the present emergency, leave, etc., can be granted or not to an official or employee in every individual case, and leave which cannot be granted should not be saved up for a later date.

If there is anybody who is entitled to ask for leave, it would be first of all only our front soldiers and secondly the men and women workers who supply the front.

For months I have been unable to grant leave to the eastern front, and nobody at home, whatever his office, should dare therefore to insist on his so-called "established right" to leave. I myself am justified to refuse because since 1933 I have not taken 3 days' leave—a fact which is probably not known to these individuals.

Furthermore, I expect the German legal profession to understand that the nation is not here for them but that they are here for the nation, that is, the world which includes Germany must not decline in order that formal law may live, but Germany must live irrespective of the contradictions of formal justice. To quote one example, I fail to understand why a criminal who married in 1937, ill-treated his wife until she became insane and finally died as a result of the last act of ill-treatment, should be sentenced to 5 years in a penitentiary at a moment when tens of thousands of honorable German men must die to save the homeland from annihilation at the hands of bolshevism, that is, to protect their wives and children.

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* In a unanimous decision on the same day as this speech, the Reichstag granted Hitler power to take action "without being bound by existing legal regulations" and "regardless of so-called well established right." The Reichstag decision is reproduced on page 204 as a part of Document NG–715, Prosecution Exhibit 112.

907802—51——30

From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour.

The achievements and sacrifices of the German soldier, the German worker, the farmer, our women in town and country, that is, the millions of our middle classes, imbued only with the idea of victory, demand the corresponding attitude on the part of those who themselves have been called by the people to protect their interests. In times like the present there can be no sacrosanct individual with established rights but all of us are merely obedient servants of the nation.

Deputies!

Men of the Reichstag!

A tremendous winter battle is behind us. The hour will strike when the fronts will come out of their rigidity, and then history will decide who was victorious in this winter—the aggressor who insanely sacrificed his masses or the defender who simply held his position. During the past few weeks I have read continuously about the violent threats of our enemies. You know that my duty is far too sacred to me and that I take it far too seriously ever to be careless.

Whatever man can do to forestall dangers, I have done and shall continue to do in future.

PARTIAL TRANSLATION OF DOCUMENT NG–102 PROSECUTION EXHIBIT 75

FOUR COMMUNICATIONS, MAY–JUNE 1942, CONCERNING THE AUTHORITY FOR THE CONFIRMATION OF SENTENCES[1]

I. A Letter from Schlegelberger to Hitler, Enclosing a Proposed Decree for Hitler's Signature

The Acting Reich Minister of Justice

Berlin, 6 May 1942

My Fuehrer!

Repeatedly, and finally in the session of the Greater German Reichstag on the 26 April of this year, you expressed that the front and the homeland require the unrelenting punishment of criminals, and that the judgments of the courts which do not meet these requirements cannot be tolerated.[2]

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[1] Excerpts from parts of this correspondence not reproduced in this exhibit are quoted in the extracts from Schlegelberger's testimony reproduced at the end of this section.

[2] Pertinent parts of Hitler's speech are contained in Document NG–752, Prosecution Exhibit 24, reproduced immediately above.

In order to accelerate the setting aside of such decisions, you, my Fuehrer, created the extraordinary objection to the Reich Supreme Court.* With the help of this legal resource the judgment against Schlitt, which you mentioned in the session of the Reichstag, was quashed within 10 days by sentence of the Reich Supreme Court. Schlitt was sentenced to death and executed at once. I believe, however, that the desired aim could be achieved even better and quicker if the Reich Minister of Justice, by means of an authority of confirmation, were given decisive influence on the award of punishment.

If you, my Fuehrer, could decide, by signing the attached draft of a decree, to transfer to the Reich Minister of Justice this right of confirmation for cases in which you do not want to decide yourself, the following would be achieved thereby:

The entire administration of penal justice be placed under the supreme control of the Reich Minister of Justice as far as the award of punishment is concerned. He could then achieve an increase of insufficient punishment in every case.

The Reich Minister of Justice would pronounce the nonconfirmation either himself or, more probably, in view of the approxiately 300,000 penal sentences per annum, through the presidents of the courts of appeal.

In case of a nonconfirmation, the president of the court of appeal would himself fix the punishment or bring about another judicial decision on the measure of punishment.

The Reich Minister of Justice could, as soon as it is obvious that a criminal court cannot master a case, transfer the matter to another court.

It is guaranteed that the Reich Minister of Justice will immediately be informed about all important criminal matters. The attorneys general who, according to the draft, would have to propose the nonconfirmation, are under his direction. I can absolutely rely on the insight and willingness to serve of the 35 presidents of the courts of appeal. Should they ever lack the necessary severity, I myself would pronounce the nonconfirmation.

Therefore I believe that, if you, my Fuehrer, will agree to the draft, I could assume the responsibility that the punishment awards of the courts will no longer lead to complaints.

Heil, my Fuehrer!

[Signed] DR. SCHLEGELBERGER

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* See section V C 1 b, "New devices to change final court decisions—extraordinary objection and nullity plea," for further information concerning this subject.

[Draft]

Decree by the Fuehrer on the authority for Confirmation in Criminal cases of.....1942.

I

As far as I shall not decide myself, in my capacity as holder of the supreme judicial power, I charge the Reich Minister of Justice to regulate within his jurisdiction the confirmation of sentences passed by special courts and other penal courts. In this connection the following is ordered:

II

I authorize the Reich Minister of Justice to pass on to the presidents of the courts of appeal the right to refuse confirmation to the amount of penalty following a valid judgment upon application of the general prosecutor in as much as such nonconfirmation of the sentence is not pronounced by the Reich Minister of Justice himself.

III

In case the president of the court of appeal denies confirmation of the sentence, he will return the case to the same or another court for another award of penalty. In case it was wrongly denied or disregarded that the culprit was a people's parasite [Volksschaedling], brutal criminal, dangerous professional criminal or a dangerous immoral criminal, he is also entitled to quash the sentence for award of a just penalty and to pass the case to the same or another court for a new trial and judgment.

IV

Upon demand of the general prosecutor, the president of the court of appeal, by calling in two judges as advisers, can also commute the sentence in free procedure himself.

V

The court to which the president of the court of appeal has passed on the case will, with the aid of the prosecutor, decide by writ or judgment in a proceeding that will be freely determined by itself.

VI

In case of urgent reasons dictated by public interest, the Reich Minister of Justice can pass a pending trial on to another court within his jurisdiction.

VII

The Reich Minister of Justice, in accordance with the Reich Minister and chief of the Reich Chancellery and the head of the Party Chancellery, is entitled to issue instructions for the execution of this decree.

.....1942

THE FUEHRER

The Reich Minister and Chief of the Reich Chancellery

2. File Memo by Lammers Concerning Discussion with Hitler's Subject Decree on Authority for Confirmation of Sentences

To RK. [files] 6832 u. 6833 B.

Fuehrer Headquarters, 11 May 1942

Subject: Draft of a Fuehrer decree on the authority for confirmation in criminal cases

1. Miss Buege: (*a*) The enclosed letter* of the Reich Minister of Justice, dated 6 May 1942, addressed to me and also the enclosed notes of the Under Secretary Dr. Schlegelberger are to be registered under Rk., (*b*) the original copy of the Fuehrer decree is to be placed into a separate file.

[Handwritten] carried out.

[Initial] BG
11 May

2. I have presented the matter to the Fuehrer on 7th instant and recommended the suggested decree. It seems to me indeed the only and safe way to master insufficient punishment in legal sentences.

The Fuehrer agreed to the decree in principle but could not decide on signing it; moreover, suggested whether it was not appropriate to soon fill in the position of Reich Minister of Justice and to leave the reform in question as well as the other reforms also to the new Reich Minister of Justice.

3. Under Secretary Dr. Schlegelberger, who visited me here, has been briefly informed by me on 8th instant about the state of the affair. He told me that he had already interested the Reich Marshal [Goering] also in the draft of the decree, and that he [the Reich Marshal] had promised him to speak in favor of the decree.

* Not reproduced herein. This letter transmitted Schlegelberger's letter to Hitler and the decree on right of confirmation, both reproduced immediately above.

Under Secretary Dr. Schlegelberger further stressed the fact that the decree would naturally lose all its value for him if the confirmatory authority would pass to party offices (Party Chancellery, Gauleiter). To that I replied that one could perhaps consider to listen to the party before using the confirmatory authority. With regard to this question on 9th instant, Under Secretary Schlegelberger presented the notes of the same day to me. (Rk 6833 B). He promised me also to send more material to the case in hand.

4. Office—Please enclose files for the filling of the position of Reich Minister of Justice!

5. To USt S. Kritzinger with the request for consultation conferences for further adaption of this matter. (Support of chief of Party Chancellery, contact with the Reich Marshal.)

[Handwritten]
Rk. 1527 H 41
Mg. Rk. 553 Bg. 41

3. Letter by Bormann Opposing Schlegelberger's Proposed Decree and File Note by Lammers Concerning It

[Stamp] Reich Chancellery 8457 B 13 June 1942 Fi
[Handwritten] Submitted with Reich Chancellery 7964 B 13 June

NATIONAL SOCIALIST GERMAN WORKERS PARTY
PARTY CHANCELLERY

The Chief of the Party Chancellery

Fuehrer Headquarters
10 June 1942

[Stamp] See affair of 10 June—III C—Ku.
[Stamp] Submitted through adjutant
[Handwritten] Duly submitted to the Reich Minister
13 June
Settled R 15 June

[Initial] F [Ficker]
[Initial] L [Lammers]

To: The Reich Minister and Chief of the Reich Chancellery
Dr. H. H. Lammers
Berlin W 8
6 Voss-Strasse

Subject: Draft of a Fuehrer decree concerning the authority for confirmation [of sentences] in criminal cases

Reference: Your letter dated 21 May 1942—Reich Chancellery 7010 B.

Dear Dr. Lammers:

During the session of the Reichstag held on 26 April 1942, the Fuehrer requested the Greater German Reichstag expressly in consideration of the exigencies of the war, for the authorization to take all measures he deemed expedient without being bound by the existing legal provisions.* The Fuehrer's choice of [expressing his desire] this way shows the importance he imputes to sovereign acts of the State [Hoheitsakten]. It is not proper to limit pronounced sentences—which have a certain effect on legal affairs—in their guiding effect on legal and factual circumstances by questioning their irrevocability through further unpredictable interventions, after all lawfully provided legal resources have been exhausted. This applies to a special degree to the judgments of courts which, in every case, represent a considerable intervention into the personal conditions of the people involved and, moreover, have a certain effect on the entire nation, be it as an intimidation or as a satisfaction with the strong, order-establishing hand of the State. Moreover, the arrangement of the life of the people requires that the further development of legal conditions starts from certain fixed basic conditions which cannot be shaken from any side, and that the security of the law be guaranteed. If the Fuehrer expressly requested the right of direct intervention over all formal legal provisions, then this emphasizes particularly the importance of the modification of a judicial sentence.

The proposal made by the Reich Minister of Justice, however, is likely to obliterate the impression of this authorization, and to impair its importance. However, this would be an inevitable consequence of the transfer of the correcting authority to the presidents of the court of appeal and of the strong decentralization originating thereby. The proposed decree of the Fuehrer would be nothing more than another effort to correct insufficient sentences as has been repeatedly undertaken before by the Reich Justice Ministry. In addition to the analogy provision of article 2 of the Reich criminal (penal) Code, I am especially thinking of the extraordinary objection, the nullity plea, the participation of the public prosecutor in civil proceedings, the public parasite decree, the decree against desperate criminals, and the provisions concerning dangerous professional criminals and immoral crimi-

[handwritten] Justiz 3

* The decision of the Greater German Reichstag, 26 April 1942, promulgating Hitler's authority to act "without being bound by existing law," is reproduced as part of Document NG-715, Prosecution Exhibit 112, on page 204.

nals. Despite all these provisions we were not in the position to silence the complaints on judgment inadequate in consideration of the exigencies of war. We observed again and again how these provisions were applied as mildly as possible, and not at all with the required readiness for responsibility and strictness which actually would have been possible.

It is my conviction that the proposed decree of the Fuehrer will have the same fate as the measures whose execution remained with the administration of justice.

It must be expected that the presidents of the courts of appeal will shrink from an intervention into the independence of the judge, of which they still have the old conception. They will bring the judge concerned on to the right path, not so much guided by their own conviction, but in order to get him to pass a sentence which will satisfy the threatening criticism. Even less, however, can one expect, for the same reason, more rigorously enhanced measures against an obstinate or incapable judge. Therefore, we must not expect the elucidating and guiding decisions hoped for in the material and personal field, the value of which lies first of all in the educational influence on other judges and on the public, but only measures or indications limited to individual cases.

In a formal respect, the following misgiving should be stressed: With the wording provided under paragraphs I and II of the draft, the Fuehrer literally deprives himself to a vast extent of the right of correcting sentences. In all cases which are brought to the Fuehrer's knowledge only after the president of the court of appeal or the Minister of Justice has decided on the confirmation of a sentence, this decision was taken "by order of the Fuehrer." Even with regard to the authorization by the Reichstag there would not be any room for the Fuehrer's decision, since by the proposed decree he would have renounced the authorization legally assigned to him, in favor of the Minister of Justice or even of the president of the court of appeal.

Because of these considerations I am not able to agree with the draft of a Fuehrer decree as suggested by Under Secretary Schlegelberger.

In view of the importance which I assign to these fundamental objections, I have refrained for the time being from showing the additional objections I have to the structure of the decree and its individual provisions.

Heil Hitler!

Yours very truly

[Signed] M. BORMANN
[Typed] (M. BORMANN)

1. During yesterday's conference with Under Secretary Schlegelberger I informed him of the basic ideas in Reichsleiter Bormann's letter dated 10 June 1942. Schlegelberger would appreciate a copy of this letter. I do not think that there are objections to this. However, I wish to answer Reichsleiter Bormann's letter and perhaps make my reply available to State Secretary Schlegelberger.

[Initial] KR [Kritzinger]
26 June

2. a. UStS. Kritzinger
b. RKabR. Dr. Ficker

With request for conference

[Initial] F [Ficker]
26 June

Berlin, 25 June 42

[Initial] L [Lammers]

4. File Memo Noting Postponement of Proposals for Judicial Reform Until a New Reich Minister of Justice is Appointed

Following report to the Reich Minister [Lammers]

To RK. 8457 B Berlin, 26 June 1942

Subject: Confirmation of sentences in criminal cases

1. The Reich Minister does not consider to pass on the letter written by Reichsleiter Bormann to State Secretary Schlegelberger and intends to discuss the matter orally with Reichsleiter Bormann on occasion.

2. Submitted to the Reich Minister according to instructions. Reichsleiter Bormann's objections are aiming essentially at two points:

[Initial] L [Lammers]

a. He does not expect much from a delegation to presidents of courts of appeal as these would not interfere with sufficient energy;

b. He fears the Minister of Justice's proposal would flatten the impression made by the Fuehrer's Reichstag speech.*

* On 26 April 1942, Hitler made a speech to the Reichstag, which discussed, among other things, the role of persons concerned with the administration of justice. Extracts from this speech (NG–752, Pros. Ex. 24) are reproduced earlier in this section. Concerning Hitler's speech, see also the letter of 7 July 1942 from the President of the Court of Appeal in Hamm to the defendant Schlegelberger (NG–395, Pros. Ex. 74) reproduced later in this section.

As to the doubts of a more editorial nature expressed at the end of the letter, it should be possible to remove them by another formulation, which will also be necessary for other reasons. This reediting might be taken in hand as soon as an agreement exists on the fundamental points.

3. In file Bormann.

[Initial] F [Ficker]
Turn over

[Reverse side]

1. Discussion with Reichsleiter Bormann took place.

We agreed that further handling of all proposals regarding justice reform must be reserved to the new Minister of Justice.

2. *a.* To USt S. Kritzinger. [Initial] KR [Kritzinger] August 3
   b. To RKabR. Dr. Ficker. [Initial] F [Ficker] July 31

Who are requested to take notice.

3. To files.

Fuehrer Headquarters, 28 July 42

[Initial] L [Lammers]

TRANSLATION OF DOCUMENT NG–387
PROSECUTION EXHIBIT 400

REPORT FROM DEFENDANT ROTHENBERGER TO DEFENDANT SCHLEGELBERGER, 4 JULY 1941, CONCERNING CRITICISM OF JUDGES BY THE SS PERIODICAL, THE DRAFT LAW ON "ASOCIALS", AND THE LACK OF SUITABLE CANDIDATES FOR JUDGESHIPS

The President of the Hanseatic Court of Appeal
3130 E–1a/3/ (3x)

Hamburg 36, 4 July 1941

Registered

To: Under Secretary Dr. Schlegelberger
Reich Ministry of Justice,
Berlin

Subject: Report on the general situation

Reference: Your No. Ia 11012/35

I

The article "Mental Black-out" in the "Schwarzes Korps" of 17 April 1941 had a disastrous effect on the morale of the judges; in the last paragraph of this article the actions of the judges are compared with the conduct of a people's parasite, who takes advantage of the black-out to commit his crimes. If the judges read the correction in the bulletin of the Reich chamber of attorneys of 20 May 1941 and then see there is no vindication of the judges to the public, a further increase of the displeasure among the German judges can scarcely be imagined.

II

I was confidentially informed of the draft of the law of April 1941 concerning the treatment of asocial elements.* According to this law the custody of these persons is exclusively in the hands of the Reich Security Main Office, and so the sterilization insofar as the decision of this office as to whether a person is asocial has been declared binding on the eugenics court. I consider so extensive a disregarding of a judicial authority very dubious, and I propose that the local court consisting perhaps of a judge, a physician, and a representative of the police should decide whether an asocial element should be kept in lifelong custody or should be sterilized.

III

Day before yesterday I undertook a careful review of the courts of Bremen, and I learned anew that there is in Bremen a complete lack of suitable younger men to become judges. One of the reasons for this lack was the fact that the customary manner in which lawyers had hitherto applied for the judicial career has been made impossible because only up to 4 years of their activity as attorneys may be included in their service age for purposes of calculating salaries. As the Finance Minister has agreed, for the annexed eastern territories, three-quarters of the period of service as an attorney may be added to the service age for purposes of calculating salaries. I propose that this provision shall also be issued for Bremen, because of the special circumstances. In view of the whole development of the judicial situation in Bremen, I should consider it very regrettable if the Bremen lawyers were deprived of the opportunity of becoming judges.

[Signed] ROTHENBERGER

* Concerning the treatment of so-called "asocial elements," see Thierack's memorandum on decisions made in conference with Himmler on 18 September 1942 (654–PS, Pros. Ex. 39), reproduced in section V C 3 a, and Crohne's notes on a conference of 9 October 1942 (662–PS, Pros. Ex. 263), reproduced in section V D 2.

TRANSLATION OF DOCUMENT NG-395
PROSECUTION EXHIBIT 74

REPORT FROM THE PRESIDENT OF THE COURT OF APPEAL IN HAMM, 7 JULY 1942, CONCERNING THE ALARM AMONG JUDGES CAUSED BY HITLER'S REICHSTAG SPEECH OF 26 APRIL 1942, AND CERTAIN ACTIVITIES OF THE GESTAPO AND THE NAZI PARTY AFFECTING LEGAL MATTERS

The President of the Court of Appeal
File No. 3130 I

To: The Reich Minister of Justice,
Berlin W 8

Hamm (Westphalia), 7 July 1942
Telephone 1780–1786

Subject: General situation, Decree of 9 December 1935—Ia 110/2

Enclosures: 2 copies of the foregoing report.
3 copies of a report by the senior judge of the local court [at] Haltern, of 22 June 1942.

1. The Fuehrer's speech at the meeting of the Reichstag on 26 April 1942 has, as far as the administration of justice is concerned, caused alarm among the judges of my district. Uncertainty in the administration of justice was threatening, since the Fuehrer's reproaches—except in the Oldenburg case, particulars of which were, however, not given either—were held in general terms, and the question on what reasons the Fuehrer based his reproaches could not be answered. As soon as possible, I called together the judges of the court of appeal and informed them, and through the presidents of the district courts, the judges of their courts, and of the local courts that I, too, did not know the reasons for the Fuehrer's reproaches, but that it was the duty of all of us to examine ourselves earnestly as to the extent to which he was to blame; the judges were to continue to do their duty and were to hold themselves responsible to the Fuehrer and to their own conscience; the sentences passed by the courts of this district have always been severe, except for some cases, and this standard should be kept up in the future. It has been reported to me that my words have had a calming effect; the administration of justice in this district continues to proceed along the proper lines, and according to my observations the standards of sentences have remained the same.

Among the population, the Fuehrer's critical remarks about the administration of justice have given rise to spitefulness as

well as to sympathy for the profession of the judges. At the moment the matter is hardly talked about, but it has not been forgotten. Above all, it is painful for the judges that the number of persons is increasing who do not believe that the judges pass unbiased sentences. In my opinion, endeavors must be made to restore the confidence of the people in the unprejudiced administration of justice. At any rate all things have to be avoided which could further that impression. I have asked the attorney general to take measures to prevent the sentence demanded by the prosecution from leaking out previously. It is quite natural that if it becomes known before the trial that the prosecutor will demand the death sentence with the approval of the Ministry of Justice, it will easily be believed that the judges are prejudiced.

According to my observations, information about the sentence which the prosecutor will propose with the approval of the Reich Ministry of Justice, is disturbing to the judges, even if mentioned only in the course of conversation, which is understandable on account of the authority of the Ministry of Justice and the position of the judges. Even old, experienced judges find their unprejudiced state of mind upset. But according to my observations, the judges are absolutely ready to accept general directives and to follow them in the administration of justice. Therefore, I think it highly desirable that the directives which are issued at the conferences of the presidents of the courts of appeal in the Reich Ministry of Justice as well as those given some days ago at the meeting of the attorneys general in the Reich Ministry of Justice should be submitted in writing to the presidents of the courts of appeal for the information of the judges. I think this will greatly assist the administration of justice.

2. The number of death sentences passed within the area of this court of appeal shows the following development. There were—

1940 .....27 death sentences.
1941 .....52 death sentences.
1942 (first 6 months) .....45 death sentences.

The increase is due to wartime conditions and to the extension of the sphere of the death sentence by the law of 4 September 1941. Of the death sentences passed this year, 6 were passed for offenses against war economy, 10 for sexual offenses, 8 for crimes of violence, and 20 for theft.

On an average, 5 to 6 weeks elapse between the pronouncing of the sentence and the execution.

3. Since last May, police officials have appeared frequently in the criminal court in order to report to their superior office about

the proceedings. The president of the district court at Dortmund has reported the following cases to me:

"(1) In the middle of May 1942, a habitual criminal was tried before the criminal court and was sentenced to death. A Kriminalsecretaer [detective] of the local criminal police attended the trial as an observer. He told the president himself, and expressly pointed out during the trial, that the Reich criminal police office had instructed him by teletype to attend. I heard that this criminal police official telephoned the prosecuting attorney before the trial and told him that he could imagine why he had been sent. The official had a conversation with the prosecutor during the deliberation of the court. During this conversation he declared that the police would have no reason to take action if an order for security detention would be made. He indicated that his presence was connected with the speech of the Fuehrer. I have neither spoken to the prosecutor nor have I had any reason to ask for a written statement. For the president who informed me vouches for the truth.

"(2) At the end of May, a trial was held before the criminal court against another criminal who was condemned to death. An official of the criminal police was summoned as a witness. Before the opening of the trial this official submitted to the court a letter from the Reich criminal police office, in which the local police authorities were requested to inform that office of the result of the trial—especially whether the demand for the death penalty, which was to be expected, had been complied with—and of the mitigating circumstances mentioned in the court's findings in the event that a punishment other than the death penalty be awarded. Unfortunately, the president failed to take note of the exact contents of the letter. The official attended the proceedings after having been interrogated in the witness box.

"(3) At another trial held before the criminal court, at which the death sentence had been demanded but was not passed, a criminal police officer who had been summoned as a witness took the court's findings down on a sheet of paper.

"(4) An SS member in uniform, holding the rank of a sergeant, attended a trial before the Special Court in which, among other persons, the wife of a Landrat was involved. He asked for permission to be present at the hearing and said that he was coming from *Kassel* on behalf of a police or security authority.

"(5) An official of intermediate rank of the local secret State police office participated as observer at another out-of-town

trial of the Special Court lasting several days. No further details are known.

"(6) A detective from Bochum participated as witness at the trial of a juvenile perpetrator by the Special Court in Bochum. He compared the penalty imposed by the Special Court with another penalty—a term of imprisonment for many years—allegedly imposed the day before by the penal chamber at Bochum upon a juvenile perpetrator (because of poisoning?). On this occasion he remarked, with regard to the sentence handed down by the penal chamber, that the police had but to examine whether there was a motive, in order to interfere. This remark was made after the trial."

4. As the attorney general has already reported to the Reich Ministry of Justice, the Secret State Police recently did not commit two civilian workers from the Ukraine who had shot a forest keeper in the Dortmund district court area to the court for prosecution, although the court had issued a warrant for arrest and the Special Court was prepared for an immediate conviction. They were hanged later on by the secret State Police. Furthermore, it was reported to me by the local court at Haltern that on 19 June 1942 a Polish laborer was hanged in its district by the police because he was said to have had sexual intercourse with a German woman. I enclose a copy of the report dated 29 June 1942. If the rumors are true that the Fuehrer has transferred capital jurisdiction to the police to this extent, it would be desirable to inform the judges and public prosecutors of this arrangement through official channels, as it is assumed that the police are engaged in unauthorized and unlawful activity. Publications in the daily newspapers give the impression that these were executions of sentences which had been legally imposed.

5. The office of racial policy [Rassenpolitische Amt] of the NSDAP issued a treatise on "National Socialistic policy with regard to foreigners" for official use by the Party of which I received confidential information. It contains regulations for marriages between Germans and members of other nations which are of importance with regard to the exemptions of foreigners from the marriage clearance certificates which are subject to the approval of the presidents of the courts of appeal. I propose to ask the office of racial policy to submit this treatise to all presidents of the courts of appeal. Applications for exemptions from marriage clearance certificates have assumed large proportions within my district. The procedure which I have adopted is in accordance with the principles of the treatise "policy with regard to foreigners."

6. The district of this court of appeal has been very disturbed by air-raid alarms at night during recent months, until about two weeks ago. Air raids occur only occasionally now, keeping within moderate limits. In a number of places the Wehrmacht has started employing male inhabitants to replace the antiaircraft personnel. Older age groups have been trained for this purpose in daily courses from 1900 till 2200 hours. 15 officials and employees of the court of appeal have been detailed for this.

[Signed] SCHNEIDER

TRANSLATION OF DOCUMENT NG–417 PROSECUTION EXHIBIT 23

SUMMARY BY DR. CROHNE OF THE REICH MINISTRY OF JUSTICE CONCERNING GOEBBELS' SPEECH TO THE MEMBERS OF THE PEOPLE'S COURT, 22 JULY 1942

Report on the Speech of Reich Minister Dr. Goebbels before the Members of the People's Court on 22 July 1942

Reich Minister Dr. Goebbels stated at the outset that he had been asked by President Thierack to address the members of the highest German court of justice. He had gladly complied with this request. What he had to say had a special political aspect owing to the Fuehrer's approval of his comments, the draft of which he had submitted to the Fuehrer.

The civil servants of the administration of justice had, owing to the nature of their work, always been subject to public criticism. Also today decisions of the courts were criticized and called alien to the spirit of the German people. One must not reply to the reproach that justice had failed by protesting that always only certain cases of wrong decisions had been singled out and the great number of the good and correct judgments had been disregarded. We are dealing here with a principle, i.e., of a wrong attitude of many judges who could not redeem themselves from their old ways of thinking. The one-sided teaching at the universities is to be blamed for it to a considerable extent and also the fact that the judge lived secluded in his professional surroundings and knew too little of life itself. Decisions alien to the spirit of the German people had, however, very detrimental effects especially during wartime. All must be done to remedy the situation before it is too late for the administration of justice. No professional men except the judges had heretofore had the guaranty of being irremovable. Even generals could be removed. A powerful state could not renounce the right to remove officers unsuitable for their office because of inaptness or other reasons. This had to

apply to the judge as well. The idea of the irremovable judges he went on to say, originated in an alien intellectual world, hostile to the German people.

The Minister then referred to individual judgments that nowadays were unbearable. He cited in the first instance the case of the Jew Leo Sklarek. (In the Minister's speech stated by error is the case of "Barmat.") He could not understand that this notorious Jewish profiteer, who after his emigration to Prague had been a spy, had only been sentenced to 8 years' penitentiary (the judgment of the People's Court of justice of 16 April 1942 was delivered for having incited to commit high treason, based on paragraph 92 of the Penal Code). The judgment which the court of Eichstaedt had delivered, in the case of a man killed in action in the East having been insulted, was also untenable. A woman upon receipt of the news of his death who had uttered, "Thank God," had been acquitted by reason of impossible justification. The Minister also referred to Moelder's letter.

While making his decisions the judge had to proceed less from the law than from the basic idea that the offender was to be eliminated from the community. During a war, it was not so much a matter of whether a judgment was just or unjust but only whether the decision was expedient. The State must ward off its internal foes in the most efficient way and wipe them out entirely. The idea that the judge must be convinced of the defendant's guilt must be discarded completely. The purpose of the administration of the law was not in the first place retaliation or even improvement but maintenance of the State. One must not proceed from the law, but from the resolution that the man must be wiped out. The criminal must know beforehand that he will lose his head, should he assault the foundations of the State. These drastic measures must not be left to offices outside of justice but are the duty of justice. The big sacrifices of life which must be made by the best part of the people during the war give us a special reason to treat the offender with all ruthlessness. We must bear in mind that during the winter 1941–1942 every criminal had better billets in the prisons than 3½ million German soldiers. Today we have an entirely different conception of certain offenses which in normal times would not have been considered serious at all, but are now regarded as deserving death penalty; (theft during an air-raid alarm, robbery of handbags during black-out hours, and heavy penalties in cases of listening to foreign wireless stations this action being mental self-mutilation). Justice ridiculed itself by placarding summons to missing persons prior to their being pronounced dead, as everybody knew the missing person in the East or even in any enemy's country could not report at all.

907802—51——31

In this connection the Minister went on to speak about the Jewish problem. He went on to say that if still more than 40,000 Jews whom we consider enemies of the State could freely go about in Berlin, this was solely due to the lack of sufficient means of transportation. Otherwise the Jews would have been in the East long ago. The officers of justice must recognize their political task also while attending to the Jews. To feel sorry for them would be a blunder. It was an untenable situation that still today a Jew could protest against the charge of a president of the police who was an old Party member and a high SS leader. The Jew should not be granted any legal remedy at all nor any right of protest.

In his final comments the Minister pointed out again that the State must apply all means to ward off its foes at home and abroad. During a war it was therefore necessary that the idea of the expedient decision took the first place in justice. The people had to be possessed with the will of absolute self-maintenance. He recalled the words which the Fuehrer had said on 30 January 1933 to him on their way from the "Kaiserhof" to the Chancellery of the Reich upon entering the chancellery, "Nobody will ever get me out of here alive." *

After this speech President Thierack expressed his thanks to the Minister for his fundamental comments and said that the Minister had greatly assisted him once before and asked him to repeat his inspiring and directing instructions also in future.

[Typed] [Signed] DR. CROHNE
23 July

TRANSLATION OF DOCUMENT NG-071
PROSECUTION EXHIBIT 98

SECRET REPORT OF THE CHIEF OF THE SECURITY POLICE AND SD, 3 SEPTEMBER 1942, CONCERNING "THE CONTROL OF PENAL JURISDICTION" AND THE REACTIONS OF JUDGES THERETO

5 September 1942

[Stamp] Reich Chancellery

The Chief of the Security Police and of the SD Office III

Berlin SW 11, 3 September 1942
Prinz-Albrechtstrasse 8

[Stamp] Secret!

Personal—Submit immediately

* Numerous persons have stated that Hitler died in the air-raid shelters under the garden of the Reich Chancellery just before Germany's unconditional surrender to the Allies in 1945.

Reports from the Reich No. 314

1. To be secretly submitted to the attention of the Reich Minister.

[Initial] L [Lammers]
10 September

2. Circulation—
Cabinet Counsellor Dr. [illegible]
Cabinet Counsellor v. Stutterheim
Cabinet Counsellor Dr. Ficker

3. To be filed.

Berlin, 5 September 1942

This report is strictly for the addressee personally and contains news material transmitted unreviewed in order to retain its character of fresh news.

ADMINISTRATION AND LAW

Reports on the Control of Penal Jurisdiction

Under the impression made by the Fuehrer's Reichstag speech of 26 April 1942 and by the general criticism of penal jurisdiction, the former leadership of the Reich Ministry of Justice* had, according to additional clauses already previously existent, been persuaded to reinforce the so-called control of penal jurisdiction. This control consisted in an extensive participation of the Ministry and of the supervising judicial officials, and presidents of the district courts of appeal and of the district courts in the sentencing-activity of the individual criminal judge on the principle that, especially in criminal cases with a political implication, the judge must receive assistance when pronouncing a sentence. Actually, it involved then a substantial extension of the already existing consultative obligations of the public prosecutor to the Ministry and, on the other hand, the introduction of a consultative obligation in the relations of the courts to the Ministry as well. According to numerous reports from the whole territory of the Reich, these measures have met with an extremely *dissentient reception among juridical circles.* The complete break with the hitherto prevailing conception of judicial independence which the control of penal jurisdiction means, is said to have been, to a certain extent, very unfavorably commented upon within the judiciary. In certain cases, this is even said to have led to outspoken

* Thierack became Reich Minister of Justice in August 1942. From March 1941 until Thierack's appointment, the defendant Schlegelberger had been Acting Reich Minister of Justice.

expressions of opinion against the National Socialist State which allegedly wished to suppress judicial independence in order to surrender justice to a right of control by political offices. The origin of this attitude on the part of certain judges in this respect is always the conventional conception of judicial independence according to which the judge was exclusively subordinated to the written law and therefore did not need to follow any directives even of the most general character, that may be issued by the administration of justice with reference to any precise line of conduct in jurisdiction.

Politically enlightened judges have likewise, according to the reports, viewed *the control of jurisdiction with misgivings.* In this, they have indeed not so much perceived a danger to judicial independence, for it was clear to them that its implication up to now, namely, exclusive subordination of the judge to the law, has been deeply altered to suit the National Socialist juridical philosophy, as in the fact that the obligations to the National Socialist ideology must have precedence over the obligations to the law if jurisdiction was not to be in opposition to the political objectives of the nation's leadership. Since the execution of law in the National Socialist State has important *political* tasks to fulfill, a certain influence on the judges must be made possible in the form of instruction on important political viewpoints which the individual judge cannot grasp outright by himself.

As reported, however, these judges have likewise given an unfavorable reception to the method of control of penal jurisdiction, for it amounts only to an attempt with inadequate means to solve from a wrongly selected principle *the* very problem posed to the administration of jurisdiction, namely *the uniform political and ideological* adjustment of the judge.

The intention of the administration of justice to gain influence on legal jurisdiction through the channel of the Ministry and the presidents of the district courts of appeal and of the district courts was therefore doomed to failure. The indispensable prerequisite for the possible success of such a gain of influence would have been that the officials exercising the control base their action on a unified political principle. As shown by experience, however, this has by no means been the case.

On the whole, the objective pursued by the leaders, who have been at the head of the Reich Ministry of Justice so far, in introducing the control of jurisdiction in order *to reduce* the far from neglible number of *wrong sentences, can only be reached under certain conditions.* Indeed certain sources of error have been removed with great difficulty. Without active handling of the basic problem of the political and ideological adjustment of

the judiciary itself, a real improvement [Gesundung] of the execution of law cannot be expected in the long run.

The following example extracted from a series of similar cases is characteristic of the situation created by the introduction of the control of jurisdiction.

Roaming about at night at his place of domicile for several months, a Polish civilian workman stole from gardens and dwelling places money, numerous articles of underwear and clothing, as well as other articles of daily utility. As the competent special court established, he had carried this out under cover of the black-out.

In line with provisions, introducing reporting as a duty, the president of the competent district court of appeal had brought the case by telephone to the knowledge of the Reich Ministry of Justice. In its reply to the telephone message the Ministry advised the following day that the death penalty would probably not be deemed necessary for the Pole. That in any case the public prosecutor would receive explicit instruction before opening of the court hearing as to the penalty which should be asked against the Pole. The Ministry thereupon instructed the public prosecutor to propose 10 years of particularly rigid confinement in a place of detention. The court ruled accordingly.

As reported, the hypotheses under which this verdict took place, as well as the degree of the sentence itself, met with lively criticism on the part of politically awake lawyers. On the one hand it caused concern that by the direction of the administration of justice in such a manner the judge might from the outset be relieved of personal responsibility for his verdict. In as much as in a very great number of cases it becomes known to the court that the public prosecutor is being supplied with instructions regarding the application in criminal proceedings, it merely needs to comply with the request of the public prosecutor, thereby evading embarrassment which might possibly result from mistrials through reference to the concept of the Ministry. On the other hand, the case as described illustrates that the success of such a control stands and falls with the persons to whom such control is entrusted. If confusion prevails in the Ministry itself as to the line which the administration of justice should follow in regard to the Pole, there naturally is no guaranty that mistrials are excluded through the concept of control. The verdict in the case under consideration must be considered a faulty judgment; because under prevailing conditions there is no justification for the leniency which it expresses on behalf of a Pole who commits crimes under the cover of the black-out.

In connection with this and a series of similar cases reports of judges whom this development fills with serious concern stressed over and over again the *need* for informing the *judiciary about the great goals of the leaders of the State.* At the present time there is but a comparatively small number of judges who make an earnest endeavor to analyze the State political necessities as such, and the political foundation of the administration of justice. Unfortunately, it has so far been a fact that any civil servant in the administration who has just passed his second state examination in law has been more fully informed about the political goals of the State leaders and the political opportuneness than perhaps any president of a senate.

Also, this circumstance should be recognized as an important reason for the failure so far experienced in the administration of justice. Consequently, there exists a greater need than ever for bringing the judges much closer to the problems of State leadership and of State necessities as they arise newly all the time due to the war.

In the opinion of others, the former heads of the Reich Ministry of Justice likewise failed to fully realize their intent of remedying the lack of judgment of some judges in the case of decisions on penal cases with political aspects by controlling the administration of justice. It was said that in meetings held in the Ministry, the presidents of the district courts of appeal had been instructed to explain in official meetings to the judges under their jurisdiction how serious the situation is which is now encountered in the administration of justice, and in that connection to discuss examples for faulty verdicts, among other things also dealing with such which the Fuehrer himself has criticized. Some of the presidents of the district courts of appeal and of the district courts had discharged this task in such a manner that they manifestly refrained from expressing an opinion of their own, thereby making known that they themselves held a different opinion. This led to increased insecurity on the part of many judges.

An extension of report requirements yielded in some districts results along similar lines. It was partly made compulsory for judges at local courts, for example, to report every case of even moderate import to the president of the district court who on his part passed it on to the president of the district court of appeal and he to the Ministry. In some districts every judge at the local court was held to make a report each session on all cases which had come up. According to another report all judges of a district court of appeal had met to consult on a verdict which a judge of the local court was about to pronounce.

Going by the Fuehrer's criticism of some individual verdicts, the Ministry occasionally makes reference as to the Fuehrer's opinion in principle—so it is reported—in regard to certain delinquencies, urging upon the presidents of the district courts of appeal to acquaint their judges with the Fuehrer's attitude as it more or less was assumed to be. This, too, resulted, in part, in completely confusing the concepts of the judges. To cite an example, a verdict was discussed at a meeting of the presidents of the district courts of appeal held in the Reich Ministry of Justice, according to which a woman, whose child had fallen into a vessel of hot water while playing and scalded itself fatally, had been sentenced to 6 weeks of imprisonment. The Fuehrer criticized that case because the loss of the child was hard enough a punishment for the mother and that, therefore, court proceedings reflected the concept of justice in form but were not in harmony with the natural concept of justice. When this case was passed on by the presidents of the district courts of appeal and of the district courts to the court judges, it was, in part, understood to mean that *in principle* it was the Fuehrer's intent that women should be punished very mildly only.

The following case is cited as an illustration of the practical result of an interpretation of the Fuehrer's will along such lines—A woman had planned to give to the judge, who was considering a civil complaint made by her, a parcel with foodstuffs, a few days before the case came up in court for a hearing. Thereupon, the judge initiated court action against her because of an active attempt to bribe a judge. Bearing in mind the purported will of the Fuehrer that mild sentences should be imposed upon women and using such will as justification, the instruction was given that the woman was not to be punished at all. Only at a later date was this instruction modified in that it was ruled that a small fine was to be paid.

In connection with these and similar cases it is reported that it is a very doubtful principle to bring to the knowledge of the judges what is merely the purported or assumed will of the Fuehrer. Naturally this is bound to lead to constant conflicts for the judge. Considering things from all angles it is evident from the numerous reports which have come to hand that the so-called *directing of the administration of justice* met with but a *limited amount of the success* at which it had aimed. Aside from the numerous doubts which arise as a matter of principle, *the amount of work involved to make this directing practically possible is not commensurate with results so far achieved.* Compulsory reporting, which met with a considerable amount of criticism by the public prosecution even before introduction of the directing policy, has

been considerably increased after the introduction of the directing policy and now extends even to the presidents of the district courts of appeal and of the district courts. This is said to have brought about a very considerable delay and burden in work which can neither be reconciled with the simplification and acceleration nor with the number of personnel at this time still available to the judiciary. Over and above this, the duty to submit reports has considerably paralyzed the power of decision and readiness to assume responsibility on the part of the judges, in as much as in many instances they are relieved of responsibility by other instances, as a result of which they feel to have been deprived of their essential task as judges.

EXTRACTS FROM THE TESTIMONY OF DEFENDANT SCHLEGELBERGER*

DIRECT EXAMINATION

* * * * * * *

DR. KUBUSCHOK (counsel for defendant Schlegelberger): I am now starting on a new group of questions. Do you wish me to start on it before the recess?

The prosecution charges you with directing the administration of penal law through the Reich Ministry of Justice. Please state your views.

DEFENDANT SCHLEGELBERGER: Concerning these questions, we must differentiate between the position of the public prosecutor and that of the judge. The public prosecutor is an administrative agency dependent upon the instructions from his superior agencies. The judge is responsible merely to the law and his own conscience and judgment. The question to what extent and under what prerequisites the prosecutor has to report to his superior agency has been laid down in administrative regulations. The more important the individual question, the higher the agency the opinion of which is requested. It has therefore always been a matter of course that the importance of penal cases according to the case itself, or according to the punishment which is to be expected, has to be reported to the higher authority. I notice the suggestion was approved and an instruction was issued, an instruction which as far as it concerned a matter which was being dealt with at the trial always had to be interpreted in such a way that in the last analysis the public prosecutor had to make his decision dependent on the course of the trial. In 1939 Guertner—I myself had no part in these matters at the time and I don't know

* Further extracts from the testimony of defendant Schlegelberger are reproduced above in sections IV E and V B, and below in sections V D 2, V D 3 and V E.

what part Freisler played—pointed out to the public prosecutor that they should see to it that a great difference between the demand for a sentence of the prosecution and the actual sentence pronounced by the judge be avoided.

[Recess]

Q. Witness, we were discussing the guidance of the administration of criminal justice. Please continue with your explanation.

A. Before the recess I had referred to a decree by Guertner which required a constant connection with the courts in order to avoid a discrepancy between the plea of the prosecution and the final verdict. May I continue on this point?

I should like to assume that this decree or this order finds its definite reason in the fact that at that time a large number of new laws had been promulgated for which precedence in sentences did not exist and could not exist. Only gradually it was possible, with regard to these laws, to form a firm foundation based upon sentences and opinions of the supreme judicial authority. Frequently, therefore, surprises occurred if the prosecution in applying the law had a definitely different position from the opinion of the Tribunal. The purpose of that decree was to avoid this ambiguity as far as possible, and to reduce these differences to the least possible measure, also concerning the extent of punishment, which depended on the findings of the court. That quite apparently, as a matter of course, could only be achieved by a conference before the trial. The reports submitted by the prosecution, by the president of the Kammergericht on 3 January 1942, and from the same year by the president of the district court of appeals at Hamm, revealed that some misuse had taken place. It is stated there that the prosecutor after the presentation of evidence—that is to say, during the proceedings—had pointed out to the court what sentence with the approval of the Ministry he would demand, and in so doing created the opinion in the court that he expected that sentence and that penalty.

From this report can be seen that the presidents of the district courts of appeal quite rightly considered this behavior a misuse. The report by the president of the Kammergericht I had not seen until now. I do not know what steps were taken after that report was received by Freisler. Maybe this is a case again, one of these cases, where important matters had been neglected by him.

The report from the president of the district court of appeal at Hamm I remember very clearly. I had made up my mind to put this matter on the agenda of the next meeting of the presidents of the district courts of appeal. These meetings had the express purpose to discuss such questions which had been raised in the reports. Owing to the fact that I left my office soon thereafter,

there was no longer any opportunity for me to carry out these intentions.

Q. The two reports you mentioned were submitted by the prosecution as Document NG–445, Prosecution Exhibit 73 and Document NG–395, Prosecution Exhibit 74 with the Documents NG–505 and 508, Exhibits 71 and 72.* The prosecution also charges you with having influenced the jurisdiction of the judges. I ask you to state your position with regard to these documents.

A. In the course of the examination today I was compelled on various occasions to explain to what degree the Party intended and tried to wrest various fields from the administration of justice and turn these competencies over to the police. In July 1941 that question was especially acute because there was an attempt to take away from the administration the prosecution of Jews and Poles. The opposition based its arguments on sentences which revealed a certain ignorance on the part of the judges of conditions of actual life. Under any form of government one has heard complaints about the fact that the judges were far removed from the facts and experiences of daily life. In the old Reichstag there was hardly any debate on matters of justice without these complaints, and such complaints naturally coming up during the war and in the course of many events the complete changes of all conditions of life and national economy found plenty of nourishment. It was the duty of the central agency to acquaint the judges with such general points of view and to demonstrate to them what the influence of temporary conditions and recent conditions would have to be upon the policy of criminal law. Apart from that, one had to be vigilant against that danger which I have described, namely, that certain fields of the administration of justice could be wrested from them.

At that time sex crimes of Poles were very frequent. The reason for that could possibly have been that these laborers who had been brought into Germany, in many cases, came into a living community with the families of the employers, that the husbands were usually at the front, and that the Poles themselves, that is, the greater part of the Poles themselves were in Germany without their families. The ground for sex offenses, therefore, was conditioned by these elements, and some judges did not recognize that.

In the documents submitted by the prosecution one case is mentioned which was tried before the Penal Chamber Lueneburg. It is the case of a sex crime committed by a Polish agricultural

* These documents are reproduced in this section with the exception of Document NG–505, Prosecution Exhibit 71, which is reproduced below in section V D 2. It is a letter signed by defendant Schlegelberger concerning "mild sentences against Poles," dated 24 July 1941.

laborer. That defendant was granted extenuating circumstances, because, and I quote, "He did not have the same restraint toward female co-workers as a German agricultural worker would." That opinion apparently was untenable. The Reich Supreme Court sharply rejected it. It was also very dangerous at the same time, because if reasons of that kind had become known to Hitler there would have arisen a new grave danger to the entire administration of justice. Therefore, I saw cause to find a different job for this judge who apparently was not aware of prevailing conditions. Cases of this nature and many others which may not have been quite as wrong but could have made a certain impression gave cause and reason for a type of propaganda which promised a great deal of success and that made me write that letter of 24 July 1941 to the court authorities in the provinces where I pointed out that in the cases of definitely criminal elements a sexual crime as a rule should be considered according to the legal provisions and regulations as a crime to be punished with death. The actual documentary background for that letter is to be found in the document of the prosecution. Therefrom one can see in what cases the police may have corrected the sentences by the judges, and one cannot overlook the fact that such frequent interventions on the part of the police to improve on the sentences by the judges represented a signal for the much desired event of taking over the power to punish by the police, and the man in charge of the Ministry conscious of his duty had to take that into account.

Document NG–508, which my defense counsel has mentioned, is the reproduction of a passage from a Hitler speech concerning the administration of justice; it was a speech before the Reichstag; and that concerned in general the necessity of severe punishment in times of war; and according to my duty I brought this speech to the attention of the judges.

* * * * * * *

Q. In Document NG–102, Prosecution Exhibit 75,[1] you made the suggestion for a confirmation of sentences by the presidents of the district courts of appeal. Under what circumstances did you make that suggestion?

A. This suggestion to have the sentences by the courts confirmed is in close causal connection with this practice of transferring prisoners to the police.[2] Hitler's Reichstag speech of April 1942 left no doubt in my mind that these interventions would increase, and my suggestion was to the effect that Hitler should

[1] Reproduced above in this section.

[2] For testimony of defendant Schlegelberger on the general question of transfer of persons to the police, see extracts from his testimony reproduced in section V B.

delegate the right, the prerogative which he reserved for himself, to the Ministry of Justice and to the presidents of the district courts of appeal. If this had been achieved, the whole matter would have remained in the hands of the administration of justice, for even the applications for nonconfirmation according to my draft were supposed to be made by the attorneys general who in turn had received instructions from the Ministry.

My letter in regard to this question of confirmation shows again what means I had to use. I could not reveal the real reason if I did not want to be unsuccessful from the very beginning. Bormann, however, in this case saw through my reasons. In a letter from Bormann to Lammers, Bormann writes, this attempt was again a confirmation of the will of the administration of justice to keep these matters in their own hands, as, for example, the question of analogy [analogy provision of article 2, Reich Criminal (Penal) Code], or the extraordinary objection or the nullity plea; but in the Ministry of Justice there was not the will to apply these means with the necessary severity. Above all, Bormann saw clearly that if my draft had become law, Hitler's right of intervention would have been destroyed with one stroke. All the presidents of the district courts of appeal were supposed to pronounce their decisions in Hitler's name, and if they had confirmed in the name of Hitler, Hitler could no longer have attacked their opinion. If I may use a common expression, I can say that Bormann, the fox, did not fall for the trap. In that connection, perhaps, I may point out two things. Lammers' remark in the document shows that I refused to have the Party drawn into this confirmation procedure basically. Furthermore, the document shows how I had to go about such things. These confirmation sentences existed in the case of military courts, that is also in the case of air force courts which were subordinate to the Commander in Chief of the Air Force, that is Goering. Thus, I could count an understanding for my suggestion in the case of Goering, and, therefore, I secured his support through a special oral report on my suggestion.

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CROSS-EXAMINATION

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MR. LAFOLLETTE: Doctor, I would like to go back, now, to Prosecution Exhibit No. 75, which is Document NG–102. Briefly that was the series of letters and correspondence beginning in May 1942, which contains your proposed method of handling

clemency matters after Hitler's speech of 26 April 1942. Do you remember?

DEFENDANT SCHLEGELBERGER: Yes, it is a question of confirming the sentences.

Q. Yes. On 6 May 1942, you wrote Dr. Lammers—addressed the letter to Reich Minister Dr. Lammers—

"Dear Sir:

"During our last conversation, I already told you that I intended to propose to the Fuehrer the introduction of a confirmation of judgment passed; a plan to which you agreed."

I am leaving out a sentence; I don't think it is necessary. It's in the record here.

"Today I am transmitting to you an open letter to the Fuehrer along with draft of the decree requesting them to the Fuehrer.

"Copies for your files are attached."

Then on the same day, 6 May 1942, you wrote to Hitler, and you started the letter, "My Fuehrer," and you stated, among other things:

"If you, my Fuehrer, could decide by signing the attached draft of a decree, to transfer to the Reich Minister of Justice this right of confirmation for cases in which you do not want to decide yourself, the following would be achieved."

Then it lists a technical analysis of the decree, as you see it. Then I go to the last paragraph of your letter addressed, "my Fuehrer," of 6 May 1942, which reads in the English text:

"Therefore, I believe that, if you, my Fuehrer, will agree to the draft, I could assume the responsibility that the punishment awards of the courts will not lead to complaints any more."

Now that followed the speech of Hitler on 26 April 1942. Do you recall writing that letter?

A. Yes.

Q. On 12 May 1942, in this same exhibit and document, you write again to Dr. Lammers, and this time you say:

"Dear Reich Minister Dr. Lammers:

"With regard to your request, I am sending you today some material from which, I think, follows that a Reich Minister of Justice controlling criminal justice cannot dispense with the possibility not to confirm a sentence. I may add that when the draft of the decree was already under way to you, Reich Marshal Goering explained to me in detail at a visit in Karinhall that he in the sphere of Wehrmacht justice, sector Luftwaffe,

could only overcome the difficulties of heterogeneous legal administration by this confirmation, and that in his opinion it was definitely necessary to introduce the confirmation also for civil justice."

Then I am going to skip a sentence and I'd like to read the last paragraph of the letter:

"I would be especially grateful to you, dear Reich Minister Lammers, if you would present the matter to the Fuehrer again. I have the hope therewith that, if the Fuehrer rejects the present handling of criminal justice, and on the strength of your argument, knows that the confirmatory proceeding is the only and safe remedy, he will not withhold this remedy from the Reich Minister of Justice.

"With best wishes and Heil Hitler,

"Yours very sincerely, signed Dr. Schlegelberger."

As I recall your testimony, it was that Hitler had been very abusive to you in his speech of 26 April 1942, and that after that you had made up your mind to resign. Is that what you testified to?

A. Yes. I have said that I wanted to make it clear whether these attacks were directed against the administration of justice, and in that case I was determined to let matters drift toward a break and to withdraw from my office.

Q. Now I know that you said in 1941 that Goering had said to you that he would never forgive you and Dr. Guertner for centralizing justice, is that correct?

A. Yes.

Q. And now when you desired to have a conversation with Goering, would you go to Karinhall or would he come to the Reich Ministry of Justice, as a rule?

A. No, no. In such cases when Goering wanted to speak to me, he called me up and asked me to come and see him. Goering at that time dealt with a case in which he wanted to have a legal opinion. That was why he wanted to talk to me. On that occasion, we came into that conversation.

Q. Did Goering agree to support your plan at this conversation you had with him between 6 and 12 May 1942, or do you recall?

A. I take the liberty to explain that. I told him what my plan was, and he told me, "But that is the only possibility to handle these things." [He said] I could not get anywhere in my field if I did not have that right of confirmation.

Q. Now in May 1942—about that time during May and June 1942—Reich Marshal Goering would have had the capacity to be a very strong ally, did he not?

A. That could be stated in that general way, and now in retrospect I could not state for any particular month because the relations between Hitler and Goering changed continuously. And with Goering it might have been similarly. It depended upon the question in what temper Hitler was met.

* * * * * * *

b. Defendant Rothenberger's writings on judicial reform and his guidance of judges in his district

TRANSLATION OF DOCUMENT NG–075
PROSECUTION EXHIBIT 27

CORRESPONDENCE BETWEEN THE REICH CHANCELLERY AND HITLER'S ADJUTANT, MAY AND JUNE 1942, MENTIONING THAT HITLER HAD CONSIDERED "NOTEWORTHY" THE ROTHENBERGER MEMORANDUM ON JUDICIAL REFORM

The Reich Minister and Chief of the Reich Chancellery
Reich Chancellery 6837 B

Fuehrer Headquarters, 11 May 1942

Subject: Memorandum regarding judicial reform

1. When I reported to the Fuehrer on 7 May, the Fuehrer informed me that he had received a memorandum regarding a judicial reform from a well known lawyer which appeared noteworthy to him. He will arrange to have this memorandum sent to me.

2. On 8 May, State Secretary Dr. Schlegelberger casually remarked, while visiting me, that he believed that the memorandum which the Fuehrer mentioned was drawn up by the president of a district court of appeal, Rothenberger.

3. Miss Buege: Enter (Rk.) Letter remains here.

4. To the personal adjutant of the Fuehrer Major General Schaub.

Fuehrer Headquarters

Dear Mr. Schaub,

The Fuehrer told me when I reported to him on 7 May, that he had received, sometime ago, a memorandum regarding a judicial reform from a well known lawyer, which appeared to him worthy of consideration. The Fuehrer did not mention the name of the lawyer. The Fuehrer promised to have this memorandum

sent to me. I should be much obliged to you, if you would take care of this matter.

Heil Hitler!

Yours obediently
(Name of the Reich Minister)

5. Resubmitted on 25 May 1942.
[stamp] Resubmitted
Office 25 May
[Handwritten] see Reich Chancellery 8230 B

[Initial] L [Lammers]

Reich Chancellery 8230 B/ 8 June 1942
1 enclosure
The Fuehrer and Chancellor of the German Reich
CS—The Personal Adjutant
NSKK–Major General A. Bormann*

Berlin W 8, Reich Chancellery
Fuehrer Headquarters, 7 June 1942
[Initial] KR [Kritzinger]

To Reich Minister Dr. Lammers
Berlin

Subject: Reich Chancellery 6837 B

My very dear Reich Minister:

In reply to your letter of 11 May, addressed to SS Gruppenfuehrer Schaub, enclosed please find the memorandum which you requested concerning the judicial reform drawn up by President of Senate Dr. *Rothenberger*, Hamburg.

Heil Hitler!

[Signed] A. BORMANN
Personal Adjutant of the Fuehrer

Certified: [Signed] SCHROEDER

Enclosure

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* Not to be mistaken for Martin Bormann, chief of the Party Chancellery, whose name appears in a number of the contemporaneous documents reproduced herein.

I

Since 1914 the world has found itself in one of the greatest revolutions of history. National socialism, which was born during the First World War, is the pivotal point of this revolution. Having welded the German nation together politically from 1918 to 1933 into a national community it is about in the present World War to "organize" Europe anew and to create a new world philosophy. It goes without saying that during such a "world revolution" certain fields of human endeavor cannot keep pace. Among such fields belongs, in particular—along with all the arts and sciences—jurisprudence. The first decisions in history were always made by men and nations in the elementary struggle for power. But the aim of this tremendous reorganization of the world is that for the first time in history not power, but justice will be victorious. In periods of transition this justice must prevail in different ways from the ways it chooses in untroubled times of peace. The scope of a peacetime administration of justice is often too narrow to do justice to present events. Thus, a historical revolution such as the present one will, of necessity, bring about a crisis in law, and particularly a crisis in the administration of justice; and the extent and intensity of this crisis depend on the extent of the revolution. A crisis is customarily defined as a state of the most violent intensification of the symptoms of a sickness, which is followed by a decisive turn, either toward the worse, to final descent—death in the case of man, and dissolution in that of a public institution—or the pendulum swings to the other side after the climax of the crisis, toward recovery. The present crisis in the administration of justice today is close to such a climax. A totally new conception of the administration of justice must be created, particularly a National Socialist judiciary, and for this the druggist's salve is not sufficient; only the knife of the surgeon, as will later be shown, can bring about the solution.

II

What is the present state of German justice? Complete and clear fronts are drawn—on the one side are all the activist forces in Germany, particularly the old guard of the Party, to whom today's justice is a hindrance in the pursuance of their aims. Natural friction occurs daily between elementary law, such as it is experienced by the activists, and the law as it is administered by the legal authorities of today. In every German village, and in every German city, modern jurisprudence, as the representative of the law, especially the judge and his verdict, have lost

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their influence considerably in the ancient struggle between might and right. We find that the pronouncement of justice does not enjoy in our totalitarian state the authority it deserves. On the other side are the representatives of justice who complain about this condition, namely, about the extensive elimination of judicial procedures; the lack of authority of the verdicts; the revision of lawful judicial sentences by police measures; the dwindling confidence of the people in their judges; the slight regard generally accorded the judges' position in the press, on the air, and in films, etc. The German judge, the true representative of justice, stands alone and unprotected, presuming upon his so-called independence, above all, justice; and the German judges have hitherto not succeeded in gaining the *confidence of the Fuehrer*. It is true, German justice has become, organizatorially speaking, a united Reich justice, and all efforts are being made to create a National Socialist justice. Jurisprudence strives—if only with varied success—to fit into the National Socialist ideology. A close relationship based on trust, however, does not exist between the Fuehrer and German justice, nor between the German nation and the NSDAP which represents the people on the one hand, and German jurisprudence on the other. This distinguishes the present crisis from all the previous ones. The fact that jurisprudence has been greatly criticized at all times lies in the very nature of the problem. It has even been stated that criticism follows the pronouncement of justice as inevitably as the shadow follows the body. From all periods of history, and from all civilized countries, cases can be cited which originate in the excitement over an injustice which a judge may have done to a person (Plato's Apology; Voltaire's writings in connection with the trial of Calas; Zola's J'accuse). He who goes to the judge believes that he is in the right. If he triumphs, he considers it a matter of course; if he is defeated, he thinks he has been wronged. However, the present condition is basically different. Justice today cannot turn to anyone. It has not gained so far the confidence of the leaders nor that of the NSDAP, and it is about to lose the confidence of the people. But without such confidence, without a connecting link with the leaders and with the people, justice is condemned to a final decline. It requires this confidence as man requires the air he breathes, in order to be able to live.

III

In a situation of this nature those who are responsible for the administration of justice have a historical responsibility—*self-recognition*. There is a painting by Raphael in one of the rooms of the Vatican, the "Stanza della Segnatura," which represents the goddess of justice [Justitia] with her three genii—the genius of

truth, holding her torch on high; the two-faced genius of wisdom; and her third companion, holding up a mirror to the goddess, the genius of self-recognition. Why does the Fuehrer, the Party, and the people criticize the administration of justice? What are the causes? What suggestions can justice itself make to the Fuehrer, in order to eliminate this condition?

1. Occasionally, the opinion is expressed that an authoritarian state can tolerate *no* strong judiciary *whatsoever*. The dynamics of national socialism exclude, it is said, the static which is the very essence of justice. The independent judge is a sad remnant of a liberalistic epoch, and there is no real justification for a separate ministry of justice in addition to a national ministry of the interior and the police. Also the National Socialist Reich came to power without the support of law; indeed, it did so *despite* the law. Consequently, it can solve its future problems without the help of the law, or at least without a strong legal system. History shows time and again—and the period since 1933 has confirmed it in many spheres of public life—that progress is a series of contradictions. White follows black. It is understandable that many old Party comrades raise the cry: fight against the judge *per se;* and they do so as a reaction against the legalistic state of the 19th century, against the neutral, unpolitical administration of justice, against judges who were trained unpolitically, who were taught to follow closely to the letter of the law, and whose independence finally resulted in the separation of the people and the state. Two aspects of this reaction are valid.

a. The bourgeois-liberalistic state which, under the influence of the doctrine of the division of power, empowered the courts to control legislation and administration, has finally been superseded by the unity of the Reich. The courts are merely an organ of the state, as the arm is only a limb of the human body. However, this arm can never set its own head aright. Law must *serve* the political leadership. Justice is not control of the leadership, neither is it protection of the individual *against* the state; rather, it is a function of the community which should serve to *regulate* the community life. The functions and the jurisdiction of the judge, in particular his relation to other departments, will therefore have to be redefined. But before this decision is reached, which is of such far-reaching consequences for the entire development of our Reich, the administration of justice itself has to be reformed radically in the interests of the Reich itself. This decision must not be influenced in any way by the experiences which the leadership has had with the law during the past 10 years. Otherwise, the danger exists that an unorganic and planless undermining from within, and a gradual fragmentation of the administration

of justice will occur—as they have already set in, because the administration of justice has failed. The criterion, however, for the functions of justice and particularly of the judge in the National Socialist Reich must be a justice which meets the demands of national socialism. Therefore, suggestions must be submitted to the Fuehrer which clearly define what such a justice, and particularly a National Socialist judge, must be like.

b. In the second place, this reaction of "antagonism toward law" is justified because the *present moment* absolutely demands a rigid restriction of the power of law. He who is striding gigantically toward a new world order cannot move in the limitation of an orderly administration of justice. To accomplish such a far-reaching revolution in domestic and foreign policy is only possible if, on the one hand all outmoded institutions, concepts, and habits have been done away with—if need be, in a brutal manner—and if, on the other hand institutions that are in themselves necessary but are not directly instrumental in the achievement of a great goal and which, in fact, impede it, are temporarily thrust to the background. All clamor about lawlessness, despotism, injustice, etc., is at present nothing but a lack of insight into the political situation. The question is solely: Is a strong judiciary incompatible with the National Socialist authoritarian state (Fuehrerstaat) *per se,* that is, permanently, or only *temporarily*?

2. He who is used to thinking along historical lines and who understands the essence of national socialism will have no doubts as to the answer. Justice has at all times been the strongest pillar of every great civilized state. Great empires fell when despotism and corruption took the place of justice and of order; great empires rose to heights beyond imagination when the central figure, the actual creator, the embodiment of the concept of justice—the judge—represented authority. It was accepted as a matter of course during the classical age of the Imperium Romanum that the most exalted and honored place in the state was occupied by the praetor along with the consul—not to mention the enormous cultural influence that Roman praetorian law has exerted for centuries on the whole of Europe. The judge was the highest official of the state also during the height of the British Empire. Italian fascism also recognized the importance of this question for the preservation of its empire by agreeing with me on the following propositions at the German-Italian Conference held in Vienna in March 1939.

Proposition 5

"The judge, in contrast to other civil servants, derives his authority directly from the state leadership."

Proposition 8

"Among civil servants the judge occupies a unique position in the organization of both states."

What a far-reaching influence was exerted on the Germanization process of the East in the early Middle Ages by the highly developed city laws, particularly by the law of Magdeburg and Luebeck! The law and therefore the judge has always been one of humanity's most prominent representatives of civilization. Also the aim of the gigantic struggle for existence in which the German people are at present engaged is to replace power and despotism by justice and order (the new order) in Europe and the entire world. There is no order without a strong law. Likewise the inner worth of the National Socialist Reich consists in the fact that every citizen does not think of it, his Reich, as the embodiment of the interests of individual pressure groups or parties, but of his sense of justice. In the eyes of the German people, more so than in the eyes of many other peoples, justice is and remains the most treasured gift; it is not the illusion of "equal rights for all," but is in line with the old Prussian saying, "to each his own." The superficial view that an authoritarian state cannot tolerate a vigorous judiciary is therefore wrong. The better the inner strength of a state is consolidated, the better is justice assured and the stronger is therefore the judiciary. Only a state based on external force must be afraid of a strong judge, and history has shown time and again that nothing leads faster to self-annihilation than a paucity of laws and a feeble administration of justice. The judge is the representative of justice. It is he who in the eyes of the people is the guarantor of justice, not the professional jurist nor the public prosecutor, nor the attorney; because he, the judge, administers justice, uninfluenced by friend or foe, unbiased and unswayed by the quarrels and tendencies of the day, not prey to human foibles. With him rests the decision over life and death; he intervenes decisively in every sphere of human life and in the most treasured possessions of a people such as liberty, honor, family, work, land, etc. Here the people expect an unflinching representative of a strong law who seeks the truth and justice with intense devotion and a clear mind. Nor can a political leader, even the best, nor a Landrat nor a Gestapo official be at the same time a judge. They all perform completely different functions; they must direct, organize, plan, and look into the future. Their decisions too must be just, but the idea of justice is not the guiding principle of their vocation. They all require a counterpoise in the form of a magistrate of whom the great Ulpian says: "Priests are we, because we foster righteousness and preach the knowledge of what is good and just."

Corruption, personal selfish interests, vanity and craving for power which happen to play an important part in human life, cannot—apart from having a rigid political leadership—be better prevented than through the fact alone that a strict judiciary authority exists.

3. And this is where the awareness of their mission and the historical obligation begins for the men responsible for the German judges. They are to see that the fire of justice never quite dies not even during the most difficult times of a great world revolution. The German ideals of justice embodied in a strong judiciary must—since it is timeless—be fitted into the future construction of a National Socialist Reich. This, however, is possible only when the fire continues to glow. Political situations require constant measures of opportuneness, and every stubborn resistance to it—"on principle" or "fundamental deliberations"—is senseless. But one must be constantly aware of the danger that the very "convenient" putting aside of a regulated administration of justice conceals the *tendency of habit.* It is the task of a new German justice to prevent such a development. This cannot be achieved, however, by bewailing the present condition or even by resigning herself to it. She must look into the mirror and ask herself: *What can I do to put at the disposal of the Fuehrer a justice and judges in which he may have confidence?*

IV

Theoretically, the constitutional position of the German judge, especially his position in respect to the Fuehrer, is not difficult to solve. Overcoming the division of power the Fuehrer is not only the legislator and executioner of power, but also the *supreme judge.* Theoretically, the authority to pass judgment is therefore only his. If he could carry out this authority also in practice, there would be no more judiciary problem and no legal crisis. But he cannot do so. Therefore, he has transferred his authority to the individual judge, that is, directly without any further administrative channels. The judge acts differently from any other official who is a member of a sometimes rather long official hierarchy, by virtue of a decree issued to him *direct* by the Fuehrer. This is the meaning of freedom of the bench. Every other private Party official or public office has to abstain from all interference or influence upon the judgment. This superior position corresponds to the obligations of the judge to find justice exclusively according to National Socialist ideas. *Because a judge who is in direct relation of fealty to the Fuehrer must judge "like the Fuehrer."* In order to guarantee this, a direct liaison officer without any intermediate agency must be established between the Fuehrer and the

German judge, that is, also in the form of a judge, the supreme judge in Germany, the *"Judge of the Fuehrer."* He is to convey to the German judge the will of the Fuehrer by authentic explanation of the laws and regulations. At the same time he must upon the request of the judge give binding information in current trials concerning fundamental, political, economic, or legal problems which cannot be surveyed by the individual judge.

That only the best are considered worthy of a privileged position such as the judge holds can also be seen from another reason. The former legislation was suspicious and therefore casuistic toward the judge. It attempted to regulate every conceivable fact of law, thereby degrading the judge to a subsumptive mechanism. The Fuehrer as legislator, however, knows that a living people's law which can be understood by every citizen and which is to reach a truly just sentence in the individual case can be established only by an elastic legislation with far-reaching opinions of the judge. The multicolored and versatile life is therefore fettered as little as possible by the law today. Every Reichsgesetzblatt teems with such general terms as—normal sentiment [of the people], dignity and etiquette, honesty, National Socialist ideology, etc. This loose binding to the law of the judge without an excellent judiciary personality is, however, a contradiction in itself and will forcibly endanger justice, unity, and security of law considerably. National Socialist free method of legislation, creation of a living people's law, and quality of the judge therefore necessarily act and react on one another.

Repeated theoretical demands for a National Socialist personality as judge are not enough. One must recognize reasonably and clearly that the present type of judge—no reproach should hereby be made to an individual judge—in his historic development, his training, and his selection does not and cannot meet this demand. And just as reasonable are the practical deductions to be made from this.

V

The *historic development of the German judiciary* is in short the following:

At the same time at which the Roman law, which in no way whatever was connected with the German national consciousness, was introduced in Germany (15th century), the freely elected German *people's* judge was replaced by the *civil servant,* the professional judge. He studied at first at Italian universities, and later—up to the present time—his method of thought was influenced by legal reasoning in accordance with Roman law. Originally he, though an alien, was nevertheless, in his capacity as the

highest official of the individual sovereigns, an authority in the country; thus, 19th century liberalism, with its hypertrophy of laws, its plethora of courts, its wild pursuit of litigation, and its juridical thinking, led to a steady increase in the number of judges, and indeed to a debasing, vulgarization, and "bureaucratizing" of the judges. In a liberal state these judges became independent simultaneously in the sense of a complete detachment from people and state. The authority of the judge can be determined by two entirely different means: Once by granting him a superior position and by letting only few qualified men with a strong personality become judges—then the authority and the so-called independence will as a matter of course come out to a certain extent as a by-product—or else the judge's position will be formally converted under severe stress into a bureaucratic civil service position in which he will attempt to carry through his conception of law by being granted independence through legal guaranty. Prussia, and with her the rest of the German states, consequently the second German Reich, took the latter way.

National socialism will have to proceed on the first path. Because the nature of national socialism is in direct contrast to this degeneration of the old German, non-bureaucratic people's judge which occurred historically through foreign influence. National socialism will revive the concept of German judge as prototype the same as it created the concepts of Fuehrer, followers, folk-community, honor, loyalty, farmer, soil. It will also have to clear the concept of German judge as prototype of human society from all that is foreign to him, all that has stuck to him in the course of the developments of the last centuries, and ask itself the question: What does a German mind understand by the term "judge"?

According to the concept which every German has of a German community the judge is a fundamental type of human life. Just like the farmer, the soldier, and the various types of trade, the judge too belongs to every community developed beyond the most primitive state. The characteristics of the prototype of judge are—

1. That he is *independent and not confined to directions.* A judge who has to ask someone else for the sentence is just as much a caricature as a farmer without a plough and a soldier without a weapon. Upon the fact that the judge can use his own discretion is founded the magic of the word "judge."

2. And a second item is in our description of a German community. The judge has a strong inner *authority.* He is the interpreter of law who is superior to all other servants of the state in knowledge, experience, and humanity. That the German people

have a fine feeling for a strong, responsible, independent judge for the decision of its interests, can be seen among other things from the following: In spite of all judiciary crises and in spite of every reproach against the judges and their decisions, national socialism has never called: Dismiss the judges, we do not wish or require judges any longer! The discontented have always turned only against the present ones and have demanded better. Neither the laborer nor the farmer, neither the businessman, nor the tradesmen has ever voiced the desire to appoint for the settlement of their arguments in place of a judge an official who is bound by instructions. However, something entirely different has occurred, with the Fuehrer a man has risen within the German people who awakens the oldest, long forgotten times. Here is a man who in his position represents the ideal of the judge in its perfect sense, and the German people elected him for their judge—first of all, of course, as "judge" over their fate in general, but also as "supreme magistrate and judge." The mail received in the Fuehrer's office in one day would prove this. No wonder, that next to this man, the German bureaucratic judge who represents so little of long established judiciary grandeur had to lose further authority. The special interest we have in this election of the Fuehrer to supreme judge in the united Reich is the acknowledgement of the *true* judge. This does not infer a renunciation of the concept of the judges itself, as is sometimes concluded, but it does infer a renunciation of the bureaucratic judge. The spontaneous recognition of the Fuehrer as supreme judge of the German people is essentially due to the fact that the Fuehrer wholly independent, separate from any influence or person, not supported by any machine of state but solely by the loyalty of the people fights for the rights of the German people within and without its borders, that is, all qualities which personify a true judge.

3. And thirdly, there will be only *one* judge in our community. Just imagine! There is a judge on every corner of a market place which we see before us. One feels that 3 of them are too many, while there may safely be 4 tailors, even 40. That they might not have enough work would not fundamentally disturb our imagination. But 4 judges. The symbol that there is only *one* right only *one* justice as presented so clearly in the single judge, would be obliterated. One would begin to compare as in the case of 4 stores—where do I get better right? The authority of the judgment suffers if more judges than needed are present.

Practical considerations also make a *radical reduction of the number of judges* imperative. During the next decades Germany simply will not have enough young students who have the require-

ments for the profession of a judge, who have the inclination and aptitude to become a lawyer, and especially a judge, in such an active period. The thorough laying off of personnel which must take place in the entire German administration after the war is even more urgent and justified in the case of judges, as this reduction is in line with the essentials of judges, they being the representatives of the one *law* and the one *justice*.

VI

The historic evolution of the German judge is also in conformity with his *training* and his *selection*. To decide what is right does not require constructive or scientific thinking but above all, it presupposes the art to appraise human beings, to understand human emotions and the ability to comprehend all phenomena of life. Training methods of today lead to abstract thinking, to materialism, and to an ignorance of the ways of the world. The theoretical scientific method taught nowadays in universities is apt to imbue the student after being first introduced to a juristic line of thought with abstract conceptions and with a system of logic which makes it very difficult for the student to find his way later on in a world of facts. The outcome is the abstract lawyer, subject to so much criticism who does no longer recognize human beings but only conceptions, moreover, it is also the source of ever recurring disagreements between politically trained National Socialists and lawyers. Very often there is a world of difference between them. The point from which all training reforms must go out must be paragraph 20 of the Party program, which reads:

> "The curriculum of all educational institutions must be adapted to *practical life*."

In detail this means—

1. Substitution of the logical, abstract method of thinking by a *method of conception taken from practical everyday life*. No "lecture" with a deductive training method, given by a professor to a hundred or more "listeners," but some kind of working community of perhaps twenty to thirty students who will be introduced inductively to the system—that is empirically from life—by a teacher endowed with scientific, practical and educational talents. These teachers are either university teachers who carry out at the same time the duties of a judge or administrative lawyer, or else judges in office who teach simultaneously at a university. The selection of about 200 qualified leaders who must be held in readiness at the end of the war for a fundamental reeducation of our youth is the most pressing problem. Only such men are able to guide the productive energies of the beginners into

the right channels, and so prevent a false, abstract education as well as the cutting of lectures and the cramming down of lessons.

2. These working communities to be established in universities must ever maintain close contact with practical work (court, administration, Party). The strict division practiced heretofore—at first 3 years' university training exclusively, then 3 years' practical work—has provided them with a dangerous, theoretical "preinoculation."

3. A man who chooses to be a judge and who therefore administers justice to all phases of human endeavor must know life itself, the real and practical life. Therefore, anyone who after passing the probationary state examination, at the approximate age of 26, has worked for 2 years in the judicial sphere as a candidate with some court—as has been customary heretofore—has not the "calling" of a judge. He has only become acquainted there with a small sector of life from a very definite angle. Only he who has steeled himself and proved his mettle outside a safe civil service position shall pass judgment and decide over human lives. He may stand his test in accordance with his inclination in economic life (banking, industry, shipping, commerce, agriculture), or as an attorney who looks at the objects of justice from "another" angle, or by taking an active part in Party or administrative life either at home or abroad. The decisive factor is that the future judge has not lived his life only "behind bars." He also must have stood "before the bars," in real life. These requirements lead us to recognize two facts.

a. No one should be appointed a judge before the age of 35. To judge requires a ripe judgment, a certain spiritual detachment, and a very pronounced character; qualities which can hardly be asked of a 28-year-old candidate who has never had to struggle in real life.

b. No one who has acquired a life position in another profession wishes to become a judge at the age of 35, unless the following primary conditions are created: *The position of a German judge must be of such high standard with regards to ideal and material rewards as to attract even the best of our youth.* By an *elastic legislation* and the *freedom of the bench,* the leadership of the State places such full confidence upon the judges—as are granted to no one else in an autocratic state—that only the best can be considered to deserve this confidence. He who has begun a thing must go on with it; if there are to be men in an autocratic state invested with the freedom of the bench, then this freedom should be granted to a few and exceedingly well qualified men only.

VII

The demand to reduce the number of judges—I reckon with a reduction from about 16,000 to about 8,000 for Germany proper —gives us the problem of *a fundamental reform of the entire organization for the administration of justice.* A mere reduction of the personnel without a simultaneous reform of working methods and of the organization would not result in improving the work but only to its deterioration as is the case everywhere else in general administration. I have laid down my conception of this reform of justice in the following detailed proposals:

1. The general political satisfaction of the people and the concept of a national community of interest, which is growing more and more, will already *by themselves* relieve the courts of much work.

2. Much work is done which is only in a general way connected with the administration of justice and which is more of an administrative than of a judicial nature. This work can well be done and without harm *by other administrative departments.* I mean herewith a large part of the work done by voluntary jurisdiction, such as recording of deeds and general registry work. The core of the administration of justice from a political point of view—that is, the administration of criminal law—must, on the other hand, remain in its entirety in the care of the judiciary as it should under no circumstances be torn and split up among several other ministries.

3. The organization of the courts, comprised at present of four levels—lower court of first level, district courts. [Landgericht], court of appeal, and the supreme court—must be converted into an organization of *three levels*—district court [Kreisgericht], Gau court, and supreme court—to conform to the new political organization of the Reich and to party jurisdiction.

All proceedings at law must be based upon the district court [Kreisgericht] which will no longer be provided with three judges as at present the district court [Landgericht] but only with one. Moreover, *trial by one judge only will be the ideal and the rule of the administration of justice.* The district judge is the principal link between the judges and the people. Establishing the facts at the source is decisive for all subsequent findings, as this established the closest contact with real life in respect of time and locality. The "exodus from the country" to "higher" positions, observed with much concern in the case of judges and which is in concurrence with the exodus from the country by the people in general and also of interior administrative organs, must be counteracted with all means with the aid of political pressure on the

personnel concerned. The district judge must be—from a human and from a professional point of view—the most efficient judge of all. Legislation has placed all means at his disposal for a quick and correct judicial decision. It must be *he* who is directing all proceedings at law, and not the parties as has been customary heretofore. A state of affairs is untenable where the parties at times "just tested their ground" in the court of the first level, and where they were reluctant to admit the truth and the evidence, because "they will go to the Reich Supreme Court in any case." The better the guaranties created in the first level with regard to personnel and proceedings, the less will be the justified demand for the *means for legal redress.* Of course, the possibility for a re-examination of each and every judgment (with the exception of petty cases) must remain. The authority that goes with the word "uncontestable" may be only accorded to the decisions of the Fuehrer. But the primary conditions for the application of legal remedies will be rendered more difficult. The capitalist conception of the value of matter in litigation shall no longer be the standard as at present, but the standard must be the importance and the effect a judgment will have on the public in general and on the further evolution of justice. The Gau court at the residence of the Gauleiter and Oberpraesident will be designated as court of appeal and will be provided with three judges in accordance with the *Fuehrer principle;* the Reich Supreme Court with three or five judges sits as court of revision also in accordance with the Fuehrer principle, therefore not subject to the outcome of voting but to leadership. I am, in principle, against all centralization. In spite of the foregoing, the place for the Reich Supreme Court of Greater Germany is in the capital of the Reich, consequently in Berlin and not in Leipzig (a compromise of the second Reich). The Reich Supreme Court will not act as at present as a court of revision for all cases of a certain value of the matter in dispute. It is only competent with regard to maintaining a uniform administration of justice and to guarantee stability of law.

Titles such as Amtsgerichtsrat, Landgerichtsrat, Oberlandesgerichtsrat, and Reichsgerichtsrat are out of place to describe the activities of judges of the future. A judge does not give "counsel" but passes judgment. Therefore, the only title that corresponds to the matter in question and with his activity is the title of "judge."

4. The merger of the present day Amtsgerichte and the Landgerichte to establish a Kreisgericht [district court] with its seat probably at the residence of the Landrat [county councilor], or of the district party leader, means the *abolition of many smaller courts not capable of sustaining themselves.* Apart from this, the conception of the "Amtsrichter" as the father of a small com-

munity has died out long ago. In his place stepped the young and forever coming and going assistant [assessor] who has to prove himself or the Amtsgerichtsrat with his all too narrow outlook on life who has very often become embittered because he had not been promoted or did not have enough to do. The decisive factor is not his judicial wisdom but his authority as a human being. Consequently, *the honorary (unpaid) justice of peace shall* try petty cases of every day occurrence in each community. He is not requested to have a legal training, in as much as it is his duty to reconcile the parties and to restore the peace between neighbors. The man who enjoys the most authority of all men in the community—in accordance with the prevailing characteristics of the place, he may be a trusted senior party member, a pensioned officer, or a farmer—will be given the chance to perform here a most beneficial activity. Besides, for judicial matters requiring the attention of a trained lawyer, the judge of the district court [Kreisrichter] in his capacity as a circuit judge will hold court in case of need on special court days in communities belonging to his district. In this way every German fellow citizen has access to a court in his place of domicile, moreover, the judge heretofore confined to a too limited sphere for his activities will automatically disappear.

5. The duties of a judge must have an exclusively judicial character. All duties not requiring for their discharge the special schooling, experience, and training of a judge must be transferred to the *judicial administrator,* the higher, intermediate civil servant of the administration of justice. The satisfactory experience made by the general interior administration, and by financial and postal offices in regard to their well versed, old time magistrates and chief inspectors may well serve as an example. *To relieve the higher officials* of some of their duties and to delegate them to lower grade civil servants prevents the former from becoming narrow-minded, short-sighted, and trivial and imbues the latter with the *readiness to assume responsibilities.* The duties of a judicial administrator—in places not provided with an official domicile of a district judge—consists of preparing current work and applications intended for the district judge [Kreisrichter] but also for the justice of the peace.

VIII

Therefore, it will be possible to produce the type of National Socialist judge only by—

1. A radical change of training methods.
2. A radical reduction in the personnel.

3. Removing the judges from the civil service.

4. A radical change in the entire judicial organization.

This means a sweeping judicial reform top to bottom, talked about for decades, even for centuries, but which was not accomplished either by the second or by the intermediate Reich [Weimar Republic]. Administrative work and decisions on each and every point require a great deal of time. Consequently, these problems must be tackled as soon as possible from within the administration, not "although," but "because" we are engaged in war; not because they will come into force and practice during the war, but because they must be held in readiness for after the war. Frontline soldiers returning from the war can be assured that the preparation made for the appointment of National Socialist judges will contribute its share of safeguarding for all time the ideals they have fought for. And the judiciary system, if not completely transformed and reorganized, will hardly attract to it the best of the returning soldiers primed with energy, wanting to quench their thirst for peaceful and constructive work. Well qualified and vigorous judges are indispensable for the enormous peacetime tasks in store for the great Germanic Reich.

Hamburg, 31 March 1942

[Signed] ROTHENBERGER

TRANSLATION OF DOCUMENT NG-389 PROSECUTION EXHIBIT 76

REPORT FROM DEFENDANT ROTHENBERGER TO DEFENDANT SCHLEGELBERGER, 11 MAY 1942, NOTING ROTHENBERGER'S INTENTION TO INTENSIFY "THE INTERNAL DIRECTION AND STEERING OF THE ADMINISTRATION OF JUSTICE," AND ENCLOSING COPIES OF ROTHENBERGER'S INSTRUCTIONS TO JUDGES IN HIS DISTRICT

The President of the Hanseatic Court of Appeal
3130 E—1a/4

Hamburg 36, 11 May 1942

Personal!
Registered

To: State Secretary Dr. Schlegelberger Reich Ministry of Justice

Subject: Report on the situation

Reference: Your ordinance of 9 December 1935—Ia 11012
3 enclosures

I

In April of this year I made a trip through various provinces [Gaue]—Dresden, Prague, Vienna, Graz—to inform myself to conditions in central Germany and Austria.

II

The Fuehrer's speech of 26 April 1942 did not surprise me very much. It confirmed to me the regrettable fact that the Fuehrer has no confidence in the German administration of justice and in the German judges. A radical National Socialist reform of the legal system which I have suggested for years in verbal and written reports[1] has therefore become even more urgent.

The effect of the Fuehrer's speech on the judges in my district was absolutely crushing. It is impossible to gauge the effect on the German judges of the proclamation regarding the removal of judges and the way in which this was made known to the world in the form of an enabling act[2] passed by the Reichstag with frantic applause. I therefore considered it my first duty to counteract this effect by taking the following measures:

1. On Tuesday, 28 April, I had a preliminary discussion with my presidents to hear how my staff felt about the matter.

2. On Wednesday, 29 April, I discussed the present situation in detail with the Gauleiter and asked him to address, together with me, all judges of my district.

3. We did this on Friday, 1 May. I spoke for approximately three-quarters of an hour, next the Gauleiter spoke for about 20 minutes. Neither of us glossed over the seriousness of the situation; we openly faced the Hamburg judges whose jurisdiction did not cause the present crisis, and we stressed the necessity for a fundamental reform. We pointed out that two dangers had to be forestalled:

a. further loss of authority of the judge's verdict,

b. a feeling of doubt on the part of the judges or of anxiety with regard to their family's livelihood.

I have, therefore assumed responsibility for each verdict which the judges discuss with me before passing it.

4. On Wednesday, 6 May, the Gauleiter upon my request addressed all political and economic leaders of Hamburg on the subject of the present crisis. I considered this necessary so as not to alarm the population and prevent attacks against the judges.

[1] Cf. Rothenberger's "Reflections on a National Socialist Judicial Reform," Document NG–075, Prosecution Exhibit 27, reproduced above.

[2] Not to be confused with The Enabling Act of 24 March 1933 reproduced on page 163 (Doc. NG–715, Pros. Ex. 112).

5. On the same day I made arrangements with all senior police officers (the Higher SS and Police Leaders, heads of the criminal police, of the Secret State Police, and of the SD) to the effect that every complaint about juridical measures taken by judges was to be referred to me before the police would take action (especially regarding execution of sentence).

6. I made similar arrangements with all representatives of the Hamburg Press. The press was to refer to me before subjecting a verdict to any form of criticism.

I cannot agree with the objection to these measures on the grounds that with other Gauleiter such procedure would not have been possible. In 1933, the Gauleiter was anything but favorably disposed toward the judges. I am of the opinion that every political minded National Socialist leader can be convinced of the necessity of an orderly legal system, provided the system is National Socialist in character. Not even the continued changes of political leaders in Hamburg, especially among senior police officers, which have occurred since 1933, ever disturbed our smooth cooperation.

III

In view of the present situation I am intensifying the internal direction and steering of the administration of justice which I have considered to be my main task since 1933. For that purpose, I have issued the instructions which are set out in enclosures 1, 2 and 3.

IV

The meeting of the chief presidents in the Reich Ministry of Justice on 5 May this year did not satisfy me. It was my impression that most of the chief presidents were very much depressed. I do not believe that their inner confidence was restored in the course of the meeting.

V

I suggest that the chief presidents should be confidentially informed of judgments passed in the Reich which have caused special criticism in the Reich Ministry of Justice, so that the judges may get some idea of the Fuehrer's will regarding the various spheres of the administration of justice.

[Signed] ROTHENBERGER

907802—51——33

Enclosure 1

Hamburg, 6 May 1942

The President of the Hanseatic Court of Appeal

To: All Judges in the District of the Hanseatic Court of Appeal

As I already stated at the plenary meeting of the judges on 1 May 1942, I am prepared to advise every judge who in doubtful cases might desire to approach me personally. I shall in such cases ask the judges to arrange for an appointment with my staff and to bring along the respective files for report.

[Typed] [Signed] ROTHENBERGER, DR

Enclosure 2

The President of the Hanseatic Court of Appeal

Hamburg, 7 May 1942

To:

The President of the Hamburg District Court
The President of the Bremen District Court
The President of the Hamburg Local Court

In view of the present situation I issue the following instructions in agreement with the attorney general:

I

A meeting of the presidents will be held at my office every week at which the presidents of the district courts of Hamburg and Bremen and of the Hamburg local court as well as my expert adviser will be present. The attorney general and the Chief Public Prosecutors with the district courts of Hamburg and Bremen have promised to attend whenever the cases under discussion are of special interest to them.

On the basis of brief written notes containing the titles, file numbers, and a few key words of the matter to be discussed the presidents in the course of this meeting will report on the important decisions which were passed in penal and civil cases during the preceding week as well as on the essential penal and civil cases to be tried in the following week.

The attorney general as well as the Chief Public Prosecutors will also bring up for discussion important preliminary investigations, submitted to the attorney general during the preceding week.

Outside of these regular meetings the presidents will immediately report to me matters of special importance and urgency.

II

For the purpose of procuring the material I request the presidents to have the criminal and civil divisions and chambers submit brief reports to them every week in the form of a review and a summing up of important pending penal and civil cases, which, if necessary, will have to be supplemented by verbal reports.

III

Apart from the weekly presidents' meeting, a special meeting with the presidents of the Special Courts in Hamburg will be held in my office every week at a date personally arranged by me in each case in which the attorney general and the chief public prosecutor of the Hamburg district court will also take part. With this meeting I shall connect a conference with the head of the public relations department for legal matters in Hamburg.

As stated under I, the chief prosecutor of the Hamburg district court will report on essential preliminary investigations on Special Court cases, which have been brought before the prosecuting authority during the preceding week.

The presidents of the Special Courts will report in the same way on essential decisions passed by the Special Courts during the preceding week as well as on important cases to be tried before the Special Court in the following week.

In case of urgent Special Court proceedings the presidents of the Special Courts have to report immediately and independently of these regular meetings.

The cases of the Bremen Special Court will also be discussed at the presidents' conference.

IV

I consider as essential in the sense of these instructions all cases which are of special importance, among them primarily—

a. Penal cases in which the death penalty or a long term of hard labor is to be expected.

b. Penal cases which are of primary significance for the protection of the population.

c. Penal cases due to the war, especially cases of offenses against the war economy, illegal slaughtering and similar penal cases, as well as cases against prisoners of war and against public enemies, and cases concerning crimes committed under the cover of the black-out.

d. Penal cases against Poles, Jews, and other foreigners.

e. Penal cases of special importance concerning crimes committed by, or against minors.

f. Crimes due to tragic unfortunate circumstances.

g. Penal cases in which a decision on the kind and degree of punishment is especially difficult or in which uniform handling is especially urgent.

h. Penal and civil cases in which persons are involved who are State or Party officials, or dignitaries, or who hold other eminent positions in public life.

i. Penal and civil cases in which it is clearly the intention of the parties to call in agencies not connected with the judicial authorities.

k. Penal and civil cases in which there seems to arise a conflict between the established law and the necessity of an economically and socially, reasonable solution.

l. Penal and civil cases concerning the interests of State and Party, or political and economic problems, as well as problems of foreign policy and ecclesiastical problems, or the effects of the war (for instance bomb damage, matters concerning urgent payment of church rates in kind, etc.).

m. Penal and civil cases in which legal problems of a general nature arise which require uniform handling by the courts.

[Stamped] [Signed] ROTHENBERGER, Dr

Enclosure 3

The President of the Hanseatic Court of Appeal

Hamburg, 7 May 1942

To the Presidents of the Civil Senates and of the Criminal Senate

The Fuehrer's speech and the Reichstag resolution of 26 April 1942 make it necessary to do everything possible in the organizational field in order to secure jurisdiction of the kind the Fuehrer expects, especially in wartime. As announced in my speech of 1 May, I therefore intend to inform myself as extensively as possible prior to the trials of cases which are of political significance, or which involve the possibility of a certain contradiction between formal law and the public sentiment or National Socialist ideology in order to discuss matters if necessary with the presidents in question. Incidentally, I expect the presidents more than ever before to confidently submit to me for discussion matters involving the afore-mentioned problems. To obtain information as far as the civil senates and the criminal senate of the

Hanseatic court of appeal are concerned, I have requested the president of the senate, Dr. Struve, at present my permanent deputy, to assist me by holding conferences with the presidents of the senates at regular intervals at which the presidents will furnish a review of the cases which will come up in the near future. Generally the report can be brief. But it must furnish sufficient details in cases which require special attention according to the Fuehrer's speech, in order to enable my deputy to decide whether my intervention is necessary or expedient. In this connection the facts of the case and the decisive legal points of view will have to be discussed. I expect that these arrangements which are only destined to serve jurisdiction and to strengthen the position of the judges will meet with general approval, and I hope that my deputy will be fully supported by you. I shall of course continue to be at your disposal for personal discussions.

[Typed] [Signed] ROTHENBERGER

The President of the Hanseatic Court of Appeal
3150 E—1a/4

Hamburg 36, 1 June 1942

Registered

To: State Secretary Dr. Schlegelberger
Reich Ministry of Justice
Berlin

Your Ordinance of 9 December 1935—I a 11012.

Following up my report of 11 May 1942 on the situation, I beg to inform that I have, in the meantime, taken the same steps in Bremen which I had taken in Hamburg as a consequence to the Fuehrer's speech. The authorities at Bremen (the Lord Mayor, the Kreisleiter, the President of the Police, the head of the Secret State Police, and the head of the SD district) have made the same arrangements with me as did the respective Hamburg authorities.

[Signed] ROTHENBERGER

c. Testimony of Defendant Rothenberger Concerning His Memorandum on Judicial Reform

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHENBERGER*

DIRECT EXAMINATION

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DR. WANDSCHNEIDER (counsel for the defendant Rothen-

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* Other extracts from the testimony of the defendant Rothenberger appear in sections V C 1 a, V C 3 a and V D 2.

berger): Dr. Rothenberger, would you please first make some general statement about your memorandum?

PRESIDING JUDGE BRAND: The exhibit number, please.

DR. WANDSCHNEIDER: We are concerned with Document NG–075, Prosecution Exhibit 27,[1] in document book 1–B, page 1. I have submitted a list to the Court on which the documents I shall mention are listed. Please begin with your statement.

DEFENDANT ROTHENBERGER: The memorandum is a brief summary of what I had worked out during the previous years in Hamburg. The reason for my writing such a memorandum at all, I believe, I already indicated yesterday. I had pointed out that the development in the Reich until 1942, when this memorandum was written, gave cause for growing dangers and misgivings for every jurist.[2] Furthermore, I had pointed out how the administration of justice was pushed more and more into a defensive position by the Party and the SS and how the jurists, as well as all Germans, either acquiesced in this condition and this development or even went along with it, and how the administration of justice was more and more in retreat battles. I did not want to and could not go along with this line of action. And I did not want the administration of justice again and again to be confronted with *faits accomplis*. The Party and the SS concerned themselves with ideas for reforms of the administration of justice and it was my opinion that the only office which was competent for this and an expert organization in the field was the administration of justice itself. And the starting point for the attempt to change the course of this development were my experiences which I had gathered in Hamburg and in England.

My conviction grew stronger and stronger to the effect that that question of the position of the judge in a state was significant not only for the administration of justice itself, but that it was a basic problem of political life in every state. Germany had always gone from one extreme to the other in politics, and now we were experiencing, during the year 1933 and the subsequent years, the extreme of a power state. And one of the causes for this was, in my conviction, that in Germany we were lacking a point of rest, an authority which due to tradition and out of its independence was in a position to influence the development critically.

[1] Reproduced earlier in this section.

[2] See the extracts from the testimony of defendant Rothenberger reproduced in section V C 1 a.

This impression in particular was very vivid to me from my experiences in England. Therefore, my belief that the idea of the so-called Judge-King in Germany too, if there was any chance at all, would exert an influence on the development. This memorandum represents a final warning to Hitler in order to hold him back from this development which had begun. If today I put the question to myself, whether I believed that I could convince Hitler at all from my knowledge that I have today I, of course, have to answer no to that question. According to my knowledge at that time I hoped for it and I believe that the fact alone that I undertook such an attempt at all is the best proof for this; and my belief of the time will be understood on the basis of the experiences which I had gathered in Hamburg where it had been possible by trying to swim against the current and to exert influence upon leading political personalities, that one could succeed there.

The aim of my memorandum was, in the final analysis, the same as has to be the aim of every state, namely, the rebuilding of an autonomous law which is independent of the form of government and without temporal limitation. In countries which have a tradition this may not be a problem at all, but in Germany this question had for decades been the problem, and already since 1905 leading jurists in Germany had occupied themselves with this problem again and again.

If I had described this idea in my memorandum in very dry and bare words then this memorandum as hundreds of others would immediately have been thrown into the wastepaper basket and I would have been described as a fool. Therefore, I had first to describe the means which could create the prerequisites for such a final condition and, therefore, I described the proximate aims which I wanted to reach first. I emphasized them first. In order to clarify to the Tribunal that the position of a judge in Germany is a completely different one than in England, and I believe also than in the United States, I have to go into the historical development of the profession of the German judge in a few words. I can do this more briefly since this historical development is indicated briefly in this memorandum; furthermore, because in a lengthy article which I wrote at that time, which will be submitted as an exhibit by my defense counsel, I went into this historical development in detail.

I therefore want to say here merely by a slogan that once due to the acceptance of the Roman law in Germany in the 16th Century which took place only on the continent of Europe and not in England, and furthermore caused by the development of the Prussian state where the administration of justice, as I already em-

phasized yesterday, was only a stepchild; that due to these two circumstances the judges' profession played only a very modest and mediocre role. In Germany we had about 19,000 judges who belonged to the General Civil Service and who in no way differed as far as their income, or their position, or their reputation was concerned from an absolutely average civil servant.

The essential factor in this development was that the practical course of the education of a judge in Germany to this very day brought about that only persons who were merely average lawyers decided to take up the judge's profession.

If I may be permitted to do so, I would like to mention briefly how one becomes a judge in Germany. At the age of approximately 25, one becomes assessor; at this time one decides whether one wants to become a judge. If one does decide to become a judge, one remains for a number of years and at that time it was about 5 to 8 years—a so-called assistant judge, Hilfsrichter.

This means that one exercises the functions of a judge, to be sure, but one can be discharged any day. And then in the course of years one finally achieves being appointed a judge. It happened only very rarely that a person who had been sitting as an assistant judge for a number of years was not appointed judge.

Then when one finally became a judge one received an income of about 300 marks. A fairly good skilled worker in Germany earned twice as much. Therefore, one had to lead a very modest life. One was treated as a civil servant to the extent that every year a so-called qualification or efficiency report had to be written about every judge. In other words, a report had to be made as to the qualifications of the judge. The superior of the judge had to go to the court session in order, as we expressed it, to examine the judge; that is, to examine whether the judge was able or not.

Then, the judge waited for his next promotion which played a very decisive role for him and for his family in view of his small income. There was a scale of promotions from the local court to the district court, to the district court of appeal, and finally, to the Reich Supreme Court.

This briefly described course of training thus demonstrates that the judge in a quiet existence of a civil servant was employed only as a judge all the time, and this gave cause to the leading German jurists since 1906 to do something about it. The first precursor of this idea was a certain Adickes. These jurists tried to suggest a basic alteration of this course.

Adickes was followed by an Under Secretary Muegel, and he in turn during the Weimar Republic was followed by the then Reich Minister of Justice Dr. Schiffer who today is again Minister of Justice in the Russian zone of occupation. All were of the same

opinion that his position of the judge had to be changed fundamentally and that this would be possible only by a very severe reduction of the number of judges.

If the prosecution is charging me I believe even in the indictment itself with the fact that I in very clear words desired to change this condition, or suggested changing this condition, by saying that not the salve of the drug store but the knife of the surgeon, was needed then I am in good company in so saying to the extent that my predecessor for these plans was Reich Minister of Justice Dr. Schiffer who by the way is fully Jewish. He expressed the following thoughts about this problem at the time, and I quote:

> "The wound should not be covered up and smeared over, it must be cut, pressed out, and scraped out. The reform in the administration of justice which we need is not an enlargement or a reconstruction but a thorough reduction."

These plans which were discussed in Germany for 50 years, and the execution of which failed every time, I now made my own. As can be seen from the memorandum, I was confronted, above all, with the problem as to what means could be used at all to bring about this reduction in the number of judges without reducing the quality of jurisdiction. The means which I suggested were also very closely allied to those means which had been suggested for 50 years. These means were as follows: First, the concept of the justice of the peace. I believe that I do not have to go into the details of this position because, first of all, I assume that the Tribunal is very familiar with this institution of a justice of the peace; and secondly, because I said something about it in the memorandum itself; and thirdly, because I discussed it in a lengthy article which will be submitted.

The second method which I suggested, and which I also discussed in a lengthy article, which will be submitted as an exhibit is the idea of the administrator of justice [Rechtspfleger]. This is an idea which conforms with the investigations I made in England about the master, the registrar, and the clerk.* The aim here is clear too, namely, that the judge should act during the trial exclusively as a judge and must be relieved of the burden of all technical preparations and of the tasks which are not truly the tasks of a judge.

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* Earlier in his direct examination the defendant Rothenberger had testified—"In 1929 I was in England for about 8 months. There I studied the organization and structure of the English courts, the position of the English judges, the positions of the masters and the registrars, and the relations of the barristers and solicitors to the court. I studied these in detail. I worked at the high court of justice with a barrister and with a solicitor. * * *" (Tr. p. 5331).

The third method which I suggested was a change in the structure of the German courts as a whole. Details about this too are not only in my memorandum, but in articles which will be submitted in evidence here. My aim was to introduce, in the place of the super organization of the German courts, a nonbureaucratic, simple, and clear structure of organization of the courts. In this organization of the courts the idea was decisive for me that every judge in Germany should have the same rank, but not as it had been up to now where the judge had to wait for and was dependent upon a promotion so that his activity, even subconsciously, was guided by his aim of being promoted. I wanted to do away with all titles. In my opinion, every judge deserves only the title "judge." I was of the opinion that through these changes, the inner independence of the judge would be strengthened. The decisive factor for this inner strengthening of the judge was my suggestion to take the judges out of the general group of civil servants.

In my memorandum I attempted to explain to Hitler the basic difference between a regular civil servant and a judge.

This, of course, would have meant that the judge, from the point of view of his income, his position, and especially his reputation, would occupy an overwhelming position in Germany. I expressed this as follows and underlined it. The position of the German judge must, ideally and materially, be organized in such a way that it will appeal to the best of the future lawyers. And with this question namely the pure civil servant career of a judge, up to this time, is connected another request I made, that only a person should be appointed judge who before that had worked in another profession and had there gained experience, be it in economics, be it in another sector of the state, or above all, as an attorney. I was of the opinion that only a person of advanced age and older than was usual in Germany—I said that the minimum age should be 35—should become a judge, because a man who is very young and who has not, outside of a quiet life as a civil servant, been forced to fight and to gather experience, is not able to judge about the fate of people which is entrusted to him in the courtroom in a just and humane manner. And the last point of these suggestions for reform is the training of judges already at the university. I started with the assumption that the legal questions are very essential for the pronouncing of a sentence, but that the decisive question in every trial is the finding of the facts and the evaluation of the persons, be it the witnesses, the plaintiff, or the defendants. The training that was given at the German universities was in former times exclusively concerned with legal problems. At the university the students

listened as an audience to a professor who read out his lectures on legal theory; that to be sure is necessary, but it had to be supplemented by a practical point of view. This recognition I had gained from my long experience as a tutor in Hamburg, and therefore my detailed suggestions which are mentioned in the memorandum which I later carried in Berlin. And perhaps I may be permitted later to go into them in detail.

* * * * * * *

Q. I now go into the individual cases. First I put the question to you. On page 6 [section III] of your memorandum you said (*NG–075, Pros. Ex. 27*)*: "Occasionally the opinion is represented that an authoritarian state cannot bear a strong judiciary." Whom did you mean? Who represented that point of view occasionally?

A. That is very clear that the Party and the SS represented that point of view.

Q. You meant thus your opponents in your daily life?

A. Yes.

Q. In your legal practice?

A. Yes, because I knew that these two organizations, the Party and the SS, in the course of the years exerted a very strong influence on Hitler. It was therefore decisive for me first to deal with the question as an immediate aim from the point of view to gain an influence on Hitler as a judge in order to exclude all influences of the Party and the SS. And out of that knowledge I made the requirement that between Hitler and the German judiciary there should be no intermediary; that, in other words, nobody should be allowed to influence the judge, be it a political leader, be it Bormann, be it Himmler, or any other organizations which so far had exercised a strong influence on the judge. And the second concrete requirement which I made, and which is contained in my memorandum is that the entire administration of the criminal law [Strafrechtspflege] should not be split up but its entire extent remain with the administration of justice. In connection with that are some formulations which I made in my memorandum which state that the political leaders and the official of the Gestapo cannot be judges at the same time. A corruption and hunger for power cannot be prevented in any better way than by a strong personality of a judge. And if I raised such requirements and then thought about how I could explain these thoughts to a man like Hitler, as I saw him at the time, how can I dare undertake such a step at all, the result of such an attempt was exclusively dependent upon the tactics or the methods which I employed. And

* Reproduced in section C 2 b, above.

therefore, in formulating my memorandum, my ideas, I made certain concessions but I always added the aim itself immediately afterward. I would like to cite two cases particularly which the indictment put into the record in that connection. First, the following sentence:

"All clamor about lawlessness, despotism, injustice, et cetera, is at present nothing but a lack of insight into the political situation." And then I continue: "The question is solely: Is a strong judiciary incompatible with the National Socialist authoritarian state [Fuehrerstaat] *per se,* that is, permanently or only temporarily?" And another sentence with which I am being charged is the following: "Political situations require constant measures of opportuneness, and every stubborn resistance to it—'on principle' or 'fundamental deliberation'—is senseless." And I continue: "But one must be constantly aware of the danger that the very 'convenient' putting aside of a regulated administration of justice conceals the *tendency of habit*"—and that last phrase is underlined—"What can I do to put at the disposal of the Fuehrer a justice and judges in which he may have confidence?"

Now for me the basic problem existed—how is it possible to make these ideas of a judiciary at all compatible with the ideas of an authoritarian state, because the authoritarian state as such was a fact for me. I could not overthrow it; and to that extent, of course, there is a difference in regard to the position of the judge which I aimed at in Germany from the position of a judge in England. For me it was a fact that Hitler was the man who in Germany combined all power in his own person, but in order to make the dangers inherent in this concentration of power clear to Hitler, I emphasized two factors in particular in this memorandum.

First for one, a historical element. By referring to the Roman Empire, to the British Empire, and to other empires, I pointed out to him on the basis of history that: "Nothing brings about the self-destruction of a state more than the absence of law and a weak judiciary." The second elements with which I hoped to convince Hitler was a more nationalist element. I attempted to explain to him the picture which every human being makes himself of the position of a judge. I used the expression, "The original judge and arch judge," and I told him that the essential characteristics of this arch judge consist of three conditions.

First, that it is a distorted picture if this judge has to ask another person what kind of a decision he should make. The independence of the judge and his freedom in issuing instruction was the most essential feature of a judge in contrast to a civil servant. The second element which I wanted to include in this picture in

which I told him that he has to imagine a court on a market place was that a human being can really only imagine that there was just one judge. As soon as one has several judges in one case, one asks, "Well, who gives me a better justice?" I said that the symbol for the fact that there is only one law and one justice would be blurred. By saying so, of course, I meant that there should be as few judges as possible. The third element which I added to this picture was, and I quote: "The judge has a strong inner authority. He is the interpreter of the law who from the point of humaneness, wisdom, and experience must be superior to all other servants of the State." The fact that Hitler, himself, was the highest legal reviewing authority in Germany was of course from my conception of the dignity and independence of the judiciary, a danger. The question exists anyhow as to whether this idea of the absolute independence of the judge is compatible with the concept of an authoritarian state.

After I was discharged, and after I had gathered the experience in Berlin during the 15 months that I was there, I absolutely denied that question. I said that those two concepts are not compatible with each other. At the time when I made this attempt, I believed that they were compatible, and that the separation of power which is necessary in every state for the purpose of controlling the people, in practice would be achieved by my program of having all influences on the judiciary eliminated.

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Q. Dr. Rothenberger, would you now please tell the court how your appointment to the post of State Secretary in 1942 came about? In this connection I would refer to [1964–PS, Prosecution] Exhibit 65. That is the authority dated 20 August 1942.

A. On 4 August 1942 the Reich Minister and Chief of the Reich Chancellery, Lammers, suddenly asked me to come to Berlin for the purpose of a conference. Lammers told me the Fuehrer had read my memorandum. He had liked that memorandum, and he would like to have the plans of that memorandum carried into effect. I asked Lammers specifically as to whether Hitler had given him any further reasons. He told me what had impressed Hitler was the question of the position of the judge. His opinion of the judge of the civil servant type was very low, and he thought that civil servants and judges were strangers to practical life.

In reply to my question, Lammers said to me, "Hitler is convinced that these plans must be carried out." I then said to Lammers that I thought during the war it was altogether impossible to put into effect my plans and I would ask to be allowed to wait

with carrying out my plans until the end of the war, all the more so as I myself had not yet finished my preparatory work in Hamburg. Lammers replied that Hitler counted on an early conclusion of the war, and the preparation for carrying out the reform would need some time after all, and I was to utilize that time.

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CROSS-EXAMINATION

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MR. KING: Dr. Rothenberger, I would like to come back to Prosecution Exhibit 27, which is Document NG–075. This is your memorandum to Hitler, or rather your memorandum which eventually reached Hitler, and to which you attribute your appointment to the position of State Secretary. The purpose of examining certain phrases from this memorandum is to enable me better to understand what your new program for the independence of the judiciary was. I am sure you know that memorandum much better than I do. I want to read to you several paragraphs from it. You say in one place: "Law must serve the political leadership." Then you say in another place on page 8 of the document, "He who is striving toward a new world order cannot move in the limitation of an orderly Ministry of Justice. To accomplish such a far-reaching revolution in domestic and foreign policy it is only possible if on one hand all outmoded institutions, concepts, and habits have been done away with, if need be in a brutal manner." Then you say still further on, "The Fuehrer is the supreme judge, theoretically the authority to pass judgment is only his." Then you say still further on: "A judge who is in a direct relation of fealty to the Fuehrer must judge like the Fuehrer." All of these phrases which I read appear in that memorandum and based on them, I want to ask you this and perhaps several other questions. You have repeatedly said that the purpose of your program was to establish an independence of the judiciary. However, the essence of your program, as it seems clear to me from reading your memorandum, is that the Fuehrer is the supreme judge. As you say here, theoretically the authority to pass judgment is only his. A judge in a position of direct relation of fealty to the Fuehrer must judge like the Fuehrer. Now my question to you, Dr. Rothenberger, is simply this: When you speak of the independence of the German judiciary, how do you reconcile that with these statements that the Fuehrer is the supreme judge, and that only he can actually judge, and that all judges must reflect his thinking?

DEFENDANT ROTHENBERGER: During my direct examination I have already tried to explain the thoughts which made me write

this memorandum. It is extraordinarily difficult to do so briefly, especially to state one's attitude only in regard to two or three sentences which are taken out of their context. Therefore, I am of the opinion that the memorandum as such should speak for itself, and that I leave it up to the Tribunal to form its judgment about the actual thoughts contained in the memorandum. And if in spite of that I may answer that question only very briefly in a concrete manner, I have to say the following: In 1942 the authoritarian state as such was a fact in Germany. That is to say, Hitler was also the highest judicial authority, and if any chance or possibility still existed to remove all the damage which had occurred during the course of years and all the burdens with which the administration of justice was loaded by the Party and by the SS—or, as we used to say at the time, on the part of the thousand little Hitlers who every day jeopardized the independence of the individual judge—under those conditions the only possibility to bring about any amelioration at all was Hitler himself. That it was impossible to convince Hitler I, and later on, everybody realized. But at the time I believed that it was possible to convince him, and I had to seize that possibility as a last chance. And if it would have been possible to convince him, then in effect the independence of the courts would have been reestablished again. For in that case this direct relationship between Hitler and the judiciary which I asked for would have been established and all other influences which burdened every judge every day would have been eliminated.

Q. Dr. Rothenberger, may I interrupt you at this point? I think that you are entirely too modest about the success of your program. If you meant what you said in your memorandum, and I assume that you did mean what you said, then isn't it true that your program was a complete success, since the final result was that the Fuehrer became the supreme judge? Isn't that true?

A. The fact that after only 15 months I again left my office is probably the best proof of the fact that my program was a complete failure.

Q. Dr. Rothenberger, do you distinguish between the success of your program and your own failure to get along with people in the ministry? Isn't it possible that those two factors are separable?

A. No. A second reason also speaks for the assumption that it was a complete failure—and that is the intervention of outside offices with the activity of the judges which I wanted to prevent; this did not stop at all after this memorandum was submitted, but rather became worse. The independence of the court and the

lifting of the judiciary from the civil service, which I was striving for, did not become effective at all. I request the Tribunal to tell me whether I should go into more detail in regard to this problem, which of course is a fundamental problem, or whether I should not say any more about it now.

PRESIDING JUDGE BRAND: We will not interefere at this time.

MR. KING: Dr. Rothenberger, I am frankly puzzled by seemingly contradictory statements in your memorandum. Let's go over it once more. You say, on the one hand, that you want an independent judiciary. You say, on the other, that the Fuehrer is the supreme judge, and all judges must act like the Fuehrer. Now, unless you meant that all judges must act in accordance with the wishes of the Fuehrer, your memorandum means absolutely nothing and is pure double-talk. If that isn't what you meant—if you didn't mean that the Fuehrer's decisions should be the final decisions—just what do you mean by all that talk of the Fuehrer being the supreme judge?

DEFENDANT ROTHENBERGER: I said in my memorandum that theoretically the Fuehrer is the highest judge in Germany; I also expressed that the individual judge in his decision must be independent even in his relationship to the Fuehrer. What I attempted to achieve first was to eliminate all other influences on the judge and therefore to establish this direct connection between the Fuehrer and the judge. Therefore, my suggestion in order to say it clearly to put in place of the influence of Bormann or Himmler, the so-called "Judge of the Fuehrer," who would influence the Fuehrer in the capacity of a judge, and would therefore not only try to direct the development in Germany into quite different channels in a legal respect but in every respect.

Q. Let me put this question to you. If, under your program, as you envisaged it in 1942, a judge came to a decision, and that decision was known not to be in accordance with the Fuehrer's views, in your view whose opinion should have prevailed, as you intended it to work out?

A. The decision of the judge.

Q. Then what do you mean when you say the judge must judge like the Fuehrer?

A. The Fuehrer does not have the right to touch a decision made by a judge.

Q. Dr. Rothenberger, we know that that wasn't so in practice, don't we? We have seen instances where it didn't work out that way, haven't we?

A. Unfortunately, after I wrote this memorandum, especially here in this trial, and also when I was in Berlin already, I found out that the Fuehrer acted in a different way. The purpose of this memorandum, however, was merely the following: to convince the Fuehrer that the men who had influenced him so far and in that direction were wrong. My knowledge from Hamburg was not sufficient in order to know already at that time that the Fuehrer himself could not be convinced. But that is not only my own tragedy, but the tragedy of the entire German people.

Q. Did you ever consider the possibility that the Fuehrer in reading your memorandum read it literally and decided that when you said "The Fuehrer should be the supreme judge," that you meant what you said? Did you ever consider that possibility?

A. Yes, I considered that possibility.

Q. Do you have any feeling that in practice it didn't work out that way? In fact, the evidence adduced here at this trial tends to prove, don't you believe, that by the end of the war the Fuehrer really became the supreme judge and interfered with all judicial decisions?

A. I saw that later, and if I had known that before, I would not have undertaken this daring attempt, because there was no hope for it from the very beginning. But at the time, I thought that as a jurist I was under an obligation to make this final attempt, because I just could not accept the conditions which existed.

Q. You knew what the Party platform was, did you not? You knew what Hitler had said in Mein Kampf, did you not?

A. About that problem, he did not say anything in a negative way in his Party platform and not in Mein Kampf either.

Q. Well, as a reasonable man, Dr. Rothenberger, you knew what his attitudes were on all of these questions, and if your program embodied having him become the supreme judge, you knew fairly well how he would judge on all these questions from your prior knowledge, did you not?

A. No. I can only emphasize again and again that as long as I saw the possibiltiy of influencing him, I considered it my duty to make this attempt; otherwise I would have been a fool.

Q. No one denies that you did influence him, Dr. Rothenberger; the implication is that you did, and that you were completely successful.

A. I did not have any success. That is just it. Hitler could not be convinced.

907802—51——34

Q. He became the supreme judge, did he not?

A. In effect, he interfered with the administration of justice, as we know now.

Q. All of the judges in Germany were in a position of fealty to the Fuehrer, were they not?

A. No fealty, no.

Q. What do you understand by "fealty"?

A. Dependence upon him.

Q. And you don't think judges in Germany at the end of the war were dependent on Hitler?

A. I just wanted to prevent this fealty.

Q. You wanted to prevent it?

A. Yes.

Q. That is not what you said in your memorandum. You said in your memorandum, "A judge who is in direct relation of fealty to the Fuehrer must judge like the Fuehrer." That doesn't sound like you were trying to prevent it. That sounds like you were trying to induce it.

A. You do not distinguish between the dependence and fealty on the one hand, and an obvious natural relationship of trust and confidence which every German and therefore every judge too should have in the Fuehrer.

* * * * * * *

JUDGE HARDING: Dr. Rothenberger, with reference to the time you submitted your memorandum to Albrecht,[1] when did this speech of Hitler declaring himself the supreme law lord of Germany occur? What is the relationship between the time you submitted your memorandum and his speech?

DEFENDANT ROTHENBERGER: The Hitler speech was delivered on 26 April [1942].[2] When my memorandum reached Hitler's hands, I cannot say.

Q. When did you submit it to Albrecht?

A. I can gather that only from the date which is below the memorandum and that is 31 March; in other words, I probably gave the memorandum to Albrecht during the month of April without knowing exactly when it was and also without knowing

[1] Reference is made to Rothenberger's "Reflections on a National Socialist Judicial Reform," (Doc. NG–075, Pros. Ex. 27), reproduced at the beginning of this section.

[2] Extracts from this speech as reported in the "Voelkischer Beobachter" are reproduced in section V C 2 a (Doc. NG–752, Pros. Ex. 24).

when Albrecht succeeded in putting it in Hitler's hands. I don't know that.

Q. It was submitted to Albrecht before you knew anything about this speech of 26 April?

A. Yes, that is certain.

* * * * * * *

3. FURTHER DEVELOPMENTS PRINCIPALLY WHILE THIERACK WAS REICH MINISTER OF JUSTICE (AUGUST 1942–1945)

a. "Special Treatment." Further relations with officials of the Nazi Party, the Gestapo, the SD, and the SS

TRANSLATION OF DOCUMENT NG–059
PROSECUTION EXHIBIT 38

FILE NOTE CONCERNING A CONFERENCE OF 18 SEPTEMBER 1942 AT HIMMLER'S FIELD HEADQUARTERS BETWEEN HIMMLER, REICH MINISTER OF JUSTICE THIERACK, AND DEFENDANT ROTHENBERGER

RK 13227 B 21 Sept 1942

Field Headquarters, 19 September 1942

Subject: Judicial reform

1. Remark—On 18 September 1942 following an invitation by the Reich Leader SS, Dr. Thierack, Reich Minister of Justice, and Dr. Rothenberger, State Secretary, met at the Reich Leader's field command post. They had a discussion, lasting 5½ hours, with the Reich Leader, in which also participated on the side of the Reich Leader, SS Gruppenfuehrer Streckenbach (Security Police) and SS Oberstrumbannfuehrer Bender (SS judge with the Reich Leader SS and Chief of the German Police). The results of the discussion, about which State Secretary Dr. Rothenberger expressed greatest satisfaction, are to be summarized in minutes.[1]

[Notation in ink] Afterward the Reich Minister of Justice and the Reich Leader SS had a private conversation.[2]

2. Obediently submitted to the Reich Minister.

[Initial] L [Lammers] September, 22
[Initial] F [Ficker]

3. For the files.
Justice 24

[1] Reich Minister Thierack's minutes concerning this conference are reproduced immediately below (Doc. 654–PS, Pros. Ex. 39).

[2] See the testimony of defendant Rothenberger concerning this notation and Thierack's minutes of the meeting, reproduced later in this section.

TRANSLATION OF DOCUMENT 654–PS
PROSECUTION EXHIBIT 39

MEMORANDUM OF THE REICH MINISTER OF JUSTICE ON A CONFERENCE WITH HIMMLER, 18 SEPTEMBER 1942, CONCERNING "SPECIAL TREATMENT AT THE HANDS OF THE POLICE" WHERE "JUDICIAL SENTENCES ARE NOT SEVERE ENOUGH", THE WORKING OF "ASOCIAL ELEMENTS" TO DEATH, AND OTHER MATTERS

Discussion with Reich Leader SS Himmler on 18 September 1942 at his field headquarters in the presence of Under Secretary Dr. Rothenberger, SS Major General Streckenbach, and SS Lieutenant Colonel Bender.

1. Correction [Handwritten insertion: "Lammers informed"] by special treatment at the hands of the police [durch polizeiliche Sonderbehandlung] in cases where judicial sentences are not severe enough. On the suggestion of Reichsleiter Bormann, the following agreement was reached between the Reich Leader SS and myself:

a. On principle, the Fuehrer's time is no longer to be burdened with these matters.

b. The Reich Minister of Justice will decide whether and when special treatment [polizeiliche Sonderbehandlung] at the hands of the police is to be applied.

c. The Reich Leader SS will send the reports which he hitherto sent to Reichsleiter Bormann, to the Reich Minister of Justice.

d. If the views of the Reich Leader SS and those of the Reich Minister of Justice agree, the final decision on the case will rest with them.

e. If their views are not in agreement, Reichsleiter Bormann will be asked for his opinion, and he will possibly inform the Fuehrer.

f. In cases where the Fuehrer's decision on a mild sentence is sought through other channels (such as by a letter from a Gauleiter) Reichsleiter Bormann will forward the report to the Reich Minister of Justice. The case will then be decided as described above by the Reich Leader SS and the Reich Minister of Justice.

2. Delivery of asocial elements [asozialer Elemente] while serving penal sentences to the Reich Leader SS to be worked to death [zur Vernichtung durch Arbeit]. Persons under security detention, Jews, gypsies, Russians, and Ukrainians; Poles with more than 3-year sentences; and Czechs and Germans with more than 8-year sentences, will be turned over without exception, according to the decision of the Reich Minister of Justice. First of all, the worst asocial elements among those just mentioned are

to be handed over. I shall inform the Fuehrer of this through Reichsleiter Bormann.[1]

3. Administration of justice by the people—This is to be carried out step by step as soon as possible, first of all in the villages and the small towns of up to about 20,000 inhabitants. It is difficult to carry it out in large towns. I shall rouse the Party particularly to cooperate in this scheme by an article in the "Hoheitstraeger." It is evident that jurisdiction must not be permitted to lie in the hands of the Party.

4. Decrees concerning the police and the administration of justice will in future be published after having been coordinated, for example, in cases where unmarried mothers attempting to procure abortion are not prosecuted.

5. The Reich Leader SS agrees that the cancellation of sentence, even for members of the police, will remain with the Reich Minister of Justice as laid down in article 8 of the law relating to the cancellation of sentence.

6. The Reich Leader SS has given full consent to the ruling I have planned on corporal punishment ordered by the Fuehrer.

7. I refer to the law concerning asocial elements and give notification of the claims of the administration of justice, e.g., in the classification of juveniles as asocial elements and their direction.

It likewise seems to me that the actual circumstances which serve to classify a person as asocial are not laid down in the law with sufficient clarity. The Reich Leader SS is awaiting our opinion and will desist from submission of the law until then.

[Handwritten] One thing is clear—the reduction of the age of discretion has been tentatively submitted to, and approved by the competent agencies.

8. The Reich Leader SS has agreed to a clause for the Juvenile Court Law, whereby the age of discretion can be reduced to 12 years and the age of limited discretion can be extended to over 18 years.

9. SS Lieutenant Colonel Bender, on the staff of the Reich Leader SS, is appointed by the Reich Leader SS as liaison officer for matters which apparently necessitate direct liaison with the Reich Leader SS. He can be contacted at any time by teleprinter at the field headquarters of the Reich Leader SS, and will also come to Berlin once every month to report to me. SS Captain Wanniger is appointed liaison officer for other matters; he is stationed at the Reich Security Main Office.

[Handwritten] Kuemmerlein[2]

10. The Reich Leader SS points out that in the administration

[1] Thierack wrote a letter to Bormann on this subject on 13 October 1942, entitled "Administration of Criminal Justice against Poles, Russians, Jews, and Gypsies." (See Doc. NG–558, Pros. Ex. 143, reproduced in section V D 2.)

[2] Kuemmerlein was Thierack's adjutant.

of punishment many more special institutions should be set up, following the principle that incorrigible criminals should be confined separately, and that those capable of improvement should be separated according to the nature of their crimes (e.g., embezzlers, thieves, and those who committed acts of violence). This is recognized as being correct.

11. The Reich Leader SS demands that the penal register be kept by the police. Arguments against this are to be examined (cancellation, aggravation, and the use of an extract from the penal register). The question is to be further discussed with SS Major General Streckenbach.

12. The Reich Leader SS points out SS First Lieutenant, Judge at the Reich Supreme Court, Altstoetter, at present on active service as a major, as being reliable and also District Court President Stepp; he considers Attorney General Jung in Dresden unreliable.

13. Finally, the Reich Leader SS broaches the subject of the office of the public prosecutor and its transfer to the police. I rejected it flatly. There was no further discussion of this subject.

14. It is agreed that that in consideration of the intended aims of the government for the clearing up of the eastern problems in future Jews, Poles, gypsies, Russians, and Ukrainians are no longer to be tried by the ordinary courts as far as punishable offenses are concerned, but are to be dealt with by the Reich Leader SS. This does not apply to civil lawsuits, nor to Poles whose names are registered for or entered in the lists of ethnic Germans.

[Initial] TH [Thierack]

TRANSLATION OF DOCUMENT NG-857
PROSECUTION EXHIBIT 434

LETTER FROM THIERACK TO THE PRESIDENT OF THE REICH SUPREME COURT, 29 SEPTEMBER 1943, PROPOSING SS GENERALS OHLENDORF AND CERFF AS GUEST SPEAKERS*

Berlin, 29 September 1943

The Reich Ministery of Justice
T 712, M I a

To: The President of the Supreme Court of the Reich, Dr. Bumke
1.
Leipzig C 1
Reichsgerichtsplatz 1

* SS General Otto Ohlendorf was commanding officer of Einsatzgruppe D, one of the special task forces assigned to exterminate "undesirable elements" in the East. He was also chief of Office III of the Reich Security Main Office (RSHA) from 1939–1943. Ohlendorf and a number of his codefendants were sentenced to death in the Einsatzgruppen Case (United States *vs.* Otto Ohlendorf, et al., Case 9, vol. IV, this series).

[Stamp] Out: 29 September 1943
[Handwritten initials illegible]

Dear Dr. Bumke,

I would appreciate it if, together with the Chief Public Prosecutor of the Reich, you would invite SS Brigadefuehrer Ohlendorf and SS Brigadefuehrer Cerff to speak before the members of the Supreme Court and before the public prosecution of the Reich. This plan has been suggested by the Reich Leader SS, and I welcome it. The two Brigadefuehrers can both be reached c/o the Reich Security Main Office in Berlin.

Heil Hitler!

Yours obediently
[Typed] DR. THIERACK

2. After dispatch to State Secretary for information.
[Initials illegible]
3. To be returned to ministerial office.

TRANSLATION OF DOCUMENT NG-219
PROSECUTION EXHIBIT 42

REPORT FROM THE GENERAL PUBLIC PROSECUTOR IN JENA TO THE REICH MINISTRY OF JUSTICE, 30 SEPTEMBER 1943, CONCERNING COOPERATION OF JUSTICE AUTHORITIES WITH THE SD AND INTEROFFICE MEMORANDUMS PERTAINING THERETO*

REICH MINISTRY OF JUSTICE

Business Office a–3

Subject: Cooperation of the justice authorities with the Security Service of the Reich Leader SS.

IV a 2745.43 g–sheet No. 1 [Stamp] Secret

Copy of an extract from the report regarding the situation by the general public prosecutor in Jena of 30 September 1943

[Handwritten] 4606/1–a–4, 1512/42

The reciprocity contained in the executive order of the Reich Ministry of Justice concerning the cooperation of the justice authorities with the SD (Security Service) of the Reich Leader

* This document is referred to in the testimony of defendant Schlegelberger, reproduced in section IV E.

SS [Himmler] of 3 August 1942—[published in] *German Justice*, page 521—is only very conditional. The [Ministry of] Justice works openly, and the Security Service secretly. So, as a general rule the [Ministry of] Justice is not at all informed of the work which is being carried out by the Security Service and is therefore also not in the position to request information. It is usually accidentally informed about such investigations. So it was in the case of Greiz, which was submitted to the Minister and during which an inspector of justice was asked about the attitude in the judicial circles regarding the judges' letters. I furthermore remember a case of Sonneberg from which the conclusion could be drawn that the Security Service made investigations regarding the protection of war marriages through the courts.

Berlin, 6 October 1943

Mr. MD I,
Mr. MD IV

For information. The Minister requests a report in this matter

[Illegible handwritten notes]

[Handwritten notes]
Mr. [?] Malzan
Mr. [?] Kremer

For information.

Are you informed about the above-mentioned cases of Greiz and Sonneberg?

[Signature] MIELKE 7 October

None of the cases are known to me.

[Initial] M 7 October

Nor to me!

[Initial] K 8 October

Mr. [illegible title] Kuemmerlein

Are the above-mentioned details known to you? I would be grateful if you could inform me about the whereabouts of the above-mentioned documents.

[Signed] MIELKE 8 October

[Marginal note] The cases are not known to me.

8 October
[Signed] MAX LECHNER

To Oberregierungsrat Mielke:

The documents have been thoroughly searched for in the Office of the Ministry. None of cases mentioned are known.

[Signature] BEITZ 25 October

[Marginal note] To Oberregierungsrat Mielke. Oberregierungsrat Bender is the coordinator of the district Jena Department I (higher level, civil service). Doctor S. P. N. Friedrich is the deputy coordinator. The cases mentioned are not known to me. (I am an assistant to the general officials.)

[Signature illegible]
26 October

To Mr. Reinecke:

I would appreciate information on the coordinators in Department I.

[Signature] MIELKE
25 October

Registered

To Ministerialdirector Letz:

I would be grateful to you for information as to whether you are informed about the cases of Greiz and Sonneberg. The peculiar method of not answering special questions is generally known throughout the entire Reich. It is unbearable for people with character and it is an impossibility for decent people or members of the Party. In my opinion it would come to an end at once if one is quite candid and would tell them the whole truth about the P.K. I personally must persist in the demand for complete equality and the corresponding etiquette. I have just given orders to the Oberregierungsrat [illegible name] to raise objections against certain abuses in a suitable manner at the Reich Security Main Office.

[Signature] VOLLMER 27 October

[Marginal note] to IV a 2745/43 g

[Handwritten notes]
To be submitted first to President Dr. Friedrich.

Are you acquainted with these cases (Greiz and Sonneberg)?
Not known to me.

[Signed] Dr. Friedrich
28 October

[Marginal note] to IV a 2745/43 g. *Sealed!*

To Ministerialdirector Dr. Vollmer:

The cases of Greiz and Sonneberg have not been known in Department I. Moreover, I know from documents, which the minister produces from time to time out of his private files, that the Security Service takes up special problems of the administration of justice with thoroughness and makes summarized situation reports about them. As far as I am informed, a member of the Security Service is attached to each judicial authority. This member is obliged to give information under the seal of secrecy. The procedure is secret and the person who gives the information is not named. In this way we get, so to say, anonymous reports. Reasons given for this procedure are of State political interest. As long as direct interests of the State security are concerned, nothing can be said against it, especially in wartime. Moreover, as far as for instance evaluation of personnel of less important nature, questions concerning the judiciary or general "reports on public opinion" are concerned, I do not regard the anonymity as harmless. The danger exists, that people will be trained to snoop around, that unjustified denunciations will occur and that an atmosphere of mistrust will be created. There can indeed be no question of cooperation between the [Ministry of] Justice and the Security Service curing such a procedure. On the other hand the minister may be interested to know how the [Ministry of] Justice is criticized outside the official channels of appeals. In any case the secret, one-sided Security Service reports cannot be a basis for the establishment of facts and certain conclusions. They may provide hints.

Berlin, 29 October 1943 [Signature] LETZ
[Marginal note] to IVa 2745/43g

PARTIAL TRANSLATION OF DOCUMENT NG–327 PROSECUTION EXHIBIT 359

LETTER FROM LAMMERS TO THIERACK, 23 OCTOBER 1942, STATING THAT THE OPINION OF THE GAULEITER HAS TO ACCOMPANY CLEMENCY CASES SUBMITTED TO HITLER

The Reich Minister and Chief of the Reich Chancellery,
Rk. 779 B g

[Stamp]
Reich Ministry of Justice
25 October 1942

Berlin W 8, 23 October 1942
Voss Strasse 6 at present,
Field Headquarters

SECRET

To the Reich Minister of Justice, Dr. Thierack

[Handwritten] has been submitted
[Signed] EBERSBERG

Subject: Consultation of Gauleiter in clemency cases

Dear Mr. Thierack!

The Fuehrer ordered that in future in all cases submitted to him for clemency, the expression of opinion by the Gauleiter[1] has to be obtained. Details should be learned from the attached copy of my letter to the Minister of State and Chief of the Presidential Chancellery of the Fuehrer and Reich Chancellor, whom I requested to contact you.

Heil Hitler!

Very truly yours,
[Signed] DR. LAMMERS

[Handwritten] taken care of IVa 1729/42g–1728/42g

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHENBERGER[2]

DIRECT EXAMINATION

* * * * * * *

DR. WANDSCHNEIDER (counsel for defendant Rothenberger): We are now coming to a group of problems which were set down in Exhibits 38 and 39.[3] The exhibits are concerned with a discussion between Himmler and Thierack, in the presence of Dr. Rothenberger, as is said at the beginning of the transcript of

[1] The IMT in its judgment found Gauleiter to be within the group of persons of the Leadership Corps of the Nazi Party declared by the Tribunal to be criminal. See Trial of the Major War Criminals, op. cit., volume I, pages 257–262.

[2] Further extracts from the testimony of defendant Rothenberger are reproduced in sections V C 1 a, V C 2 b, and V D 2.

[3] Document NG–059, Prosecution Exhibit 38, and Document 654–PS, Prosecution Exhibit 39, are reproduced above in this section.

18 September. Dr. Rothenberger, would you tell us, please, who was your main opponent outside the administration of justice?

DEFENDANT ROTHENBERGER: Himmler, as the Reich Leader SS. That he was my opponent I had known for many years. I gathered that on the one hand from the fact that at public demonstrations I had repeatedly in view against all measures which had been taken against the administration of justice at the instigation of Himmler.

In particular, I remind you of the measures described in the Schwarze Korps against the German judges. I remind you of his measures which amounted to a correction of sentences. It was natural that the view which I had expressed in public as to what those measures would lead to, that Himmler through the SD service would have been informed of that. For me it was a matter of course, that Himmler would have been informed of the contents of my memorandum to Hitler, and that was proved right during the discussion later on. About that discussion Himmler knew that I had warned Hitler of the development of the administration of justice and of the development of the Reich as a whole, a development towards becoming a pure power state.

In particular Himmler knew from the memorandum* that I had requested that the entire administration of penal justice was to lie exclusively in the hands of the judiciary. That that constituted a camouflaged attack on the administration of justice by the Gestapo was naturally obvious to Himmler. That view of mine, namely, that Himmler for that reason harbored great distrust toward me, was confirmed to me not in the course of the discussion, but it was confirmed to me by the results of that discussion; and it was confirmed without any doubt. I saw Himmler once in my life and for the following reason:

He had sent out an invitation. Thierack said to me that I was to go along with him because it was a first official visit. We had only just assumed office and this was supposed to be my first official call on Himmler. We had not heard before what points were to be discussed there. One could only rely on suppositions. My supposition was that the problems which for years had been an object of dispute between the administration of justice and the police would probably be mentioned in the course of this discussion. Among those problems there were, in particular, the following questions:

On the one hand, the question of the transfer of the prosecution to the police, which has been mentioned here a few times, but the significance of which, I believe requires some explanation. I mean, it is significant for the entire set of proceedings and trials in

* Reference is made to Rothenberger's "Reflections on a National Socialist Judicial Reform," (NG-075, Pros. Ex. 27), reproduced at the beginning of section V C 2 b.

Germany. The German prosecution at this trial here has repeatedly been described as the most objective authority in the world. Naturally, that was an exaggerated expression. But contrary to the Anglo-American procedure, what is correct about that statement is that the public prosecutor, because he has to deal with all elements that speak in favor of the defendant as well, constitutes a very far-reaching protective element for the defendant as well.

This is therefore for the entire method of proceedings, the position of the judge and in particular also the position of the defense counsel—which for that reason, too, is an entirely different position than it is under Anglo-American procedure—of essential importance.

If Himmler would have gotten the prosecution into his hands, which he had wanted to do for years, that agency which hitherto had been objective would have been in Himmler's hands. Himmler's struggle against the administration of justice would have been carried into the courtroom. That explains my great misgivings against that demand of Himmler's. For this reason, as far as I knew this problem would become acute, I considered it my duty, although formally it did not concern me, but because it was a basic question for the reputation of the judiciary as such, I tried with all means at my disposal to persuade Thierack before the discussions that on no account was he to give way on that point. I had all the more cause to do so because I had the feeling that Thierack wavered on that point. I did not know, I only heard that here, that actually on the occasion of the Elias case which has been mentioned here, in Czechoslovakia he in a certain way had already committed himself. I made particular use of this factor without Thierack—I told him that if the prosecution would no longer be under the administration of justice, you yourself, who directs the penal administration of justice, will lose the ground under your feet. What I said was, "you yourself will saw off the branch on which you are sitting." That factor evidently did have some effect upon him; it evidently succeeded.

The second problem which would probably be broached by Himmler was the question of the community law concerning asocials, which has already been mentioned. I shall refer to that briefly later, because that problem was discussed during the conference.

There were two further points which I thought would be broached. They were old hobby horses of my own. I am referring to the question of the Schwarze Korps and that of the correction of sentences. Thierack himself said to me before the conference on the way there—we went there together—"Will you keep in the

background at the conference, please, because, on the one hand, the problems will probably concern matters which do not affect you, that is to say, matters of the administration of penal justice; and furthermore, I do not want an argument to arise between us again, which is quite apparent to outsiders, such as occurred during our visit to Lammers a month ago."

Q. What happened at the conference itself?

A. It is nearly 5 years ago now since that conference took place, but as it was very impressive I believe I can remember it fairly well. It was not a formal meeting, since only a very small circle of people attended. It was, in fact, an informal conversation, interrupted by a supper. Himmler was the main speaker. I noticed this manner of speaking was very much like that of Hitler's.

PRESIDING JUDGE BRAND: Wouldn't it be possible for you to concentrate a little more on the actual material features of the conversation?

DEFENDANT ROTHENBERGER: Yes.

Q. We don't care how he spoke, or about his manner.

A. Yes, Your Honor.

To begin with, he made general remarks about the war situation, of which he took a favorable view. I do not remember now the sequence of the individual points which are mentioned in the minutes, but I do believe that he then immediately went over to the subject of the transfer of prisoners, that is to say, the transfer from the administration of justice to the police. That was a problem which was entirely new to me. He said that through his organizations he had had the facts established that the prisoners under the administration of justice, on the one hand, were badly overcrowded, and furthermore that in some cases at those prisons, work was still being performed which was not essential to the war effort. He mentioned handicraft and pasting together of paper bags. He himself, on the other hand, had constructed large armament works. He was of the opinion that at a time when every German, be it the soldier at the front or the man or woman in the homeland, was working for the war efforts, the prisoners too, in one form or another, should make their contribution toward the war effort.

When he had explained that to us in great detail, it seemed to me that Thierack's attitude on that point was not altogether clear. On the contrary, I had the impression that Thierack had understanding for that request which Himmler had put forward.

No details were discussed as to what type of prisoner Himmler wanted transferred, but it was said in a general way that only

prisoners with long terms would be considered for such transfer, since prisoners with short terms would have to be discharged again at an early date.

I myself kept silent on that point to begin with, because for one thing I did not feel certain on that question, and secondly, because Thierack had especially asked me to hold back. However, in the course of our talk—I do not remember whether it was immediately or whether it was later on—the conversation turned to the subject of the general relations between the administration of justice and the police. That conversation dealt mainly with the old arguments concerning the Schwarze Korps and Himmler's correction of sentences. Himmler was of the opinion that the administration of justice had failed in various instances, and for that reason he had been compelled to intervene. Since Thierack, on that point too, did not take up a clear attitude in favor of the administration of justice, I considered it my duty to interfere. Naturally, I was cautious in my manner, but I was clear as far as the matter itself was concerned. I had just been appointed by Hitler and had the belief that Hitler was backing up my plans. I said that the problem of the police and the administration of justice could not be considered just from the point of view of one single sentence which might have been correct or incorrect, but that one must regard that problem from the general point of view of the reputation of the judiciary. I said that the reputation of the State as such was dependent upon the reputation of the judiciary.

In speaking of these things I referred to my memorandum and my opinion that Hitler had approved my memorandum on those points, too. I said that from that point of view I, too, considered it incorrect for the administration of justice to transfer prisoners to the police. If the prisoners were not being put to sufficient use for the war effort, the administration of justice itself would have to see to it that sufficient use would be made of such prisoners.

Himmler listened to my remarks with comparative calm. It seemed to me that he had understanding for what I was saying.

He said that he had never heard of these problems from that angle, and he said that in future he would instruct the Schwarze Korps to refrain from attacking the administration of justice; he would also stop the police from intervening in the case of individual sentences.

These two subjects had thus been concluded. The question of the transfer of prisoners seemed to me to remain undecided. Besides that point a few other problems were discussed, for example, the question of the asocial law.

Q. I wonder, would you for my convenience tell me the technical name of the asocial law, either by date or in any other way?

What law are you referring to as the asocial law?

A. May it please the Court, that is not a law in the sense of ever having become a law. It is merely a draft which dealt with the question as to whether the police were to be allowed to arrest asocial elements. Have I made myself clear, Your Honor?

Q. In saying "the asocial law," you didn't mean that there was any law at all?

A. No, no, I did not. No, it never became law. I will explain that in a moment. I was familiar with that problem from my time in Hamburg. Yesterday I explained, as is evident from Document NG–387, Prosecution Exhibit 400,* that I had put forward the proposal that if such a law were to be issued at all, a judicial authority would have to be set up in order to decide as to who, in fact, was an asocial element. That same question was brought to my attention immediately when I assumed office in Berlin. I believe it was in my first or second week there when a Ministerialdirigent Rietsch came to see me. He said to me—Mr. Under Secretary, you must help us. Minister Thierack is prepared to agree to that law, and that would be impossible, because that law would give to the police alone the right to determine who is an asocial element. Since a large number of the criminal elements are also asocial elements, such a regulation, that is to say if the police were to have the right to determine who was asocial, that would mean that the penal courts would be completely eliminated. Together with Rietsch, before the conference at Himmler's, I had had a lengthy conversation with Thierack on the matter, because this problem again constituted a fundamental question of the administration of justice. Thierack did not give his approval, even when Himmler broached that question at the conference and asked Thierack to give his consent, Thierack remained firm. That is evident from item No. 7 of the document. As I heard later on, negotiations were held between the Referenten, and the law never became a law in effect, at least not during my period of office, and I do not believe that it became effective afterwards. The further point which was discussed was the problem which I think has been discussed in almost too much detail here, that of the justice of the peace. It was astonishing and surprising to me that Himmler had any interest at all in that problem. He was fairly well informed about the historical foundations both abroad and in Germany, and it was equally surprising to me that he concurred in my opinion—I talked about that subject, my opinion being that the office of the justice of the peace was not to lie in the hands of the Party. That is evident from item No. 3 of the document.

* Reproduced in section V C 2 a. It is a situation report of 4 July 1941 from defendant Rothenberger to defendant Schlegelberger.

Various other questions were discussed at length, questions which were largely of a technical nature, partly anyhow. I do not remember the order in which these questions came up for discussion. I am merely mentioning the question of age in regard to responsibility before the law [Strafmuendigkeit]. I believe that Himmler mentioned a few cases where children of only 13 years of age had committed punishable acts and where he was of the opinion that one had to punish them, whereas under the previously existing legislation a child only becomes punishable at the age of 14. Questions concerning the penal register were then discussed, concerning ordinances to be issued jointly by the administration of justice and the police. I do not remember for certain whether punishment by flogging was discussed in my presence. I think it is possible. I am certain that while I was there the question of the transfer of the prosecution was not touched upon at all. This document contains a reference under 13 where Thierack says "I flatly rejected Himmler's demand for the transfer of the prosecution to the police."

DR. WANDSCHNEIDER: Dr. Rothenberger, may I interrupt you before we continue? When you spoke about the correction of sentences you said that the correction of sentences, according to Himmler's remarks, was to be stopped. The document of 18 September 1942 itself shows that beyond that a number of details were laid down as to what procedure was to be adopted in correcting sentences, concerning the relation between Himmler and Thierack and with the corresponding participation of Bormann. Were such particulars discussed in your presence?

DEFENDANT ROTHENBERGER: No. Himmler merely emphasized that a unilateral interference such as has occurred hitherto would no longer be permitted by him.

Q. Would you continue, please?

A. The last point which is contained in the document was also certainly not discussed at all. I am referring to the question of the transfer of the penal administration of justice concerning Jews, Poles, gypsies, Russians, and Ukrainians.

Q. Dr. Rothenberger, you know the transcript of 18 September, those minutes where it says that Himmler and Thierack led the discussion and that you were present. How can you explain it that those points which, according to you, were not mentioned in your presence must have been kept secret from you or deliberately cannot have been discussed in your presence?

A. The file note which Thierack wrote personally I saw for the

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first time here.[1] Today it is altogether clear to me how that file note came about.

Added to the file note in NG–059[2] is a notation signed by Ficker, Reich Cabinet Counsellor.

That notation confirms that following the conference which I attended, the Reich Minister of Justice and Reich Leader SS, I quote, "had a private conversation." When I think it over as to why such a talk between the two alone took place, today I realize fully that Himmler and Thierack quite deliberately excluded me and misled me, in particular, concerning the most delicate points.

What their motives were, I naturally can't say but in accordance with all the previous and subsequent events, immediately after the conference, I am bound to assume that Himmler and Thierack did not exactly regard me as their ally in such plans, and that during the first conference which I attended, they quite deliberately created the impression that they were making certain concessions. As to whether they, themselves, were not certain of themselves, as to whether Hitler really had a certain amount of understanding for my plans I cannot tell of course; but as far as the early period is concerned, that is possible. And now Thierack, I do not know when, for it cannot be seen from the file note (*654–PS, Pros. Ex. 39*), which bears no date, summarized the results of both discussions; that is to say, the conference which I attended and the following conversation between Himmler and Thierack alone, in this file note, without differentiating between them. It seems that a part of this file note was added by him only at a later time. I gather so from the original document, according to which some of the document was added later on by a different typewriter. That part concerns the last item, point 14, the question of the transfer of the administration of penal justice over Jews and Poles.

Q. Dr. Rothenberger, may I put another question to you in this connection? If I understood you rightly, you wanted to tell us that Thierack and Himmler were uncertain toward you and did not quite know where they stood with you. To what do you attribute that feeling that they had, that they did not quite know where they stood with you?

A. Mainly I think that feeling was caused by my memorandum. I assumed that Himmler knew that memorandum and that Himmler was not certain whether Hitler was really supporting the ideas of that memorandum.

Q. Did the unusual way in which you came to Hitler play any part in that?

[1] Document 654–PS, Prosecution Exhibit 39, reproduced earlier in this section.
[2] Prosecution Exhibit 38, the first document reproduced in this section.

A. No doubt, for Himmler and Thierack both knew that I had been appointed by Hitler himself in an unusual manner.

PRESIDING JUDGE BRAND: You have covered that.

DR. WANDSCHNEIDER: Thank you. May it please the Tribunal, may I continue with my examination?

PRESIDING JUDGE BRAND: Yes.

DR. WANDSCHNEIDER: What was your first impression after the conference?

DEFENDANT ROTHENBERGER: My first impression after the conference was favorable. Immediately after the conference, I told Reich Cabinet Councilor Ficker so. That too can be seen from Document NG–059, Prosecution Exhibit 38. I believed that that favorable impression was due to the fact that in regard to the main problems of the administration of justice, Himmler had not prevailed with his view. He had not asked to have the prosecution transferred. Concerning the correction of sentences and that of the Schwarze Korps, he had given assurances, in the problem of the asocial law, too, he had withdrawn his demand, and the question of the transfer of prisoners had at any rate remained open.

After the conference, the next morning in fact, I left by myself. Thierack remained behind—I do not know for how long he stayed. I went to Hamburg via Berlin to join my family in Hamburg, and there, too, I talked to a friend in a very positive way about this very important meeting which had concerned the administration of justice. When I returned to Berlin, the great disappointment began. Already after a few days, there was among the files which lay on my desk, a paper. That, too, was a file note by Thierack. It was a much briefer file note than the one here. As I remember it now, it concerned a conference with Goebbels. That file note indicated, in what form I do not remember now, that Goebbels had voiced to Thierack the idea of the extermination through work. That file note, was not addressed to me. It must have come into my possession by mistake.

When I read it, I could hardly comprehend that idea to start with. I could not comprehend what was meant by it. Feeling upset, I went upstairs to see Thierack immediately and asked him what it was all about. Thierack said to me with a certain amount of arrogance and condescension, "Do not get excited. It is correct that I talked to Himmler alone afterwards, that was the first time I heard of it, and in the course of that talk, this question, too, was discussed by Himmler and myself. But I rejected that demand on the part of Himmler with determination. I did that for humane reasons alone, and Himmler too understood that at the time everybody in Germany was needed."

During that talk, Thierack took a paper out of his desk, and on this paper—which I did not read myself, but I could see it—Thierack wrote in the margin so that I could see it, in his green pencil, "Settled" or "Rejected." I believe it was settled, as I can see now. Evidently, he wanted to confirm to me his assertion that this idea of extermination by work had been dropped by writing down that remark. I had only been in office for 3 weeks at that time, and I was still so innocent that I did not realize that those men might really carry out such an idea, and that they were deluding me.

Q. Dr. Rothenberger, in connection with this group of questions, a number of documents have been submitted about which you will have to give us your views. I now want to enumerate the various documents and to ask you to give us your views.

* * * * * * *

We are now going to deal with Exhibit 264,[1] document book 4–A, page 42, that is a letter from the Reich Ministry of Justice to the general prosecutors, dated 22 October 1942, it is signed by Crohne, and it was connected with the carrying out of the agreement of September 1942.

A. I never saw the letter either, which was natural, because it was a problem which concerned penal law and the administration of penalties. Such matters were not submitted to me, on principle.

Q. As Exhibit 268,[2] the prosecution submitted a document which was signed by Dr. Eichler, and is dated 1 April 1943; it concerns the transfer of Jews, Poles, etc., into concentration camp. Did you ever hear of such a letter?

A. No, I never saw that letter either.

Q. Finally, a gruesome letter from Thierack to Bormann, dated 13 October 1942, plays a part. That letter was read into the record and was not submitted as a separate document—if I remember correctly. The court knows it, did you ever see this letter from Thierack of 13 October 1942.[3]

A. No, I do not know that letter either.

* * * * * * *

Q. And then at the end of 1943, how did your leaving the Reich Ministry of Justice come about?

A. Yesterday I briefly mentioned the fact that as early as in April of 1943, after Thierack had tried to transfer me to the

[1] Document 648–PS, Prosecution Exhibit 264, reproduced in section V B.
[2] Document 701–PS, Prosecution Exhibit 268, reproduced in section V B.
[3] Document NG–558, Prosecution Exhibit 143, reproduced in section V D 2.

Reich Supreme Court in January but had stated that the time was not yet ripe for that, at that time I offered him my resignation which he rejected. Furthermore, I had mentioned that at the same time that did not keep him from starting investigation proceedings against me the same time of that year 1943 without my knowledge for the allegedly illegal procurement of furniture. That Thierack was primarily interested in getting rid of me in a manner which would give the impression to the outside world that I was being dishonorably discharged is proved by what I shall say briefly about my finally leaving the office.

Yesterday I also mentioned the fact that Thierack, as early as September 1942, kept my book for about 3 months. The German *Judge*—

PRESIDING JUDGE BRAND: You need not repeat what you said yesterday; we remember it. Go on to something new.

DEFENDANT ROTHENBERGER: Yes. After Thierack had finally turned over this manuscript to the Party Chancellery and after it had been examined there for about 6 months, about in August or September—I am not quite sure about that date any more—of 1943 an SD report was received in the Ministry. Thierack put that SD report to me, and he told me it could be seen from that SD report that a plagiarism was contained in that book. That book contained a short historical review of the position of the judge in the old Germanic and Franconian era, and several sentences concerning that era were allegedly taken from a book by a Professor Fehr. Professor Fehr, Thierack told me, was an emigree, who lived in Switzerland, and a democrat; and there was concern that one day the London broadcasting station might broadcast the information that the German reform of the administration of justice really emanated from an emigree who was a democrat and lived in Switzerland. He said that was extremely dangerous from the point of view of foreign policy, and that I had to clear it up.

I did not know the name "Fehr" at that time at all. As can be seen from the preface, a considerable number of my assistants in Hamburg had participated in the work on this book, and one of these assistants dealt with the historical part of the book. One year before, when no mention was made about the possibility of publishing that book, he had compiled that historical data for me, which I needed for a lecture that I was supposed to give in the Reich Ministry of Justice. The other day I stated that in August of 1941 I gave a lecture in the Reich Ministry of Justice about the segregation of the profession of judges from the usual civil servant class. That historical compilation was made for that purpose.

I had the matter clarified by that assistant, Dr. Brueckmann, and he said yes, that was correct, he had used several sentences from a book by Professor Fehr compiling the data, without having any opportunity at that time to know that it would lead to publication.

Thereupon, I told Thierack what the causes for that oversight had been. At no time did anybody, not even Thierack, make the assertion that there was any guilt on anyone's part. But I told him the man who could be interested to see that some sentences of a general historic content such as could be found in any book, that such sentences would be also contained in my book would only be Professor Fehr. Therefore, I wrote a letter to Professor Fehr, explained it to him, and asked him if that should be necessary for an interview; and before that conference took place—it was intended to take place in January 1944—Thierack succeeded in having me dismissed, and that in the following manner: I was just on a duty trip at the beginning of December 1943. During that time he went to Lammers and reported to Lammers that an application had been made by professors of the city of Hamburg who, he said, had complained that I was still in office. That in other words, would have been colleagues of mine, because I myself was a professor at Hamburg at one time. He added that from the point of view of foreign policy one could no longer maintain the responsibility of keeping me in office, and therefore, he asked that Lammers should suggest my dismissal to Hitler. I was informed about that at the end of December 1943, that is to say, before that conference with Fehr was to take place. At the end of 1943 I was suddenly called on the telephone—I was at that time with my family, it was during Christmas—[and told] that I had to come to Berlin immediately and take Thierack's place temporarily because he wanted to join his wife. Thierack called me into his office and told me, "Hitler has directed that you be dismissed." Upon my question, "Why," he answered that the matter with Fehr had gone so far on account of the application made by the professors from Hamburg that it was no longer bearable to keep me. I told him that he himself didn't believe that, and I wanted to leave the room. Thereupon suddenly he became very friendly and soft and told me, why, of course the matter of that book was just the external pretense, but first of all, in the course of this year and a quarter, I had never succeeded in establishing good relations with the Party Chancellery and the SS. Moreover he said I was accused of having taken part in the funeral of Guertner, which I didn't understand at all, how anybody could be so stupid to charge one with having attended the funeral of an extremely decent former Reich Minister of Justice.

I replied if these are the real reasons, then I was proud of it. Before I left him he again lied to me by saying, yes, he would have liked very much to nominate me for the position of president of the Reich Supreme Court, but Lammers had raised opposition against that. Then a few days later I saw Lammers in order to inquire about the background of the story. Lammers told me just the opposite. It was he, he said, who tried to offer some office of some kind to me, but Thierack had been the person who rejected that. Through these circumstances the separation which had been pending for a long time actually took place, and without a new office, without gratitude, and without any compensation of any kind I left. And in accordance with that was the publication in all German newspapers where the following notice appeared, and I quote: "Change of office in the Reich Ministry of Justice. Upon the suggestion made by the Reich Minister of Justice the Fuehrer, after effecting the transfer of Under Secretary Rothenberger, into Wartestand [Civil Service inactive status] has appointed Ministerialdirektor Klemm, who up to that time was in the Party Chancellery, Under Secretary in the Ministry of Justice."

* * * * * * *

b. Judges' Letters Written by Thierack and Defendant Klemm

TRANSLATION OF DOCUMENT NG-500
PROSECUTION EXHIBIT 90

CIRCULAR LETTER FROM THIERACK TO JUDGES, 7 SEPTEMBER 1942, EXPLAINING THE ESTABLISHMENT AND FUNCTION OF THE JUDGES' LETTERS

The Reich Minister of Justice
3110/2-IVa 4 1902

Berlin W 8, 7 September 1942
Wilhelmstrasse 65
Telephone: 110044
Long Distrance 116516

To:

1. The Presidents of the Reich Supreme Court and People's Court
2. The Presidents of the District Courts of Appeal (except of Prague)
3. The Presidents of the District Courts (with extra copies for the local courts)

For information:

1. The Chief Reich Prosecutor at the Reich Supreme Court and People's Court
2. The Attorneys General
3. The Chief Public Prosecutors

Subject: Judges' Letters

I will, can, and must not tell the judge who is called to preside over a trial, how to decide an individual case. The judge must remain independent in order to be able to carry the full personal responsibility for his decisions. I therefore cannot order him to use a certain legal interpretation but only try to convince him how he can help the nation by correcting or regulating with the aid of the law a life that has gotten into disorder or is ripe to be brought into order.

In this respect the profession of the judge and that of the physician are akin—he gives aid to the compatriot who asks him for help and thus prevents damage to the community. The judge, like a physician, must be able to eliminate the seat of a disease or perform operations like a surgeon.

This conception of the duties of the administration of justice has already been accepted by the German jurists to a great extent. Its practical conclusions, however, have not been fully applied yet in the field of the administration of justice.

To aid the judge in fulfilling his high duty in the life of our people, I have decided to publish the "Judges' Letters." They shall be distributed to all German judges and public prosecutors. These judges' letters will contain decisions, which I consider to be especially worthwhile mentioning on account of result or argumentation. With these decisions I intend to show how a better decision could or should have been found; on the other hand good, and for the national community important, decisions shall be cited as examples.

The judges' letters are not meant to create a new casuistry, which would lead to a further ossification of the administration of justice and to a guardianship over the judges. They are rather aimed at telling how judicial authorities think National Socialist justice should be applied and thereby give the judge the inner security and freedom to come to the right decision.

The contents of these letters are confidential; the chief of an office shall keep them personally, and let every judge and public prosecutor take notice of them against receipt.

For the publication of the Judges' Letters the collaboration of all the judges and prosecutors is needed. I expect suitable decisions from all branches of justice to be presented to me for publication. When published, neither the judge nor the tribunal pronouncing the sentence will be named.

I am convinced that the Judges' Letters will help essentially to adjust the administration of justice uniformly along National Socialist lines.

[Typed] [Signed] DR. THIERACK
[Certified]: [Signed] MASSMUND
As Chief Secretary of the Ministerial Chancery

[Stamp]
The Reich Ministry of Justice

PARTIAL TRANSLATION OF DOCUMENT NG-298 PROSECUTION EXHIBIT 81

THE FIRST ISSUE OF THE JUDGES' LETTERS, 1 OCTOBER 1942

RICHTERBRIEFE [Judges' Letters] Communications of the Reich Minister of Justice, Issue No. 1, 1 October 1942

Confidential

German Judges

According to ancient Germanic interpretation of the law, the leader of the nation has always been its supreme judge. When the leader therefore invests another person with the authority of a judge, this means that the latter not only derives his judicial power from the leader and is responsible to him, but also that leadership and judgeship have related characters.

The judge is therefore also the guardian of national self-preservation. He is the protector of the values of the nation and helps in the annihilation of the unworthy. He regulates those functions of life, which are considered diseases in the body of the nation. Justices vested with absolute authority are essential for maintaining a true national community.

On account of this task, the judge is the direct assistant of the leadership of the State. This position renders him prominent, but also shows the limits of his tasks which cannot, as a liberal doctrine assumed, lie in the supervision of the leadership of the State. For, if a state does not have an organization which grants the leadership to the best, the administration of justice cannot substitute this selection by its activity.

The judge is the embodiment of the wide-awake conscience of the nation. Any state is bound to fall if honesty and common

sense do not form the standard of values in the national community. It is the task of the judge to see that this is done. In rendering judgment he must always show the people his adherence to this rule.

These tasks place the judge in the center of the administration of justice. They show the profession of judges as one of the earliest professions—to be compared with that of the farmer and the soldier. These tasks can only be fulfilled by men who are mentally free and honest, and who possess a high sense of responsibility, shouldering this responsibility gladly, and conforming by their inner and outer bearing to the picture of a judge as the German people see it. The judges must therefore become a corps of judges, which represent an elite of the nation. But this must not lead to the judge keeping aloof from the people; on the contrary he has to live with and among his people and know its needs and sorrows in order to be able to help.

Such a corps of judges will not slavishly cling to the letter of the law. It will not anxiously look for cover by the law, but aware of its responsibility, it will find within the bounds of the law a decision which shall be the best guide for the life of the community.

The war for instance makes demands on a judge, which are totally different from those in quiet peace times. The judge has to adapt himself to these changes. He can only do this when he knows the intentions and aims of the State leadership. The judge must therefore always be in close contact with the leadership of the State. This is the only way to guarantee the performance of his high task for the good of the community, and it prevents the administration of justice—detached from its real problems in the life of the people—from being considered as a body for its own ends. From this ensues the meaning and necessity for the guidance of the administration of justice.

Guidance in the administration of justice does not mean to impose upon the judges a certain view of the law. The judge must remain independent, otherwise he will no longer be judge. But the State can and must lay down the general line of policy, which judges must follow, if the administration of justice shall fulfill its obligations.

I have therefore decided to issue Richterbriefe which will be sent to all German judges and public prosecutors. These Judges' Letters shall mainly contain decisions which I deem to be especially worthy of interest, because of their findings or argumentation. By these decisions I want to show how better findings could and ought to have been arrived at; on the other hand, good

decisions which are essential to the community shall be held out as exemplary.

There is yet another consideration, which caused me to issue these "Judges' Letters"—The outlined view of the judge's tasks has carried its point with most of the German lawyers, its practical effects on the administration of justice, however, has not yet been totally realized and cannot have been fully realized yet in view of the traditional training of lawyers. Therefore, I want to help the judge by means of the Judges' Letters to accomplish his high duties in the life of our nation. I want to impress upon him how he must help and protect the community.

The Judges' Letters are not intended to create a new cult of decisions, which would lead to further formalism in the administration of justice and to subjecting the judges to tutelage. They are only to give an idea of how the leadership of justice wishes to apply National Socialist law, in order to give the judge self-confidence and freedom to find the right decision.

The contents of the letters are confidential; they are handed to each judge and public prosecutor by the chief against receipt.

I am convinced that the Judges' Letters will essentially contribute to the creation of a uniformly directed German corps of judges.

Berlin, 1 October 1942

[Signed] DR. THIERACK
Reich Minister of Justice

1. PUBLIC ENEMIES, ESPECIALLY BLACK-OUT OFFENDERS*

Sentences imposed by several courts in the years 1941–1942

1. A 19-year-old laborer who had been employed by the Reichsbahn [Reich Railroad] since 1941, stole, soon after his appointment in the winter of 1941–1942, during black-out hours, luggage and parcels from the luggage vans of long distance trains, and parcels from mail vans. There were in total 21 charges against him.

The Special Court sentenced him to 4 years' imprisonment as a public enemy.

2. A 34-year-old lathe operator attempted black-out purse snatching at the end of 1941. In the darkness he approached a woman in the street and snatched her handbag off her arm. He was followed and arrested. He has six previous convictions against

* This section of the document discusses the interpretation of the "Decree against Public Enemies," 5 September 1939, reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 188.

him, among which was theft, inflicting bodily harm, and killing by negligence. He had been sentenced in respect of the bodily harm, because in 1931 he had together with a Communist knocked down a National Socialist with a fence pole.

The Special Court did not legally appraise the act as street robbery but as theft, because the woman carried the handbag only loose on her arm, so that the culprit did not have to use force. It regarded him nevertheless as a public enemy, and expressed the view, that the community should be specially protected against him. Yet the sentence imposed was but 2 years' imprisonment.

3. A 29-year-old laborer, who was a shirker and had several previous convictions against him, tried in 1941 to commit black-out purse snatching. He had just been discharged from the hospital as a malingerer and wanted to provide himself with money. He followed two women in the darkness in the street and reached for the purse while passing them, but he could not pull it off, because it was held tightly. In answer to cries for help, some men hurried to the scene and got hold of the culprit.

The Special Court sentenced him to death as a public enemy, and added, that persons needed special protection during the black-out in order to retain the feeling of safety in the country for the people.

4. An 18-year-old culprit W., who had no previous convictions against him raped a soldier's wife during the black-out in 1941. After having visited an inn, he accosted, about midnight while on the way home with his 19-year-old friend P., a young woman who was going home from work at that late hour. She rejected the men and said that her husband was a soldier at the front and that she wished to go home without being molested. W. hit a man, who was standing nearby and who witnessed the incident, several times in the face without cause. Then he dragged the woman into a lane, hit her, and raped her on a bench, breaking her resistance by pretending to have a revolver on him. P. was waiting nearby in the meantime but did not interfere.

The Special Court sentenced W. as a public enemy to death for rape. P. was convicted to 5 years' imprisonment for aiding and abetting the criminal.

Opinion of the Reich Minister of Justice

At a time when the best men of the nation are risking their lives at the front, and the nation is untiringly working for victory, there is no room for criminals who destroy this will of the community. The lawyers therefore must realize that during the war it is their duty to exterminate the traitors and saboteurs on the

home front. The law offers enough expedients for this. The home country is responsible to the front for peace, quiet, and order in the land. This high responsibility lies not least of all, in the hands of the judge. In principle, every crime counts more gravely in wartime than in peace. The special struggle, however, is against the "public enemies" a concept closely confined by the law. When a judge after careful examination of the punishable offense and of the personality of the accused decided that a criminal is to be considered a "public enemy," this serious decision must also be expressed with full severity by the sentence. It is self-evident that a thief who steals goods and property from fellow citizens after the terror raids of our enemies deserves death only. But any other culprit too who commits crimes by taking advantage of the circumstances of war sides with the enemy. His faithless character and his challenge therefore deserve the severest penalties. This applies especially to the cowardly black-out criminal. "I do not want," so the Fuehrer said, "a German woman who may go home from work at night time, to have to watch anxiously that no good-for-nothing or criminal will hurt her, for the soldier has the right to demand that his family, his wife, and his kin at home are protected."

It can be said that the majority of the German judges have fully recognized the demands of the hour. The death sentence which was pronounced by the Special Court on the only 18-year-old criminal who raped a soldier's defenseless wife, also meted out to the shirker who snatched handbags, justly puts the rights of the people in the foreground. There are, however, still cases in which personal consideration of the perpetrator is placed above the interests of the absolute protection of the community. This is shown by the comparison of the present judgments. The cunning handbag robbery at night by the previously convicted perpetrator and the twenty-one thefts of parcels by the 19-year-old worker are not justly punished with 2 and 4 years in the penitentiary. The decisive element here is not whether the taking of the handbag is legally to be considered theft or robbery—which, incidentally does not depend on whether it was carried loosely or pressed tightly to the body—or whether the sexual criminal has done any particular harm. The fact that in wartime he assaults in a cowardly and cunning manner a defenseless woman and that he endangers the security in the blacked-out streets puts him on a level with the traitor. The safeguarding of our community demands that in wartime in such cases punishment should serve, above all, as a deterrent. Here prevention is always better than cure. Every punishment of a "public enemy" which is too mild will sooner or later be detrimental to the community and carries

with it the danger of disease-like spreading and gradual disintegration of our defense. It is always better, the judge exterminates such a bacillus in good time than having to face helplessly a contaminated multitude later on. In the fourth year of war the criminal must not gain the impression that the community relaxes in combating him; he must feel always anew that the German judge fights the internal enemy with the same determination as the soldier fights the external enemy on our fronts.

2. SEXUAL CRIMES COMMITTED AGAINST CHILDREN AND MINORS

Several Verdicts from the Year 1941–1942

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The Opinion of the Reich Minister of Justice

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3. APPLICATION FOR COFFEE RATIONS BY JEWS

Decision of a Local Court of 24 November 1941

In autumn 1940 a special coffee ration was distributed to the population of the town B. Among others a large number of Jews applied for this coffee ration which, however, they did not receive as they were excluded from the distribution *per se*. The food authorities saw in this conduct an offense against the distribution regulations and imposed fines on the Jews. Thereupon several hundred Jews appealed against them and asked for a court decision, so that about 500 identical cases were pending simultaneously with the local court in B. The judge informed the food authorities that in his opinion the imposing of fines could not be upheld for legal reasons—one of which was the statute of limitations—and recommended rescinding them. The food authorities did not share this legal opinion of the judge and refused to rescind the fines but suggested to the court that it mention only the point of limitation in case the fine should be set aside. Thereupon the court rescinded the fine in one case; the other cases were to be dealt with according to prescribed procedure and with reference to this decision.

This ruling, in seven sections and covering 20 pages, contains verbose interpretations of the factual and legal position. The introduction tries to justify in long tirades the length of the reasoning. Then it is set forth in detail that the Jews had been able to register with their grocers *before* the official announcement of the impending coffee distribution, since the distributors had been informed in advance by their respective economic groups.

"The contrary interpretation on the part of the food authorities was absolutely incompatible with the established facts," as the food authorities had "overlooked" various factors. After an entirely immaterial description of the attitude of the individual grocers toward the Jews after the announcement of the decree, the document deals in detail with the investigations undertaken by the food office. The ruling continues that the court had tried in vain to cause the public prosecutor to take over the pending cases and deal with them in the regular manner, but that it had also refused on the grounds that no punishable act had been committed by the Jews, or, at least, that it falls under the statute of limitations. After again dealing with the fruitless efforts of the court to have the food office withdraw the fines, a series of factual and legal questions are declared irrelevant, but nevertheless discussed in detail beforehand. The following nine pages of the ruling deal with the examination of the legal question whether the registration of the Jews must be regarded a punishable act according to the distribution regulations. They arrive at the conclusion that this is not the case and that it would be wrong to prove it "by means of an abstruse interpretation of the law." The long interpretation culminates in the summarizing statement that the Jews had not committed a punishable act.

Opinion of the Reich Minister of Justice

The ruling of the local court, in form and content amounts to pilloring a German administrative authority by the Jews. The judge should have put himself the question: How will the Jews react to this 20-page-long ruling, which certifies that he and the 500 other Jews are right and that he won over a German authority without losing one word about the reaction of our own people to this insolent and arrogant conduct of the Jews. Even if the judge was convinced that the food office had arrived at a wrong judgment of the legal position, and if he could not make up his mind to wait with his decision until the question, if necessary, was clarified by the higher authorities, he should have chosen a form for his ruling which under any circumstances avoided harming the prestige of the food office and thus putting the Jew expressly in the right. The freedom from punishment for the unauthorized coffee registration was, even according to the law then in force, definitely doubtful. The fact that Jews were not entitled to a supply of genuine coffee was self-evident even if it was not specially mentioned in the official decree. Registration had taken place by presentation of a coupon of the ration card and by having this card stamped. If, considering the special circumstances of this case, this had been construed as an abuse of the right to draw

rations, it could have resulted in an affirmation of the punishable character of their act. The impudent, provoking conduct of the Jews would have made it a "particularly serious case." In this case an offense could legally have been assumed. To such an offense a longer statute of limitations would have applied.

A legal view of this kind on the part of the food office need not have been regarded as "untenable," "fabricated," or "abstruse."

Apart from this it was not necessary to point out to the Jew that he was only one of many members of his race who also had complained. Just as superfluous was the information that the food office in the preceding negotiations had refused to withdraw the fines and that the local prosecutor, through its refusal to take up the case, had also shown its opposition to the food office. These points were irrelevant to the ruling. The Jew could perforce only gain the impression of a dissension between the various authorities. Instead of this a few sentences of the ruling, dealing merely with the statute of limitations, would have been sufficient if the judge denied the punishable character of the offense.

The voluminous argument of the case would not even have been necessary if the case had involved a German. The order of the Fuehrer in the decree of 21 March 1942 on the simplification of the law that "court rulings must be given in short and concise form and must be limited to the absolutely essential" was already a wartime necessity. The German fellow citizen does not expect verbose and learned statements from the judge. The various ancillary and incidental considerations which guide the judge in his decision do not interest him. He wants to be informed by a few easily understandable words on what grounds he was found right or wrong.

4. VIOLATION OF FOREIGN-EXCHANGE REGULATIONS BY A JEW

Verdict by a District Court of 26 May 1942

The defendant, a 36-year-old Jew, had in 1936 taken possession of his deceased father's textile firm. In 1938 he emigrated to Holland. In 1941 he was arrested in Amsterdam.

The defendant is guilty of a number of cases of illicit dealings. His activities began when he, as the chief heir of his father, ostensibly renounced his inheritance in favor of his sister who was a foreigner with the intention of depriving the German foreign currency control of the entire domestic and foreign fortune; simultaneously he made an agreement with his sister that everything should remain as it was. From their holdings in a firm in Holland which, as a subterfuge, were transferred to a dummy, the

Jew and his fiancee received about 100,000 Dutch guilders in 5 years, which were not offered to the Reich Bank. He also disposed of the proceeds from various houses without a permit. As for the Dutch firm, which was practically his own, he deceived the Reich Bank for several years by pretending that he had nothing to do with it, and that moreover it was in the red and unable to repay a loan. In doing so he cheated the German authorities by producing forged balance sheets. Finally, after the Aryanization of his firm, he tried to persuade the new owners, former employees of his, through reduction of his claim by 80,000 RM, to bring 40,000 RM across the border to Holland without a permit. When his property was registered as "Jewish property" the defendant concealed considerable assets. He defended himself mainly by asserting that all these offenses were only the continuation of his father's violations of foreign currency regulations and that he was under the influence of his sister.

"For the reason given by the defendant" the district court did not find it a grave offense in the sense of article 42 of the Foreign Exchange Regulation of 4 February 1935, nor of article 69 of the Foreign Exchange Regulation of 12 December 1938. It sentenced the defendant to a total of 2 years' imprisonment, making allowance for the pretrial detention and to a fine of 9000 RM.

The verdict, in the accompanying opinion, discusses first of all facts that might be extenuating and mentions that the defendant had not previously been convicted; he had acted under a certain coercion, owing both to his father's doings and to his sister's obstinacy. One offense by necessity led to the next. Through his confession he had considerably facilitated clearing up the facts. On the other hand, the long duration of his offenses, his fraudulent conduct toward the German authorities, and the requests he made of his former employees were cited as demanding a heavier punishment.

Opinion of the Reich Minister of Justice

The court applies the same criteria for imposing punishment as it would if it were dealing with a German fellow citizen as defendant. This cannot be sanctioned. The Jew is the enemy of the German people, who has plotted, stirred up, and prolonged this war. In doing so, he has brought unspeakable misery upon our people. Not only is he of different but of inferior race. Justice, which must not measure different matters by the same standard, demands that just this racial aspect must be considered in the meting out of punishment. Here, where a profiteering transaction typical of the defendant as Jew and to the disadvantage of the German people had to be judged, the verdict in awarding the

907802—51——36

punishment must take into consideration in the first place that the defendant had deprived the German people for years of considerable assets. He had, as innumerable members of his race have done before him, ruthlessly and for deliberate selfish reasons violated the most vital German interests by profiteering and fraud. He has abused Germany's hospitality, which had enabled him and his father to pile up a huge fortune, and finally has not hesitated to instigate German men who depended on him economically to serious violations of foreign currency regulations, violations which endangered their very existence. From these general points of view of the German people the question had to be clarified whether this was a particularly serious case; it did not suffice here to rely solely on the rather unconvincing statements of the defendant himself, who could not have been under coercion for 4 years, but acted in his own interests and on his own initiative. This typical Jewish parasitical attitude required the most severe judgment and heaviest punishment. The reflections of the Jew and his family, in this respect, are of very minor importance.

5. CONCEALMENT OF THE REQUIRED DESIGNATION AS JEW

Verdict of a Local Court of 24 April 1942

A Jewish proprietress of a boarding house had failed to apply for the addition of the surname Sara in the official telephone directory 1940 and 1941. The local court sentenced her to a fine of 30 RM, or an alternative of 10 days' imprisonment. In the opinion it says: According to the ruling of the local court, Jewesses are obliged to add the name Sara to their names in the telephone directory. Therefore, the Jewess is to be fined. The reason for the mild sentence was the fact that sometimes individual judges had not ruled in conformity with the local court.

Opinion of the Reich Minister of Justice

The verdict contains no grounds for the sentence. The reference to a ruling of the district court does not free the judge from offering an opinion of its own; on the contrary, it rather gives the impression as if the judge had half-heartedly and reluctantly submitted to the authority of the district court. The verdict should give the essence of the grounds in a short and concise form. Here the essence is the following: when she registers in the official telephone directory, the defendant enters into general legal and commercial life as the proprietress of a boarding house. The registration in the telephone directory is in the nature of the sub-

scriber's visiting card for telephonic business relations. Application for change of name is therefore absolutely necessary in order to avoid mystification.

Moreover the grounds for awarding the punishment are not sufficiently set forth. The verdict must make a clear decision—if the court finds an action punishable, then it has to award the punishment appropriate for this action regardless of whether other courts have, because of incorrect deductions, acquitted the culprit. The idea that the defendant did not have to expect a sentence with certainty because the court rulings, owing to deviating verdicts, were not yet uniform does not justify leniency. The court which is lenient because of one single wrong judgment actually compromises with the defendant. But what she did was a typically Jewish camouflage in her business dealings. It is surprising that people are only gradually realizing this.

TRANSLATION OF DOCUMENT NG–315
PROSECUTION EXHIBIT 82

EXTRACTS FROM ISSUE NO. 3 OF THE JUDGES' LETTERS, 1 DECEMBER 1942, SUMMARIZING TWO CASES AND GIVING IN EACH CASE THE OPINION OF THE REICH MINISTER OF JUSTICE

* * * * * * *

13. FORGERY OF A TESTIMONIAL BY A CLERK

Judgment of a local court of November 1942

A 19-year-old, so far unpunished clerk, who had worked in a firm of machine tool makers wanted to be employed in a larger enterprise. For this purpose she made herself out a testimonial of her present firm in which she confirmed that she was efficient and able to cope with an "independent leading position." She forged the signature of her chief by tracing it from the signature folder and copying it with ink. This brazen forgery was immediately discovered when the testimonial papers were submitted to the new firm, to which she had been referred by the labor office.

The prosecution sees in the action of the part of B. severe forgery of documents (pars. 267 and 268 of the Reich Criminal Code) on account of the fact that the forgery was committed for monetary gain. The proposed penalty was 2 months' imprisonment and a fine of 30 reichsmarks.

The local court saw in this offense the given facts as contained in the former paragraph 363 of the Reich Criminal Code which provided imprisonment or a fine up to 150 reichsmarks for forgery of testimonials for the purpose of improvement of one's position.

As this ruling, however—this is what it says in the judgment—has been rescinded through the law of 4 September 1941 and has been substituted by the new paragraph 281 of the Reich Criminal Code (misuse of identity papers)—which however does not apply in this case as the testimonial is not a document of identification—the court has only to regard the action of B. either as a grave forgery of a document according to paragraphs 267 and 268 of the Reich Criminal Code or "again to apply the provision of paragraph 363 of the Reich Criminal Code despite its having been cancelled and to consider it still in existence in accordance with the sound sentiments of the people and in accordance with the will of the legislator insofar as the provisions of paragraph 281 of the Reich Criminal Code are not complied with." The court assumed the alleged second possibility. "Working on the principle that nowadays the judge is no longer obliged to adhere slavishly to the exact letter of law, the court found the accused guilty of having forged a testimonial according to paragraph 363 of the Reich Criminal Code."

The sentence was 3 weeks' arrest.

On passing sentence the judge remarked that the convicted person may be placed on probation, which was later granted.

Opinion of the Reich Minister of Justice

It is correct that nowadays the judge should no longer have to adhere strictly to the letter of law in a slavish way. This freedom in applying the law should, however, not lead the judge to base judgment on a law, which the legislator has cancelled. Moreover, the manner in which paragraph 363 of the Reich Criminal Code is applied assumes a law which is still in existence. Paragraph 363 of the Reich Criminal Code was cancelled because particularly during the war it was no longer possible to counter all forgeries of certificates generally with the purpose of furthering one's advancement merely by light contravention punishment. The many opportunities of changing one's job frequently these days offer the temptation to facilitate this change of position through such forgeries of testimonials. Such temptation must therefore be countered by a threat of more severe penalty than was provided by the former paragraph 363.

This generally more severe measure applied to such cases does not, however, prevent from justly taking into consideration the particular circumstances of individual cases within the framework of now existing law codes, if the offense as in this instance is really a mild one. The judge sensed correctly that B.'s offense corresponded to the degree of guilt of the former paragraph 363. He could have provided for this also under existing laws.

B. is a yet young and inexperienced girl of whom one may assume that she was not entirely conscious of the extent of her deed. This impression is confirmed by the primitive means of the forgery. B. endeavored to leave her present firm in order again to work in a larger enterprise. For this reason she wished to make her recent activity appear to the best advantage. It cannot simply be assumed that she thought of a better paid position in doing so, especially as it is not so simple to secure such a position under wage scales in force at present. In consequence, it could be rejected that she sought a monetary gain. Thus only an ordinary document forgery could be dealt with in accordance with paragraph 267 of the Reich Criminal Code. As the penal code did not demand imprisonment, having regard to the special circumstances of this case, the judge could have imposed a fine according to paragraph 27b of the Reich Criminal Code.

The payment of this fine would have more forcibly brought home to the still young B. the antisocial action of this deed rather than an imprisonment, which the judge immediately postponed.

14. REFUSAL BY A SCHOOL CHILD TO GIVE THE GERMAN SALUTE

Decree by the Court of Guardians of 21 September 1940

An 11-year-old girl is conspicuous in school through continuously refusing the German salute. She bases this on her religious convictions and cites in explanation some passages from the Bible. In matters concerning the Fuehrer she appears altogether disinterested.

The parents, who also have a 6-year-old daughter, approve of this behavior of the child and obstinately decline to influence the child to the contrary. They also refuse to give the German salute and point to the passage in the Bible, "Do nothing with an upraised hand for it displeases the Lord." They adhere to this in spite of advice by the court and the director of the school. The mother refuses altogether to discuss it with the child. The father is willing to do so, but says that the child should decide herself. The parents prove themselves to be adversaries of the National Socialist State also in other respects. They possess no swastika flag. They did not enter their child for the Hitler Youth: they were expelled from the National Socialist Public Welfare Association, because they will not support the collections, despite an adequate income of the man. Nevertheless they deny being adversaries of the movement. The juvenile board suggested that the parents should be deprived of the right to bring up the two children on account of their attitude.

The guardianship court refused to carry out this proposal and merely made an order for supervision by a probation officer.

In the explanation, the court stated that it had not been proved that the parents were adversaries of the National Socialist movement or that they really had fought against it; they were merely "not sympathetic to the movement and not willing to promote it."

It was stated furthermore that "the parents are only in so far responsible for their attitude toward the National Socialist movement as they act contrary to the relevant penal laws." The parents must realize that the children must be brought up in the National Socialist spirit and that the schools have instructions to educate them in that spirit. If the parents are not willing to bring up their children in that spirit themselves, or if they believe that their religious views do not allow them to bring up their children in that spirit, the least that must be demanded from them is not to oppose National Socialist education at school. Owing to the fact that the child is well brought up in other respects and that—judging from the court's personal impression—the parents are "of absolutely reliable character," it may be assumed that in future they will not give the school any trouble with respect to education.

The court of appeal rescinded the decision of the guardianship court and deprived the parents of the right to look after their children, as they are not fit to bring them up.

Opinion of the Reich Minister of Justice

The judge at the guardianship court in his decision misunderstood the principles of National Socialist education of youth.

Today, the education of German youth is based on the home, the school, and the Hitler Youth (law regarding the Hitler youth of 1 December 1936). They have to cooperate and each of them has to carry out that part of the educational task allotted to him by the community. The aim of this joint work consists in educating the young people in body, in mind, and morally in the National Socialist spirit for service to the nation and for the community.

This aim can be reached only by joint cooperation of the home, the school, and the Hitler Youth. Any opposition to and any deviation from this education endanger the common aim. An essential part of this education as well as a particular responsibility have been laid into the hands of the parents. They are united with the child by ties of blood. The child lives close to them and constantly looks to the habits and the example of the parents. To educate means to guide. To guide means to set an example by your way of life. The child models his way of life on the example

of his parents. What the child hears and sees there, especially in early youth, it becomes accustomed to by degrees and accepts it as a rule of life. Therefore, the educational aim of the National Socialist State can only be achieved if the parents, conscientiously and aware of their responsibility, give their child in thought and deed a model example for its behavior in the community life of our nation. To this education of German man or woman belongs also the imparting of respect and awe for the symbols of the State and the movement at an early stage. Here, too, the community expects active cooperation on the part of the parents. A reserved neutral attitude is as harmful as attacking the National Socialist idea. Thus, indifference to the training of a patriotic member of the national community means neglect of duty on the part of the parents and endangers the educational aim for the child, even if this is not immediately apparent in each case. For this reason, it is not enough that in the present case the parents will not oppose the school in the future, they are supposed to cooperate actively in their children's education as a whole. Thus, the responsibility of the parents does not start where its violation becomes punishable. The child is often being endangered if the parents consciously oppose the educational work of the community. That was the case here. Who continues to refuse the German salute on account of erroneous religious beliefs, who separates himself from the great social work of construction of national socialism without any reason, and who purposely withholds his children from the Hitler Youth and never takes advice, of him it can no longer be said that he merely "does not sympathize" with the movement and does not promote it. He attacks it by his opposition and is its adversary. This is proved by his convictions and by his inner attitude.

Thus, the judge of the guardianship court ought to have deprived them of the right to look after their children simply by consideration of the fact that parents, who openly profess the ideas of the "Jehovah's Witnesses," are not fit to educate their children in the spirit of national socialism.

TRANSLATION OF DOCUMENT NG–498
PROSECUTION EXHIBIT 93

LETTER FROM THIERACK TO PRESIDENTS OF VARIOUS DISTRICT COURTS OF APPEAL, 17 NOVEMBER 1942, CONCERNING MANNER OF ACQUAINTING JUDGES AND PROSECUTORS IN ALSACE, LORRAINE, AND LUXEMBOURG WITH THE JUDGES' LETTERS

The Reich Minister of Justice
m Rb./34/42

Berlin W 8 17 November 1942
Wilhelmstrasse 65
Tel. 110044
Long distance: 116516

To the Presidents
of the District Courts of Appeal and the Attorneys General
in Karlsruhe, Cologne, and Zweibruecken

Subject: Judges' Letters.

May I ask you to make it a habit to give the judges and prosecutors in Alsace, Lorraine, and Luxembourg, too, an opportunity to acquaint themselves with the Judges' Letters. In cases where judges and prosecutors are suspected of political unreliability, they are to be excluded in a suitable manner from the list of subscribers to the Judges' Letters.

[Typed] [signed] DR. THIERACK
Certified:
[Signed] BEITZ
Clerk

[Seal]
Reich Ministry of Justice

PARTIAL TRANSLATION OF KLEMM DOCUMENT 33
KLEMM DEFENSE EXHIBIT 33

ANNOUNCEMENT OF MARTIN BORMANN, PARTY CHANCELLERY CHIEF, 2 DECEMBER 1942, REQUESTING GAULEITER TO INFORM THE PARTY CHANCELLERY OF THEIR OPINIONS ON THE JUDGES' LETTERS AND OF GOOD AND BAD VERDICTS*

p. 377 ff.
Judges' Letters

R. 187/42
2 December 1942

Party Comrade Dr. Thierack, in his capacity as Reich Minister of Justice, appeals to all German judges and public prosecutors, by way of confidential Judges' Letters, to bring German justice in line particularly with the political exigencies of justice. I will see to it that the Judges' Letters are passed on to the Gauleiter, and I request them to give their opinions, where necessary, on all proposals and suggestions made by the Reich Minister of Justice in these Judges' Letters.

* This announcement was taken from "Ordinances, Regulations, Directives," 1942, (vol. II, p. 377 ff.), issued by the Nazi Party Chancellery and published by the Central Publishing Office of the NSDAP, Frz. Eher Successor, G.m.b.H., Munich.

Furthermore, I request the Gauleiter to inform the Party Chancellery of good and bad verdicts, as far as they come to their knowledge, and as far as they may be used in the Judges' Letters. We will then discuss the relevant parts with the Reich Minister of Justice.

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TRANSLATION OF DOCUMENT NG-676
PROSECUTION EXHIBIT 178

LETTER FROM DEFENDANT KLEMM TO THE PRESIDENT OF THE STUTTGART COURT OF APPEAL, 5 JULY 1944, STATING SENTENCES IN THAT AREA WERE TOO LENIENT, PARTICULARLY IN CASES IN WHICH DEFENDANT CUHORST PRESIDED*

COPY

The Reich Ministry of Justice — Berlin W 8, 5 July 1944
IV secret I 5045/44

To the
President of the District Court of Appeal
(Oberlandesgerichtspraesidenten)
and to the Attorney General
in Stuttgart

Subject: Practice [Rechtsprechung] of the District Court of Appeal
(Oberlandesgericht) Stuttgart
in cases of defeatism

For some time now the practice of the criminal senate of the District Court of Appeal Stuttgart has given me cause for grave thoughts with regard to matters of defeatism. In the majority of cases the sentences are considerably too mild, they do not sufficiently bear in mind the thought of the protection of the people which must govern the punishment of defeatism, and are in an incompatible disproportion to the sentences which are in similar cases passed by the People's Court and by other district courts of appeal. I would refer especially to the following sentences which lately attracted my attention:

1. Criminal case against Friedr. Linder—OJs. 205/43–, sentence of the 2d criminal senate of 7 January 1944 (President of the Senate Dr. Kiefer, District Court of Appeal Counsellor (Oberlandesgerichtsrat) Dr. Stuber, and Hegele, presiding officer of a

* The technical German term for this type of letter was "Lenkungsbrief" ("guidance letter" or "directing letter"). They differed from the "Judges' Letters" of Thierack insofar as they were not circulated generally but rather addressed to specific courts. See the extracts from the testimony of defendant Klemm reproduced later in this section for discussion of these letters.

chamber at the court of appeal (Landgerichtsdirektor)). You made a report under date of 28 April 1944 on this case on the sentence. In view of the danger and of the frequency of the statements made, I must maintain the interpretation already expressed in my decree of 15 March 1944—IV secret I 5045 b/44—that the defendant, a foreigner, deserved a severe sentence of penal servitude. I have therefore directed the files to the Chief Reich Prosecutor at the People's Court to examine the question whether the extraordinary objection should be applied against the sentence.

2. Criminal case against Karl Unger—OJs. 203/43. Sentence of the 1st penal senate of 22 February 1944 (President of the Senate Cuhorst, Oberlandesgerichtsrat Dr. Stuber, and Oberlandesgerichtsrat Eckert).

The defendant is an old active Communist who apparently remained an activist also after the assumption of power and who has not given up his former opinions. His age and the illness, to which you refer in your statement of 17 May 1944, did not prevent him again to make malicious Communistic oral propaganda at an especially dangerous time. I must, in these circumstances, consider the sentence passed of 2 years' penal servitude, as being much too mild. I have therefore directed this case also to the Reich Chief Prosecutor at the People's Court.

3. Criminal case against August Jooss for aiding and abetting the enemy—OJs. 41/44—judgment of the 1st penal senate of 14 April 1944 (President of the Senate Cuhorst, Landgerichtsdirektor Dr. Bohn).

The foul defeatist statements made to the French civilian worker were dangerous to such a degree that even the mentally deficient defendant must have known about the consequences, and they show a frightening measure of lack of national dignity. The sentence passed of 2 years' penal servitude must in these circumstances be described as inadequate.

4. Criminal case against Johann Kornmayer—OJs. 31/44. Sentence of the 1st penal senate of 24 April 1944 (President of the Senate Cuhorst, Landgerichtsdirektor Dr. Bohn, and Oberlandesgerichtsrat Dr. Stuber).

The reasons aggravating the punishment which were appropriately stated in the sentence should have resulted in sentencing the defendant, an old Marxist, to a considerably higher sentence than 3 years' penal servitude.

5. Criminal case against Paul Friebel—OJs. 32/44—sentence of the 1st penal senate of 4 April 1944 (President of the Senate Cuhorst, Landgerichtsdirektor Hegele, and Oberlandesgerichtsrat Eckert).

The defendant spoke in an especially critical period, in favor of a capitulation after the Italian example. I cannot accept the sentence of 1 year's prison term as a sufficient punishment.

6. Criminal case against Clothilde Radspieler—OJs. 26/44—sentence of the 2d senate of 9 March 1944 (President of the Senate Cuhorst, Landgerichtsdirektor Payer).

The sentence passed of 1 year's prison term is not in proportion with the particularly dangerous remarks made, even taking into account the mitigating reasons of the personality of the defendant.

7. Criminal case against Heinrich Brechtel—OJs. 221/43—sentence passed by the 1st penal senate on 24 February 1944 (President of the Senate Cuhorst, Oberlandesgerichtsrat Dr. Stuber, and Oberlandesgerichtsrat Eckert).

There are considerable doubts about the negation of the inner facts of the case, the defeatism, in view of the political past of the defendant and the undisputable meaning of his remarks. In any case the sentence of 1 year's prison term cannot be regarded as sufficient in the case of this old Marxist who saw a new light dawn after the fall of the Duce and who openly expressed his hostility towards the State.

8. Criminal case against August Meier—OJs. 14/44—sentence of the 1st penal senate of 26 April 1944 (President of the Senate Cuhorst, Landgerichtsdirektor Dr. Bohn, and Oberlandesgerichtsrat Dr. Stuber).

In this case also the especially dangerous remarks of the defendant made to the wife of a soldier and to a soldier have been punished with a sentence of 1 year's prison which sentence is in no way satisfactory. I intend, also in the cases 3 to 8, to submit the files to the Reich Chief Prosecutor at the People's Court for examination of the question whether the extraordinary veto should be applied against the sentences passed.

9. Criminal case against Maximilian Seebacher—OJs. 196/43—judgment of the 2d penal senate of 10 February 1944 (President of the Senate Dr. Kiefer, Oberlandesgerichtsrat Dr. Sick, and Oberlandesgerichtsrat Dr. Stuber).

In the case of this defendant who, as a former Marxist, openly expressed his hope for an overthrow by violence, a severe penal servitude sentence would have been appropriate in place of the 2 years' prison. In this case, however, for the reasons mentioned in your statement of 27 and 28 April 1944, I shall put aside my objections and refrain from further action.

10. Criminal case against Leo Graf—OJs. 22/44—judgment of the 1st senate of 22 February 1944 (President of the Senate

Cuhorst, Oberlandesgerichtsrat Dr. Stuber, and Oberlandesgerichtsrat Eckert).

This defendant who had repeatedly propagated the abdication of the Fuehrer, would have deserved a considerably severer sentence than the 10 months of prison term passed. For the reasons stated by you, Attorney General, in your report of 8 May 1944, the sentence passed may, however, be accepted as just adequate.

11. Criminal case against Alois Baum—OJs. 22/43 of the 1st penal senate of 25 February 1944 (President of the Senate Cuhorst, Oberlandesgerichtsrat Dr. Stuber, Oberlandesgerichtsrat Eckert).

This defendant, particularly as an old Party member, should have shown more self-discipline. The annoyance about his treatment at the post office was certainly not sufficient reason to make such foul defeatist remarks. In view of the danger of these remarks, the sentence of 2 years' prison term demanded by the representative of the prosecution would at least have been appropriate. In view of the serious physical ailment of the defendant I shall, however, refrain from any further action.

12. Criminal case against Karl Peter—OJs. 28/44—sentence of the second penal senate of 18 April 1944 (President of the Senate Dr. Kiefer, Oberlandesgerichtsdirektor Dr. Sick, and Oberlandesgerichtsrat Dr. Stuber).

The sentence of 2 years' penal servitude passed on this defendant appears to me precariously mild. Even if he be a mentally somewhat deficient boaster he has, in an attitude of hostility toward the State, continually incited others in an especially hateful manner. I shall, however, refrain from submitting the files to the Reich Chief Prosecutor.

At the meeting at Kochem I requested the President of the Senate to explain, in what manner in the fifth war year cases of defeatism should be tried. I believe that I may now expect that the District Court of Appeal (Oberlandesgericht) Stuttgart will also pass judgments accordingly. It is indispensable that you, President of the Oberlandesgericht and you, Attorney General, will in future direct your special attention to these criminal cases. I further request you, Attorney General, to report to me until further notice when submitting indictments for defeatism, what sentence you intend to demand in the main trial so that I may point out possible objections with regard to the measure of punishment.

As deputy
Certified: [Typed signature] KLEMM
[Typed signature] GRUNDMANN
First Judicial Secretary

PARTIAL TRANSLATION OF DOCUMENT NG-627
PROSECUTION EXHIBIT 474
(Also Rothenberger Document 73
Rothenberger Defense Exhibit 7)

LETTER OF DEFENDANT KLEMM TO THE PRESIDENT OF THE HAMBURG DISTRICT COURT OF APPEAL, 1 MARCH 1945, STATING THAT SENTENCES IN CASES OF "UNDERMINING THE MILITARY EFFICIENCY" OF GERMANY HAVE BEEN TOO LENIENT

The Reich Minister of Justice
IV g-23-3118/45

Berlin W 8, 1 March 1945
Wilhelmstrasse 65
Telephone: 41 00 44
Long distance 11 65 16

(Stamp)
Hanseatic District Court of Appeal
Received: 9 March 1945

To the

President of the District Court
of Appeal
and the
Attorney General
in Hamburg

Subject: Too lenient sentences and sentences proposed by the prosecution in cases of undermining the military efficiency

I have observed for quite some time that the sentences passed and to some extent also the sentences proposed by the prosecution at the Hamburg District Court of Appeal in cases of undermining the military efficiency (offenses under par. 5, art. 1, No. 1, Extraordinary War Penal Ordinance) are dangerously lenient and below the Reich average. With unusual frequency I have had to decide therefore to propose extraordinary objection to sentences pronounced by the District Court of Appeal. Recent sentences submitted to me which appear to be too mild, cause me to draw your attention to the particularly lenient sentences passed in the following cases:

1. O. Js. 184/44 (IV g-23-3118/45) against Bastian u.T.*

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The judge in charge as well as the deputy of the attorney general must proceed from the fact that public undermining the

* A list of 28 more cases follows.

military efficiency is punishable by death, according to article 5, paragraph 1 of the extraordinary war penal ordinance;* only in less serious cases may the death penalty be waived. Therefore, the death penalty has to be demanded not only if an especially serious case is under consideration, but an offense of average gravity is sufficient to render the provisions of article 5 of the ordinance applicable. Only those cases can be considered less serious, where the gravity of the offense is below average. The jurisdiction of the Reich Supreme Court has developed the principle that a less serious case can be considered as such only "if the facts of the case distinguish it fairly clearly from the usual type of the punishable act in question, in favor of the accused and if the over-all assessment of the circumstances, especially the offender's personality and the circumstances which might have induced him to commit the offense, justify a deviation from the regular jurisdiction" [handwritten: "usual punishment"]. This principle also applies to cases of undermining the defensive power with the reservation that on account of the particular danger in wartime far less importance can be attributed to extenuating circumstances arising from the personality of the criminal than in connection with other crimes.

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It is justified that the sentences should go by the effect of the remarks. In some sentences remarks can be found like, "Serious harm has not resulted from his action." I doubt whether in such cases the repercussions of the remarks have been followed up to the end. Their effect on the audience can be determined through their interrogation; however, it is difficult to determine whether this audience has passed on the remarks, and what impression they made on third and fourth persons. Reasons of this type are therefore only justified if extensive investigations with definite results have been instituted.

In the sentences cited above there are among the reasons for the award of punishment, statements about the personality of the offender, the extenuating consequences of which are doubtful, for instance—

"Especially hard life."

"Uprooted by the Russian revolution."

"Lets himself go frequently because of his rather surly nature."

* This is the abbreviated designation for the "Decree concerning special criminal law in time of war and special emergency," signed on 17 August 1938 but not promulgated until 26 August 1939. The pertinent provisions of article 5 of this law, which define the crime of "undermining the German military efficiency" are reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 184.

"He has been a good comrade."

"People with a disorder of the stomach, as we know from experience, are inclined to be disgruntled."

"He may have been annoyed about a certain phrase in the radio lecture in question."

"He had to suffer under the Jewish boycott movement during his activities abroad."

(That should rather be a reason for more severe punishment).

"The accused has been happily married to her husband, a veteran of the movement. She maintains she also got along very well with her husband as far as political matters were concerned."

(That, too, in consideration of the grave utterances—OJs. 275/44—should not serve as an extenuating but as an aggravating reason, as on account of living together with a veteran of the movement, the woman should have been better educated than others in National Socialist sentiment and thought.)

Please discuss the sentences as well as my opinion about them in the proper way with the judges and public prosecutors in question, and see to it that in all cases of undermining the military efficiency the required severe punishment will be meted out in your area, too.

Acting
KLEMM

Certified:
[Signed] SCHREIBER
Clerk

[Stamp]

Reich Ministry of Justice
Chancellery of the Minister

EXTRACTS FROM THE TESTIMONY OF DEFENDANT KLEMM*

DIRECT EXAMINATION

* * * * * * *

DR. SCHILF (counsel for defendant Klemm): Now we have finished with the group of questions which concern the Party Chancellery. Now, we are coming to the last phase, that is, your

* Further extracts from the testimony of defendant Klemm are reproduced in sections V C 1 a, V C 3 d, V D 2, and V F.

work as Under Secretary of the Reich Ministry of Justice.* The Tribunal knows when you became Under Secretary. Now, I am asking you, did you, yourself, have any influence on your appointment to be Under Secretary in January 1944?

DEFENDANT KLEMM: No, I did not. During the last 3 months of 1943 I heard Thierack say to me that he was thinking it over whether he should propose me to be his Under Secretary; then, I heard nothing more. I only told the head of my department at the Party Chancellery about that remark of Thierack's.

* * * * * * *

Q. Mr. Klemm, we shall now discuss the subject of Judges' Letters and also the so-called Guidance Letters [Lenkungsbriefe]. You know that the prosecution submitted a very extensive amount of evidence in regard to this subject.

First I want to ask you about the Judges' Letters. In what manner did you participate in Judges' Letters?

For the information of the Tribunal, I would like to cite the documents that are concerned with this question. They are Exhibits 81 through 86, 90, and 94 to 96 inclusive. The NG numbers are given on the list which I have submitted. Since the documents do not have to be discussed individually, I believe it is sufficient to refer to exhibit number.

Please answer my question, Mr. Klemm.

A. The Judges' Letters had already been issued for more than a year at the time when I became Under Secretary. I cannot say anything about the history of their origin. My participation was limited to having a carbon copy of the finished Judges' Letters submitted to me in draft form. Thierack was given a copy at the

* Klemm and his counsel divided Klemm's direct examination principally into four phases of activity during the Hitler regime. Klemm testified that the first phase included two different assignments. From 1933 until March 1935, he was personal Referent and adjutant to Thierack who was at that time, Minister of Justice for Saxony. From March 1935 until he was conscripted as a soldier, Klemm testified that he was an official in Department III (later Department IV) of the Reich Ministry of Justice in Berlin. He testified that here he reached the rank of ministerial counsellor and acted as liaison officer between the Ministry and the supreme leadership of the SA (Storm Troops) of the Nazi Party. The second phase, Klemm testified, was an assignment on the staff of the German civilian administration in the Netherlands from July 1940 to March 1941, where he introduced German penal administration for German citizens in Holland and acted as liaison between Reich Commissioner Seyss-Inquart and the Dutch administration of justice. Klemm testified that the third phase was from 17 March 1941 to January 1944. During this period he was on the staff of the deputy of the Fuehrer (Rudolf Hess, until Hess flew to Scotland on 10 May 1941) and then on the staff of the Party Chancellery (which was created with Martin Bormann as its chief after Hess' flight to England). Here Klemm was the chief of Group III–C, administration of justice, of the Party Chancellery. (See Klemm's testimony reproduced in section V D 2.) Klemm testified that the fourth and last phase began when in January 1944, Thierack, at that time Reich Minister of Justice, had him appointed Under Secretary in the Reich Ministry of Justice as successor to defendant Rothenberger. (See the extracts from the testimony of defendant Rothenberger reproduced in section V C 3 a.) In 1944 and early 1945, Klemm resided in Theirack's house in Berlin.

same time. When looking it over, I had to start from the point of view of not only the selection of the cases which had to be treated and the subjects, but also of the fundamental opinion of Thierack which had already been laid down by him in advance. Technical changes would have been of little avail, since Thierack looked at these drafts word for word and changed them considerably. He regarded the Judges' Letters as his own exclusive province.

Moreover, of the letters which the prosecution has submitted here, I myself participated only in the Judges' Letters, Document NG–321, Prosecution Exhibit 86.* All of the other letters date from the time prior to which I was Under Secretary.

Q. The prosecution regards the Judges' Letters, from the point of view of their contents as well as their form, as an illegal pressure exercised on judges and jurisdiction at that time. It asserts that it was a serious intervention into the independence of judges. When you were concerned with the Judges' Letters, did you consider that effect? Did you fear it, or did you support it, or did you see those matters from a different point of view than the prosecution asserts here?

A. I wish to say the following about that. The thought never occurred to me that the impression could be created at all which the prosecution today raises as a charge. The sentences were incorporated into the Judges' Letters anonymously, that is to say, without stating the name of the court, without stating the name of the condemned person or even the name of the judge, or the time. Through that, it was intended to be emphasized, especially by this means, that the question of general interest and not the individual case was at stake, nor the praise or the blame of a judge. By the manner in which these matters were incorporated into the Judges' Letters, in particular, the judge could not feel himself being addressed directly, as usually occurs in legal journals, in which these sentences are published in the legal press with the full naming of the court, the file number and the date, and then there usually follows the discussions of the opinion.

That the Judges' Letters were confidential was not due to the fact that they had to be afraid of showing themselves in public, or that something that was incorrect was supposed to be covered up. The reason was rather the following; the truthful presentation of the case, and they were not hypothetical cases reported in the Judges' Letters, but those which had actually occurred. Thus, I am saying that the truthful presentation of a case could

* This is a Judge's Letter, issued for March and April 1944. It was entitled "Plunderers and public enemies during air raids," and contains 26 case histories with comments by the Reich Minister of Justice. It is not reproduced herein.

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not always keep the judicial decisions anonymous, but it was intended to avoid—also to the advantage of the person who was condemned—that he not all over again be exposed to public criticism. Furthermore, it was also intended to prevent that the public may learn of the wide and general criticism of one court by another.

The National Socialist press, in its total character, was exclusively hostile to the administration of justice, and the administration of justice in particular had to suffer the most unbelievable attacks in the Nazi press. The press would have jumped at these Judges' Letters in order to criticize the administration of justice, and would have said, "The offices of the administration of justice themselves state how wrong the attitude of the administration of justice is." Above all, however, it was intended to be avoided that the Judges' Letters would be interpreted in an entirely wrong direction—that is, through the general public—in clemency pleas, that in a false lay comparison, by referring to Judges' Letters, a claim for a pardon would be raised.

In addition to that, the Judges' Letters were intended to be the basis for a friendly discussion between the highest authorities of the administration of justice and the individual judge. Judges and prosecutors were requested expressly—by the Judges' Letters themselves—to address requests in regard to the Judges' Letters directly to the Minister of Justice, and they were told that they were not forced to go through channels. Every judge and prosecutor was supposed to be a direct collaborator in these Judges' Letters, and in this direct way letters reached the Ministry of Justice.

* * * * * * *

Q. We can now interrupt the subject of the Judges' Letters. May I inform the Tribunal I intend to submit more evidence in my document book in regard to this subject. Now we come to two so-called guidance letters which bear your name, Document NG–676, Prosecution Exhibit 178 and Document NG–627, Prosecution Exhibit 474.* These letters concern information issued by the Reich Minister of Justice which you signed as Thierack's deputy. Witness, the first went to the president of the district court of appeals in Stuttgart. That is Exhibit 178. The second one is to the president of the district court of appeals in Hamburg. That is Exhibit 474. The contents of these documents show that undermining of military efficiency was the subject. The sentences by these courts of Stuttgart and Hamburg were criticized as being too lenient by the minister—that is by you—because they were

* Guidance letters of 5 July 1944 and of 1 March 1945 reproduced earlier in this section.

signed by you as deputy. Please describe to the Tribunal how these two letters came about.

A. Undermining of military efficiency was regarded as particularly dangerous. The reason for it was the experiences which Germany had in 1918 when the German armies were far in enemy territory and through the failure at home sufferable peace was prevented. Therefore, undermining of military efficiency was already in 1939 introduced by law as a subject for penalty. Care was to be taken that the will for tenacity and the inner strength and hope and faith in a sufferable end of the war would be maintained. In view of the successes which the German Wehrmacht had the first years of this war and also during the middle of the war, we hardly heard anything about reverses at that time with the exception of Stalingrad. Thus, this crime never occurred. Only toward the end of the war when the military situation got worse, the prosecution had to send the indictment and the opinion to the Ministry of Justice. These matters were handled in the Referat, the department of Franke, in order to get a uniform picture of the jurisdiction. It was also important to pay attention to the fact that the penalties were uniform in the different districts of the Reich.

If it happened that in individual cases there were considerable misgivings against the legal evaluation or the extent of the penalty, the files were submitted to the Oberreichsanwalt, the Chief Reich Prosecutor, for review as to whether a further means of legal recourse was necessary. The misgivings, however, referred not only to sentences that were too lenient, but also to sentences that were too severe. Only in the latter case it was simpler. One could help by means of a clemency plea. I here have to insert that neither the minister nor I, myself, saw the opinions in cases in regard to the undermining of military efficiency with the exception of those cases in which the execution of a death sentence which had been issued was pronounced or cases in which the Referent or department chief requested the introduction of a legal recourse. A longer observation of the sentences in the Referat, or department, could then show that a certain district deviated from the generally recognized principles in its sentences, especially from the principles recognized by the Reich Supreme Court.

PRESIDING JUDGE BRAND: Mr. Klemm, I think you fully explained the reasons why you desired to have uniformity. Now this particular exhibit indicates that in this particular instance you complained of sentences being too mild. You have explained the reasons which underlay your theory in the matter, and I think you have covered it sufficiently. We must avoid such continuous repetition, Mr. Schilf.

DR. SCHILF: Mr. Klemm, therefore let us go concretely to the contents of these two letters. How did it happen that these two letters as such were written? I believe it will be necessary to bore the Tribunal with that still because your name is under this letter.

PRESIDING JUDGE BRAND: Counsel, you are not boring the Tribunal, nor is the witness. But we have the substance before us at this moment of these letters and you need not ask the witness what the substance of those letters were. We are here to try the case fairly and we don't want counsel to worry about boring us, but we do want counsel to worry about undue explanations and too long explanations. Ask your next question.

DR. SCHILF: Please state the practical cause how these letters happened to be written. Due to the decision of the court, you do not have to discuss the contents any more.

DEFENDANT KLEMM: The method for writing such letters had already been established long before I entered the Ministry of Justice. If cases accumulated in one district, the president of the district court of appeals who was concerned received a letter so that in future cases a general just sentencing, as it happened in the entire Reich, would take place.

PRESIDING JUDGE BRAND: Why did you write this particular letter? Just ask him why he wrote the particular letter shown in Exhibit 178.

DEFENDANT KLEMM: These cases had been collected in the Referat—in the Department—and then they were reported to the minister and the minister determined whether such a guidance letter was supposed to be written. In these two cases of Stuttgart and Hamburg, Franke and Vollmer, the department chief, reported to the minister about the jurisdiction exercised by these district courts of appeal and suggested to compile the most extreme cases and to call them to the attention of the presidents of the district courts of appeal. The minister approved of this suggestion and in addition to that determined that I had to sign these letters. That in these letters, the first person singular "I" was always used, is the accepted official style. To that extent I may refer to Exhibits 48, 94, 95, 96, and 99 in which simply Referenten and associates also write in the first person singular, although the letter bears the letterhead of the Reich Minister of Justice, and they sign it personally.

DR. SCHILF: Mr. Klemm, in regard to the two guidance letters to Hamburg and Stuttgart, were the judges who pronounced these sentences and who had aroused the disfavor of Thierack

supposed to be called to account personally, or were measures supposed to be taken against them?

DEFENDANT KLEMM: That was not supposed to be done in any case. It would have been neither in accordance with the intentions of the Ministry nor was it the meaning of such a guidance. The president of the district court of appeals in Hamburg, who was requested at the end of the guidance letter to speak to the judges in the appropriate manner, that was what it says literally in the letter, could handle it directly. As the official superior, he did not use this letter at all; but within the framework of a community of work within the NS lawyers league, that is, on a purely comradeship basis and not as a superior, he spoke about these matters. Even less could the president of the district court of appeals in Stuttgart issue measures to the individual judges personally, or reproach them, because this letter was expressly addressed to him. At the end it says that "you, Mr. president of the district court of appeal should call direct and special attention to these problems." There is also a circular letter by the Ministry of Justice which is known and which emphasizes again and again that the independence of the judges should not be touched.

Q. But in the Stuttgart case the names of the participating judges were listed. What was the purpose of that?

A. Of the twelve sentences which are mentioned in the Stuttgart letter, nine had been pronounced when different members were sitting in the court. For that very reason the names were listed to show that the issue was not the failure of one individual judge, but that the general jurisdiction of the district court of appeals of Stuttgart in matters of undermining military efficiency was not in accordance with the wishes of the Reich level and the needs of the time.

Q. In that connection the name of the codefendant Cuhorst is mentioned. Did you know at the time the then President Cuhorst?

A. No, his name did not mean anything to me.

Q. Did you know that the then Senate President Cuhorst was also president of the Special Court of Stuttgart; and, were the guidance letters supposed to criticize the jurisdiction of the Special Court at Stuttgart?

A. I did not know the jurisdiction of the Special Court of Stuttgart at all. That the same person was presiding judge of the Special Court and president of the senate of the district court of appeal was not known to me at the time.

* * * * * * *

Q. One final question in that context. In the two so-called guidance letters, especially in the one to Stuttgart, mention is made of the fact that an extraordinary objection was supposed to be raised. Do you know anything about whether that was done?

A. The sentences were not sent to the Oberreichsanwalt with a request to raise the extraordinary objection, but with the instruction to examine whether it would be worthwhile to raise an extraordinary objection. In neither of those cases, neither in the guidance letter to Hamburg or to Stuttgart, the problem was the changing of prison sentences to death sentences, but the questions were merely prison terms and whether they should be increased but still remain prison sentences. Thus, the Oberreichsanwalt was not instructed to raise an extraordinary objection. As far as I know, at the time, the Oberreichsanwalt in the cases which were sent to him for examination refused to register an extraordinary objection; and, as far as I know, the minister was satisfied with those results of the examination.

Q. With that we have concluded the question of the Guidance Letters.

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c. Lawyers' Letter Written by Thierack

PARTIAL TRANSLATION OF DOCUMENT NG-260* PROSECUTION EXHIBIT 87

EXTRACTS FROM LAWYERS' LETTER NO. 1 SIGNED BY REICH MINISTER OF JUSTICE THIERACK, 1 OCTOBER 1944

Lawyers' Letters

Information of the Reich Minister of Justice

Confidential
Number 1, dated 1 October 1944

LAWYERS OF GERMANY

The German people, on the threshold of the sixth year of war, face tremendous war tasks.

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* Mr. LaFollette, Deputy Chief Counsel, stated the following concerning the prosecution's purpose in offering this document in evidence: "I briefly stated this morning with reference to the other brief [Judges' Letters] and to this brief [Lawyers' Letter] that the prosecution offers them as evidence for the purpose of showing that there was a direct controlled judiciary and bar. We are not offering these documents as evidence of any particular act contained therein, but since we offer them, we are to some extent bound by them and our purpose of offering them is to prove there was a connection" (Tr. p. 412). Mr. LaFollette also stated that this was the only Lawyers' Letter known to the prosecution.

The Fuehrer has ordered that all resources of the armed forces and armament industry be used to the utmost in order to master these problems.

In pursuance of these measures dictated by total war, the administration of law will also be curtailed and simplified to a great extent. The further mobilization of German lawyers into the armed forces and armament industry cannot be balanced only by curtailment and simplification. Above all it necessitates the utmost concentration of those elements which will have to carry on with our future administration of justice. Every lawyer who in the future will still be entrusted with his office must always be aware that the administration of German justice has, now more than ever, the direct duty of securing the frontiers and the waging of war, especially in view of the new tasks, which will arise through the increasing totalization of the war. Thus, the German lawyers have become the rear guard of the fighting forces. The complete concentration of all resources which this involves and which is expected especially from the senior members who take the place of their younger colleagues, presupposes unified direction and rigid execution of the work of all lawyers regardless whether they are judges, public prosecutors or attorneys.

In the hour, when our people have entered upon the decisive battle for its right to live, each lawyer must concentrate all his attention solely on this battle for freedom. Everything that does not directly serve this battle must now be put aside and everything that serves this struggle must be done with the least possible expenditure of time and work and in the simplest fashion. When the life of our people is at stake, all other individual interests must be pushed aside. For some time now there has no longer been any room for petty quarrels. Things which yesterday had some importance are perhaps quite unimportant today. Legal affairs not immediately connected with the war, must also be dealt with in the shortest and most economical way. The only aim of judges, public prosecutors, and lawyers is to preserve the life of our people.

The lawyer who is very often the first to deal with troubles and needs of his fellow countrymen is today entrusted with a particularly responsible task. Affairs which are not absolutely important in waging war, he must keep away from the law courts; however, legal cases of importance in respect to the war are to be dealt with quickly but not less conscientiously as the need of the hour demands. This task cannot be accomplished with good intentions only. Above all he must be thoroughly acquainted with the various plans and intentions of the administration of justice in the various branches of law.

I know that the lawyers are waiting for such a reorganization of their work and that such a regulation of the administration of justice will be welcomed especially by the conscientious members. Therefore, I have decided to introduce in these fateful hours, at a time of total war, a new chapter in our administration of justice by publishing the Lawyers' Letters which are to supplement the Judges' Letters, published two years ago.

These Lawyers' Letters serve a double purpose. They are to inform lawyers of the aims of the administration of justice by means of publication of the verdicts of law courts in various branches of law, which are of importance in conducting the war, and they are to demonstrate the policy of the court in order to save unnecessary work in regard to remonstrances, complaints, or legal remedies of all kinds, for which there is no longer any room today. On the other hand they are to regulate the general relations of lawyers toward each other in their own profession, and also toward the judges and public prosecutors in order to develop close collaboration among all administrators of justice, and thus avoid future friction, complaints, or quarrels on this subject as far as possible in order to mobilize all forces for the actual legal work. The harder the times and the more stringent the restrictions, the closer cooperation should be among all administrators of justice in their common task.

Therefore, the Lawyers' Letters, just as Judges' Letters are to be a close link between the administrators of justice and its personnel; and thus, judges, public prosecutors, and lawyers are to be more closely connected by a general reorganization of their work. These are not orders, but signposts to help master the great tasks which lie ahead of us.

I expect that no German lawyer fails to recognize the seriousness of the hour and the magnitude of the task. I expect the complete mobilization of all resources for tasks that war puts before us, including our people's struggle for freedom. I know that we shall win this battle, if we work together and fight like one man.

With this in mind, I hope these Lawyers' Letters are a means of unifying and strengthening the fighting spirit of German lawyers.

The letters are not to remain mere words but should take shape in actions!

[Signed] DR. THIERACK

Berlin, 1 October 1944

1. The defense counsel selected by a citizen of the Protectorate who was sentenced to 12 years' penal servitude and 10 years' loss of civil rights directed a letter to his client in the penitentiary, wherein he held out the prospect of obtaining a mitigation of the sentence by means of a request for clemency. Among other things the letter states:

"Today I have a personal request. Of your own accord, you offered to recommend me to other well known Czech families, in which some members met with a similar fate. You also informed your wife of this offer at the last discussion we had together with her. Therefore, I wrote to Prague, but received the answer several times that likely clients needing defense counsel are not known. Had I been acquainted with this fact, I would have asked you during our many conferences to give me the addresses * * *.

"During the proceedings I was able to prove by many documents, that you are not at all hostile toward Germany but definitely pro-German. I also believe that you will find the right attitude toward the new Greater Germany after this difficult experience and wish you the best for the future.

"With the kindest regards and Heil Hitler!

"yours,
"signature"

2. An attorney defended a woman, who together with her sister was accused of keeping contact with prisoners of war which was forbidden. Both women were accused of having received French prisoners of war in their home, of having entertained them and exchanged caresses with them.

Among other things the defense counsel said in his final statement:

"We too, would be glad if kindness were shown to our German prisoners of war in foreign countries, and we do not consider those foreigners, who are kind to our German prisoners, liable to punishment."

3. Several Czech businessmen had to vindicate themselves before a Special Court because of offenses against the penal order for protecting the rationing of consumer goods (receiving butter they were not entitled to). Their counsel said in his final plea,

"I feel impressed by these defendants who like true German men and good family fathers shouldered a responsibility which was really one for their wives."

In order to show the pro-German attitude of a defendant, the defense counsel read parts of a speech which one of the defendants made on some occasion with regard to the aims of national socialism. He interrupted the reading and cried, "I could almost believe I hear my Fuehrer speak."

4. A factory owner had obtained a great deal of food for the canteen of his factory from the black market and had used part of it for himself. Therefore, he was sentenced to 2½ years of penal servitude for violating regulations for war economy. In his plea the defense counsel pointed to the fact that the food was of benefit to the workers, and thus also armament and the armed forces. He finished his speech with the words—"And now, then, condemn the defendant!"

In answer to the reproach of the presiding judge he declared that he could formulate his plea in other words and demanded the acquittal of the defendant.

5. Counsel took charge of the defense of a woman shopkeeper, who had in several cases sold new bicycle tires and high tension batteries to customers without purchase certificates in exchange for butter, meat, sausage, and bacon. She was sentenced to 2 years' imprisonment and a fine of 1,000 reichsmarks because of continued offenses against the penal order protecting the rationing of consumer goods and the prohibition of bartering.

The defense counsel said in his final speech:

> "The defendant is not to be blamed for getting additional food in an illegal way. She is very corpulent and therefore surely needs more than other people. One need only look at that body to see that it needs a considerable amount of food. The food is insufficient even for normal persons. Reich Minister of Health Dr. Conti himself declared, that the food rations are not sufficient."

The lawyer has repeatedly given cause for measures of controlling him because of his professional conduct. To date, 16 statements of objection and disapproval have been made against him because of insulting expressions to the court, to colleagues and parties, and because of charging of inadmissible special fees, etc.

6. A mother and her daughter were indicted by a Special Court because of offenses against paragraph 4 of the decree dealing with people violating the national emergency orders. The daughter as the head clerk of a firm had stolen a large number of food ration coupons and clothing cards and had given them to her mother. The latter loosened the coupons from the paper and kept them for future use. The food bought with those tickets was often served at their home parties.

In his final speech the defense counsel expressed himself somewhat in the following manner:

"The indicted daughter was the brain of the firm. The rooms expanded, the house expanded. According to that quotation it is but natural that the daughter has given parties and invited guests. The mother is a busy modest housewife, and both are ladies of good family. The fact that the mother loosened the coupons so neatly and guarded them so carefully shows her to be a good and orderly housewife, who proved her orderliness even in this work."

The defense counsel came to the conclusion, that both women had earned the sympathy of the court and a reward for having confessed. Neither defendant, he finally said, did wrong; there is no criminal guilt.

7. A basket maker who was defended by a counsel was sentenced to 3 weeks' imprisonment and 14 days' detention for resistance against the police and for insulting and gross misconduct. In a drunken state he had tried to cross a train track at a point where it was forbidden to cross and was offensive toward railway officials who tried to prevent him from doing so. In town he had molested pedestrians and resisted arrest by the police. The court had sentenced him to imprisonment because the defendant had previously been punished at 4 different times for attacking superiors, and because prior to that he was sentenced to imprisonment for absence without leave while in the army.

His defense counsel petitioned for clemency, asking that the prison sentence be changed into a fine, and in so doing he pointed out that the defendant, who makes deliveries with his own team would be badly affected economically by the prison term; that he was released from the army because of imbecility and that, therefore, his offense was not so bad. He lodged a complaint against the refusal of the public prosecutor and in his argument he said, among other things, the following:

"The case was taken much too tragically. Under prevailing circumstances incidents which were punished with minor fines in peacetime are now often looked upon as capital offenses. This is due to the general nervousness by which the courts are undoubtedly influenced. However, this is only temporary just as the immense number of private charges. There is a lack of humor, preventing us to see these things at their true value."

8. A woman was charged with insulting another woman. She had called out to the other woman who had shortly before lost one of her sons at the front: "They shot one of your boys, we hope they shoot the others, too."

In his appeal the defense counsel said:

"Without intending to minimize the heinousness of her words, as they are stated in the indictment, the question of whether the expression is an insult must be examined. The expression contains—so it goes on to state—a malediction, a curse, and is certainly wounding to the feelings of a relative, particularly of a mother, very gravely, but thereby it does not amount to defamation. It is not an expression slighting a person, and therefore it is not an insult."

The defense counsel adhered to this contention in his final speech although the president had pointed out to him that his standpoint about the punishable nature of the expression was not tenable.

When the insulted mother was questioned as a witness during the proceedings, she started to cry when the president asked her about her son, and took out two pictures of her son in uniform and showed them to the judge; whereupon the defense counsel declared that she was obviously hysterical. After being sharply rebuked by the president, the defense counsel answered in the same sharp way that he quite understood the grief of the woman, but he doubted the credibility of her words. The word "over-excited" was also used.

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Opinion of the Reich Minister of Justice

The problematic nature of the position of the attorney at law which rests upon the premise that the lawyer acts, on the one hand, on principle as the representative of an individual citizen who appoints and remunerates him, on the other hand, as an agent of administration of justice and lawyer of the community which has assigned him to and entrusts him with his function, has long been especially apparent in criminal jurisdiction. The evolution of civil right from the purely "private right" of the past—when the individual pursued his right more or less for his own sake—to the civic right of our time in which the citizen also administers his "private rights" as trustee of the community has indeed also changed and reformed the task and position of the lawyer. This modification did not, however, become so obvious because in their widest sense the pursuit of justice and the administration of justice in the domain of civil right still command, at least outwardly and notwithstanding the sway of the community's influence, a form which does not make the dual position of the lawyer with its inward conflict of duties so conspicuously prominent as has always been the case in the domain of criminal jurisdiction.

A penal suit according to our present idea of penal law is no longer a matter of two parties contending for their rights. Here, it is not a "private citizen," threatened in his freedom, who disputes against a "juridical person" called the State opposed to him on a level of equality or against the State attorney before an independent judge for the rectification of a claim raised against him by the State, but a citizen who vindicates his conduct before the community and its leadership to which he owes loyalty and consideration, against the suspicion of breach of loyalty or of contempt. Here it is not rights of freedom which are fought for but social obligations which are assessed. Here it is not mere compliance with the law that is examined; it is the honest collaboration, the loyalty, and the worthiness or unworthiness of the personality of the individual citizen which are weighed and determined for the community. Here it is not so much a matter of the rights of the community with regard to the individual as they have been given it by the voice of the citizen, but rather that the individual has as many rights and obligations as the community has conferred and imposed upon him.

It is evident that such a viewpoint must involve far-reaching effects on the position and task of the lawyer as the criminal defense counsel, even if outwardly criminal procedure does not essentially differ in its form from the former criminal trial. As defense counsel, the lawyer has shifted closer to the State and community. He is incorporated into the community of the administrators of justice and has lost his former position as unilateral representative of the interests of the defendant. Whoever is not ready to accept this clearly and absolutely and is not prepared and able consistently to act accordingly ought not to don the robe of a German lawyer nor take a place at the defense counsel's bench. Not only would he be at disagreement with himself, not only would he fall from one conflict into another, but he would also though often unconsciously do harm rather than service to the administration of justice and last but not least also compromise the reputation of those of his colleagues who think and act differently. It is obvious that as defense counsel the lawyer has found it so much more difficult than the judge and the public prosecutor to achieve this mental change. However, this must never convey the delusion that merely the thorough and successful striving to acquire this professional frame of mind and a thorough devotion to this professional aspiration clears the way to the fulfillment of the difficult as well as responsible and gratifying office of defense counsel. What the issues involved in the individual sphere by this altered role of the criminal defense counsel are, will often be discussed in these Judges' Letters in the

future. The fact remains, at all events, that the qualification of the lawyer as criminal defense counsel, for which the bar has now been fighting for over 10 years with varying success, will ultimately depend upon whether and to what extent it succeeds in its attempt to attain this new role not only ostensibly but also in a really moral sense and to unite nonetheless, this enhanced position of obligations towards the community with the obligations towards the individual citizens in such a way that the community gets its right while the individual citizen who entrusts himself to a lawyer is not abandoned or perhaps even betrayed.

That this struggle of the bar is to this day by no means ended is daily shown anew by incidents of professional routine, apart from the cases mentioned.

I know full well that many lawyers shrink before this struggle for their new adjustment which calls at the same time for an honest pledge, because they deem it to be disloyal to their clients and therefore keep aloof from penal cases.

My appeal is not meant for them. For whoever shuns moral obligations or does not have the strength to see the fight through could never indeed perform useful work as a criminal defense counsel.

However, the motives which have formerly induced and are still inducing many others to shun criminal cases are very diverse. There is no question here of those lawyers who from inclination or calling handle civil cases only, and who in this and other spheres as lawyers in economic cases, for instance, mostly in an exclusively advising and managing capacity perform the most valuable legal work without this ever becoming known to the courts or the public. Of these I do not wish to make criminal counsel for it would be entirely amiss to take them away from their important tasks and give them another one for which they feel no moral calling. Aside from this there is, however, quite a number of lawyers who decline to work on a criminal case because they generally consider criminal cases of secondary order because they are "less juristic." One ought not to put questions of hierarchy of this sort between criminal law and civil law at all. The opinion that criminal jurisdiction and thereby also counsel for criminal cases are of secondary importance—which is occasionally expressed even today—can only be upheld by someone who interprets the concept "juristic" by abstract constructions and logic reasoning thus trying to maintain a concept "juristic" which has long been given up in civil law also.

Whoever realizes that law is of vast significance to the life of the community, conscious of the problem facing a lawyer in the serving of his nation and its ways of life, recognizing the high

ethical value of such legal work, and measuring the importance of each individual case for the community, will not underestimate the defense of the life and freedom of a fellow citizen in a criminal case; but rather consider it more vital and important than the contesting of property rights or other legal questions which perhaps are of secondary concern to the community. And whoever has come to realize that a serious and responsible defense cannot be conducted nowadays, with the knowledge of a few sections of the penal code or even with rhetoric swing and an elegant appearance, but that in addition to this a profound knowledge of modern criminal law and the entire legal sphere is essential not to overlook criminal biology in its widest sense to which belongs above all an extensive understanding of politics, and intuition will agree that, nowadays, the defense counsel in his own "juridical value" does not occupy a secondary rank any more than the judge or prosecutor. On the contrary the best lawyers are barely good enough to be defense counsels or judges particularly when taking into consideration the vital importance of criminal law in wartime. Just as I fill the judges' seats only with the best today—the same principle applies to civilian law as far as the judges in the divorce courts are concerned who similarly decide the fate of human beings—so only the best lawyers should be admitted as defense counsel.

The measures required for the mobilization of all forces for total war which must lead to further curtailment in the administration of justice will automatically cause some lawyers, hitherto engaged on civil cases only, now and again to occupy themselves with criminal cases, insofar as personnel shortage necessitates this. For these lawyers, more than for their colleagues (who up till now have been for the greater part, or exclusively working on penal cases), it is necessary that they approach their new work from the very beginning with a clear inner attitude and professional conscience which will also give them the necessary assurance in their appearance and work which is a primary asset for successful legal work.

They need not fear to be called upon to do legal work of a secondary nature. He who takes the job of a defense counsel in penal cases of importance to the war, also contributes to the war effort. This means today, however, that he is expected to make a considerable war effort. In cases where the State permits the use of defense counsel, it does not want to see court statisticians but sincere and responsible fighters of the law who seek justice side by side with the judge and the prosecutor. Penal cases have always demanded particularly exacting work, due to the fact that the long sessions involve both physical and mental strain, and

require in every case a higher personal effort than the most difficult civil cases, in which the main work can be completed in the office and at the desk.

One of the main objections raised today by lawyers, and by no means by the worst ones, concerning taking the job of defense counsel which can only be approached with complete frankness can be found in results of the guidance of practicing law. The defense counsel, they say, only seldom has the opportunity to succeed, in getting through his deviating opinion due to the close collaboration of judge and prosecutor, for instance, in the introduction of evidence, or to find sufficient attention in his final plea so that sometimes it may appear that the verdict has already been pronounced prior to the main proceedings. The lawyer's success in any case is often rather minor, and the lawyer very easily attains a secondary position compared to the judge and the prosecutor.

This contains both truth and untruth.

He who is seeking "success" as defense counsel in penal cases must first ascertain what is understood by it. It should go without saying that a conscientious lawyer does not only see success where he manages to reduce the sentence proposed by the prosecutor, to find loopholes in the law for his client following the old tradition, or where he otherwise succeeds in exploiting the case to his client's advantage. He who only has this conception of the entire affair, not only misunderstands the tasks of a defense counsel, and not only lives in penal conceptions of the past which have been overcome by the introduction of paragraph 2 of the Reich Penal Code and by the law itself, but he also lowers the value of his own work. The success of a defense must already be apparent in the consciousness of having done everything possible as a co-responsible lawyer in order to lead justice to a successful conclusion.

More than that the defendant could not demand and if he did—which is humanly understandable since he cannot be arbiter on his own behalf—then the defense counsel should not support him.

As far as the secondary position compared to that of the judge and the prosecutor is concerned which might be feared by quite a few, I can only answer: Everyone achieves a rank in his life and profession which he works and fights for through his accomplishments and personality. The duty of a defense counsel is not limited to his activity in the main proceedings as many believe. His chief task begins much earlier while cooperating at the elucidation of the state of the case, the production of evidence to be introduced in court, and numerous interviews prior to the trial.

* * * * * * *

The defense counsel as a result of his dual position as a defense counsel of one person on the one hand and as an administrator of justice for a community on the other hand will repeatedly face the danger of the fact that the accused whom he is defending depends upon him, making him forget that he is not the mouthpiece of his client but an independent administrator of justice. If, for instance, a defense counsel submits applications only upon request of the defendant, or if he proposes the hearing of character witnesses though he himself does not doubt the credibility of the hitherto heard witnesses, if he adds more lengthy letters of the defendant to his brief as appendices only to comply with the defendant's wish, this indicates either a lack of the required self-criticism or of the necessary energy toward his client in carrying out his office as defense counsel.

* * * * * * *

The cases mentioned in this first Lawyers' Letters, some of which have led to reprimands and disciplinary measures are only a small part of the vast material at my disposal. They really speak for themselves. At the same time they show how much work remains to be done, if we are to solve the tasks which the increased totalizing of war puts to us. If we succeeded in releasing only part of the manpower—represented by lawyers at present engaged in examinations and court of honor proceedings—for really important and war essential legal work, a considerable contribution would have been made. To attain this is not only the goal of the judicial administration. Lawyers themselves should collaborate in this with self-discipline, which I particularly expect from now on.

If there are any difficulties, doubts, wishes, and troubles, every lawyer may report these to me either himself or through his chamber so that these questions may be discussed and cleared as far as possible in these Lawyers' Letters.

As for the cases reported to me this is briefly to be said:

(1) The letter of the defense counsel to a traitor in a penitentiary speaks for itself. Not only is the unconcealed wooing of clients repulsive, but especially the inconceivable lack of dignity and the servility with which this German lawyer addresses a declared marked enemy of the state, calling him "Dear Sir," wishing him "all the best for the future," and after mentioning "his esteemed wife" closes with "best regards and Heil Hitler, yours."

Surely it cannot be expressed more clearly that one is unqualified for the legal profession.

907802—51——38

(2) The lawyer, whose plea was that "we would be glad if our German prisoners of war would be shown a kindness" shows a total lack of understanding of the seriousness and significance of this offense. It is not the business of German women "to show kindness" to prisoners of war, but they should behave as German women. Decency and honor should bar the least contact with prisoners of war who are still our enemies. What should women who have resisted the temptation to which the defendant fell say if they hear a lawyer express such views?

(3) As for the defense counsel, who was "impressed" by the attitude of the Czech industrialists who had bought butter without ration tickets because the defendants "like real German men they took the blame for their wives who were really responsible," all that can be said is that he knows very little about the tasks of a German lawyer. Here again the lack of tact and understanding was not that he tried to minimize the offense. He obviously knows nothing about the situation of ethnic Germans in the Protectorate and about the interests of the German people. To mention a speech by one of the Czech defendants in one breath with a speech by the Fuehrer was—no matter how it was meant—outrageous. Such a thing cannot be excused as an "awkward mistake." Lack of instinct is a feature of one's character.

(4) The lawyer who pleaded for a factory owner, accused of an offense against wartime economy, was it is true right in pointing out that the defendant also thought of his workers when he acquired food illegally. As far as this was a fact he even had to point it out. But in disregarding the fact, that the defendant as the sentence of 2½ years penal servitude shows bought considerably for his own benefit, he has violated his duty as defense counsel. Furthermore, in trying to influence and mislead the court by saying "and now condemn the accused" thus demanding the acquittal of the defendant, he went far beyond the limits of a possible and legitimate defense. This suggestion had to give everybody and not least the defendant, too—to whom he should have explained his offense—the impression that the sentence was unfair and as such contrary to the interest of the people. This type of plea does not serve, but damage the administration of law.

(5) The next two cases also show that some defense counsel have not yet, in the fifth year of war, recognized the importance of criminal proceedings to war economy. To excuse black market activities with the obesity of the accused can scarcely have been meant seriously and can, of course, not meet with success—except for the bad impression counsel makes. This again cannot excuse

the temporary lapse, because counsel has, by saying incorrectly and tactlessly later on that the Reich health leader himself describes the food rations as insufficient, revealed that he himself disagrees with our laws and government. The 16 objections and reprimands brought up against him so far confirm the picture, which he has given of himself in this case.

(6) To defend parties and dinners given by the two "better class women" with the help of stolen ration cards by saying that business, so to speak, required such parties is just as stupid as it is to expect the court to find the defendants not guilty of an offense. Such statements not only show considerable lack of understanding of the importance of criminal cases in the field of the law of war economy, but they should never be made at all in a court of law.

(7) Humor should certainly not be suppressed especially in difficult times, but only where it is appropriate. But it is inconceivable for a defense counsel to reproach a court or the prosecution for their lack of humor, because a defendant who indulges in a drunken brawl annoys people and resists the police received a well earned punishment. The defense counsel would have done better to consider that in the fifth year of war one should not burden judges and prosecutors with uncalled for petitions for mercy and complaints; about the latter there is still much to be said. He would have done better to make it clear to his client who had already repeatedly made himself unfavorably conspicuous, how to conduct himself in these times instead of backing him up by his false statements.

(8) If in this case the defense counsel raises legal doubts against the assumption of an insult to the mother, he can thus only intend to obtain an acquittal. Therefore as a representative of the law he takes the view that in such cases according to our law there is no protection of the honor of soldiers killed in action and their relatives. This attitude and his subsequent conduct at the trial, in which he called the gravely afflicted mother of the dead soldier "hysterical and highly strung," when facing the judge she naturally re-experienced her pain and sorrow, revealed, even had the mother been very excited, a rare absence of any feeling for the community and human compassion. He who tries to cover such a criminal deed, particularly as a representative of the law, puts himself ideologically on a level with the defendant.

* * * * * * *

d. The Withholding of Criminal Proceedings against Persons Participating in "Lynch Justice" against allied Fliers

TRANSLATION OF KLEMM DOCUMENT 68a
KLEMM DEFENSE EXHIBIT 68a

DECREE OF HIMMLER TO ALL HIGHER SS AND POLICE LEADERS, 10 AUGUST 1943, CONCERNING "CONTROVERSIES BETWEEN GERMAN CITIZENS AND PARACHUTED ENGLISH AND AMERICAN TERROR FLIERS"

Personal Staff
Diary Nr. 48/16/42 g
Bra/Bn
To: All Higher SS and Police Leaders

[Stamp]

Personal Staff Reich Leader SS
Archive SECRET
File Nr. Secret/121/21

By order of the Reich Leader SS I am sending you enclosed a decree with the request to bring it to the attention of all commanders of the police and Security Police who are to inform orally all their subordinate agencies of its contents.

In addition, the Reich Leader SS requests that the competent Gauleiter be orally informed of this decree.

[Signed] BRANDT
SS Obersturmbannfuehrer

1 Enclosure

Der Reich Leader SS
Rf/Bn
48/16/42 g

[Stamp]

Personal Staff Reich Leader SS
Archive
File Nr. Secret/121/21
Field Command Post, 10 August 1943

Secret

It is not the task of the police to interfere in controversies between German citizens and parachuted English and American terror fliers.

[Signed] H. HIMMLER

PARTIAL TRANSLATION OF DOCUMENT NG–149
PROSECUTION EXHIBIT 110

VARIOUS MEMORANDUMS FROM THE FILES OF THE HIGH COMMAND OF THE ARMED FORCES, 6 JUNE – 5 JULY 1944, CONCERNING THE TREATMENT OF "TERROR FLIERS"

1. Memorandum of General Warlimont, 6 June 1944[1]

Matter for Chiefs! — (only through officers)

Deputy Chief of the Operations Staff of the Armed Forces,
No. 771793/44 Top Secret Chief matter

Field Headquarters, 6 June 1944

Top Secret

3 copies—1st copy

Subject: Treatment of enemy terrorist airmen

Notes on a report

1. In the afternoon of 6 June, SS Obergruppenfuehrer Kaltenbrunner[2] informed the Deputy Chief of the Operations Staff of the Armed Forces, in Klessheim, that this question had been discussed a short time previously between the Reich Marshal, the Reich Minister for Foreign Affairs, and the Reich Leader SS. In the course of this conference, and in opposition to the original suggestion of the Reich Minister for Foreign Affairs, who wanted to include any kind of terror attack against our own civilian population—thus bomb attacks on cities too—an agreement was reached, according to which *only machine-gun attacks directly* aimed at the civilian population and its property, should be considered as constituting criminal acts in this sense. *Lynch* justice should be considered as being *the rule*. Sentencing by court martial and transfer to the police, on the contrary, had not been discussed.

2. The Deputy Chief of Armed Forces Operations Staff set forth—

a. In pursuance of the broad outlines sketched by Reich Minister Dr. Goebbels and various press reports which point in the same direction the main task now consists in *making public* a case of this kind which has been unexceptionally confirmed stating the name and the unit of the concerned airman, the place where it happened, and other details in order to establish accordingly the seriousness of the German intentions in the face of incredulous

[1] General Warlimont was convicted for his participation in the "Terror Flier" program in the High Command Case, United States *vs.* Wilhelm von Leeb, et al., Case 12, volumes X and XI. Extracts from his testimony on this question are reproduced in section VII C 5, volume X, this series.

[2] Kaltenbrunner was appointed chief of the Security Police and SD and head of the Reich Security Main Office (RSHA) on 30 January 1943. He was sentenced to death by the International Military Tribunal. See Trial of the Major War Criminals, op. cit., volume I, page 365.

enemy propaganda, and above all in order to achieve the desired deterrent from further assassinations of our own civilian population. Accordingly, the question is to be put whether such a case is in the files of the SD, or whether the necessary facts are at hand in order to fabricate such a case with the necessary details.

Obergruppenfuehrer Kaltenbrunner answered both questions *in the negative.*

b. Deputy Chief Operations Staff of Armed Forces points out that besides lynch justice the procedure too of a segregation of any such enemy airmen who are suspected of having committed criminal acts of this nature, their admission into the airmen reception camp Oberursel, and upon confirmation of suspicion their transfer to the SD for special treatment should be prepared.

In this connection, the Operations Staff of the Armed Forces is in contact with the High Command of the Air Force, in order to establish the directives with which, in such cases, the commander of Oberursel camp would have to comply.

SS Obergruppenfuehrer Kaltenbrunner declares that he agrees absolutely with his suggestion and with the *taking over of the segregated individuals by the SD.*

c. Concerning the *publicity* question, an agreement is reached that until further notice an agreement between High Command of the Armed Forces/Operations Staff of the Armed Forces, High Command of the Air Force, and the Reich Leader SS should be arrived at in any case in order to *establish* the *form* of publication.

The cooperation of the Foreign Office is to be secured through the Operations Staff of the Armed Forces.

3. In the course of a conference with Colonel von Brauchitsch (of the High Command of the Air Force) held on 6 June, it was established that the following acts are to considered as terrorist acts justifying lynching:

a. Low level machine-gun attacks on civilian population, on single individuals as well as on gatherings;

b. Attacks on own (German) airplane crews dropping by parachute;

c. Machine-gun attacks on passenger trains of the regular public service;

d. Machine-gun attacks on hospitals, field hospitals, and hospital trains clearly marked with the Red Cross sign.

The facts listed under 3 are to be communicated to the commander of the airmen reception camp at Oberursel. If any such facts are proved by interrogation, the prisoners are to be delivered to the SD.

Colonel von Brauchitsch said that another report about these matters to the Reich Marshal was not necessary.

[Signed] Warlimont

Distribution:

Chief High Command Armed Forces copy 1
through Chief Operations Staff Armed Forces
Deputy Chief Operations Staff Armed Forces
Ktb. copy 2
Qu. (draft) copy 3

* * * * * * *

2. Letter from Field Marshal Keitel to the German Foreign Office, 14 June 1944

Fuehrer Headquarters, 14 June 1944

Top Secret

The Chief of the High Command of the Armed Forces
Operations Staff Armed Forces/Qu. (Adm. 1)
Nr. 771793/44 top secret Chief matter

3 copies—2d copy
Chief matter: only through officer.

To the Foreign Office,
c/o Ambassador Ritter*
Salzburg

In connection with home and foreign press reports concerning the treatment of terrorist airmen who are falling into the hands of the population an unambiguous fixation is needed of the concept of what facts constitute a criminal act in this sense. At the same time the procedure should be established as to the *publication* of such cases which have led either to a lynching by the population or—in case of apprehension of terrorist airmen by armed forces or police—to a special treatment by the SD.

In agreement with the Commander in Chief of the Air Force [Goering], I intend to write the communication a draft of which is attached which should be an instruction to the commander of the airmen reception camp at Oberursel. It concerns such cases in which, according to an investigation made in this camp, it is found suitable to segregate the culprit, owing to confirmation of suspicion, and to transfer him to the SD.

* Karl Ritter was ambassador for special assignments in the German Foreign Office from 1939–1945, and liaison officer between von Ribbentrop, the Foreign Minister, and Keitel, the Chief of the High Command of the Armed Forces (OKW). Ritter was a defendant in the Ministries Case, United States *vs.* Ernst von Weizsaecker, et al., Case 11, volumes XII–XIV, this series.

Previous to any publicity in the press, by radio, etc., it must be insured that name, unit, place of crime, and other detailed circumstances present a perfectly clear picture which publication may effect the intended result of deterring from further murders. In this connection, the formulating of publication should make allowance for the circumstance that enemy protests of all kinds are to be expected. Therefore, and in agreement with the chief of the Security Police and the SD and with the director of censorship, it is intended that prior to any publication and until further notice an agreement is to be reached between the High Command of the Air Force, the Operations Staff of the Armed Forces, the Foreign Office, and the SD, in order to settle facts, date and form of publication.

You are requested to confirm, if possible not later than 18th instant, that you agree with the above principles as well as with the procedure intended for publications.

1 enclosure

3. Letter from Goering's Office to Keitel, 19 June 1944

The Reich Marshal of Greater Germany
Adjutant's Office
Adj. Off. No. 7605/44 secret
Command matter

Berlin WC, the
Leipziger Str. No. 9
Tel. 420044
Headquarters, June 19th, 1944

Subject: Treatment of enemy terrorist airmen

Reference: Your letter No. 771793/44 top secret chief matter II, Ang. Operations Staff Armed Forces/Qu. (Admin. 1) of June 15th, 1944

2 copies—copy No. 1

To the Chief of the High Command of the Armed Forces,
Field Marshal Keitel

The Reich Marshal [Goering] has noted with reference to the above-mentioned letter:

"The reactions on the side of the population are not in our hands anyhow. However, it should be prevented as far as possible that the population takes steps against other enemy airmen to which above facts do not apply. In my opinion, above-mentioned facts always can be *dealt with by a tribunal,* as in this

case *acts of murder* are concerned, which the enemy has prohibited his airmen from committing."

Acting:
[Signed] TESKE
Lieutenant Colonel, GSC

4. Draft Letter from the German Foreign Office to Field Marshal Keitel, 20 June 1944

Ambassador Ritter No. 444

Carbon Copy

Secret Reich Matter
Salzburg, 20 June 1944

[Handwritten] *Draft*

To the Chief of the High Command of the Armed Forces
Your letter of 15 June 1944
No. Operations Staff Armed Forces/Qu. No. 772991/44.....II.ed.

Subject: Treatment of enemy terrorist airmen.

The Foreign Office agrees to the intended measures as a whole, notwithstanding the clearly palpable objections from the viewpoint of foreign policy and international law.

Examination in detail should differentiate between cases of lynching and cases of special treatment by the SD.

I. In cases of lynching, a sharply defined establishment of criminal facts according to paragraphs 2–4 of the letter of June is not very important. First, a German authority is not directly responsible; death has already taken place before some German authority deals with the matter. Further, the circumstances will be such, as a rule, that it will not be difficult to represent the case in a suitable manner on publication. Accordingly, in cases of lynching, the principal aim will be to *deal suitably with the individual case on publication.*

[Handwritten marginal note] only this was the aim of our letter.

II. The procedure suggested for *special treatment* by the SD* with subsequent publication, would only be defensible if Germany would openly repudiate at the same time, and in this connection, the obligations under international law which are in force now and which Germany still recognizes. When an enemy airman has been apprehended by the armed forces or by the police and been

* "Special treatment by the SD" generally meant killing of the persons in question by the Security Service. This subject is extensively treated in the High Command Case, United States *vs.* Wilhelm von Leeb, et al., Case 12, volumes X and XI, this series.

transferred to the airmen reception camp Oberursel, his legal status has become *eo ipso* that of a prisoner of war. Concerning the criminal prosecution and sentencing of prisoners of war and the carrying-out of death sentences against prisoners of war, definite rules have been established by the Prisoners-of-War Convention of 27 July 1929, such as, e.g., article 66, which provides that a death sentence may be carried out no sooner than 3 months after notification of the death sentence to the protecting power; in article 63: sentencing of a prisoner of war only by the same courts and according to the same procedure as applicable to members of the German Armed Forces. These regulations are so precisely worded that it would be hopeless to try to *veil any infraction thereof by a clever form of publication of individual cases.* On the other hand, the Foreign Office cannot recommend a formal renunciation of the prisoner of war convention on this occasion.

[Handwritten marginal note] this is already being prevented by the intended segregation.

[Handwritten marginal note] No—owing to segregation and the special treatment immediately following.

A way of escape would be the following, viz, that suspect enemy airmen should not be allowed at all to have the legal status of prisoner of war; that means that one should tell them immediately on capture, that they were not to be considered as prisoners of war *but as criminals,* that they be handed over, not to authorities competent for prisoners of war such as a prisoner of war camp, but to the authorities competent for the prosecution of criminal acts, and that they then be sentenced in special summary judicial proceedings. If, during the interrogation under these proceedings, the circumstances prove that this special procedure is not applicable to the case on hand, then in individual cases the concerned airmen could *afterwards* be given the legal status of prisoners of war, by transfer to the airmen reception camp at Oberursel. Of course, even this opening would not prevent Germany from being blamed for infractions against valid agreements, and perhaps not even the taking of reprisal measures against German prisoners of war. Anyway, such an opening would enable us to keep to a clear viewpoint and free us of the necessity of either openly repudiating valid agreements or of making use, on publication of every single case, of excuses which nobody will believe. Of the facts mentioned under 2–4 of the letter of 13 June, the facts mentioned under 1 and 4 are legally unobjectionable. The facts under 2 and 3 are legally not unobjectionable. However, the Foreign Office is prepared to disregard that.

[Handwritten marginal note] yes, this too is possible.

It would perhaps be advisable to summarize the facts under 1, 3, and 4 by saying that any attack of an airman on civilian population committed with machine guns is to be treated as a criminal act. The individual acts listed under 1, 3, and 4 would then merely form particularly remarkable instances. Nor does the Foreign Office see any reason why such attacks should not be punished, when committed upon civilian population in ordinary dwellings, in motor cars, in river vessels, etc.

The Foreign Office proceeds from the fact that German airmen are, as a general rule, forbidden, when attacking England, to make use of machine guns against the civilian population. As far as the Foreign Office is informed, such a prohibition was issued some time ago by the Commander in Chief of the Air Force. A general publication could point out the fact that such a prohibition is in force.

III. The above considerations warrant the general conclusion that the cases of lynching ought to be stressed in the course of this action. If the action is carried out to such an extent that its purpose, viz, the deterring of enemy airmen, is actually achieved which the Foreign Office approves of, then the machine gun attacks of enemy airmen upon the civilian population ought to be given publicity in quite another manner than has been the practice up to now, if not in home propaganda, then at any rate in foreign propaganda. The competent local German authorities, probably the police stations, should be instructed to send at once, in every case of such an attack, a short and true report mentioning details concerning place, time, number of killed and wounded, to a central office in Berlin. This central office ought then to transmit these reports at once to the Foreign Office for use.

As such machine gun attacks on the civilian population also have taken place in other countries, e.g., in France, Belgium, Croatia, Rumania, the competent German offices or the governments of those countries ought to be asked to collect in the same way news about attacks on the civilian population and to make propagandistic use of these in foreign countries in cooperation with the German authorities.

IV. In the letter of 15 June the intention has been mentioned that any publication should, until further notice, be proceeded by an agreement, i.e., with the Foreign Office. The Foreign Office attaches special importance to this and insists also that such an agreement take place not only until further notice, but during the entire duration of the action.

BY ORDER

[typed and crossed out] Signed: RITTER

5. Notes of General Warlimont, 30 June 1944

Operations Staff of Armed Forces
No. 006988/44 secret command matter

30 June 1944

Top Secret

3 copies—copy No. 1

Subject: Treatment of enemy terrorist airmen

[Pencil note] We must, at least, act. What more do we need?

Notes on a Report

I. Enclosed *draft* of a reply letter of the Reich Minister of Foreign Affairs to the Chief of the High Command of the Armed Forces, which has been transmitted to the Operations Staff of the Armed Forces through Ambassador Ritter, is submitted.

On 29 of this month Ambassador Ritter states by phone, that the Reich Minister for Foreign Affairs has approved this draft but has instructed Minister Sonnleitner to report to *the Fuehrer* the point of view of the Foreign Office prior to the sending of the letter to the Chief of the High Command of the Armed Forces. Only if the Fuehrer approves of the principles established by the Foreign Office, is the letter to be sent to the Chief of the High Command of the Armed Forces.

II. The Reich Marshal agrees with the formulation transmitted from the High Command of the Armed Forces concerning the concept of terrorist airmen and with the proposed procedure.

[Signed] WARLIMONT

Distribution:

Chief High Command Armed Forces
through Deputy Chief Operations Staff Armed Forces, copy No. 1
Ktb. (files), copy No. 2
Qu. (adm. 1) copy No. 3

6. Notes of General Warlimont's Office, 5 July 1944

Operations Staff Armed Forces
Qu. (Adm. 1)

5 July 1944

Top Secret

Notes
Concerning "Terrorist Airmen"

In the noon situation conference of 4 July, the Fuehrer decreed as follows:

According to press reports, the Anglo-Americans intend for the future, as a reprisal action against "V 1," to attack from the air also small places without any economic or military importance. If this information is true, the Fuehrer desires publication through radio and press that any enemy airman who participates in such an attack and is shot down during it cannot claim to be treated as a prisoner of war, but will be killed as soon as he falls into German hands. This measure is to apply to all attacks on smaller places, which are not military, communications, nor armament objectives, etc., and which accordingly have no significance from the point of view of the war.

For the time being, no measures are to be taken, but only to be discussed between the armed forces and the Foreign Office.

TRANSLATION OF DOCUMENT NG–364
PROSECUTION EXHIBIT 108

SECRET CIRCULAR FROM MARTIN BORMANN TO NAZI PARTY LEADERS, 30 MAY 1944, CONCERNING "PEOPLE'S JUSTICE AGAINST ANGLO-AMERICAN MURDERERS"

German National Socialist Workers' Party

Party Chancellery

The Chief of the Party Chancellery

Fuehrer's Headquarters, 30 May 1944
[Stamp] 9 June 1944

[Stamp] *Secret*

[Initial] TH [Thierack]

Circular 125/44 Secret
(not for publication)

Subject: People's justice against Anglo-American murderers

During the past weeks English and North American fliers have repeatedly been strafing children playing on playgrounds, women and children working in the fields, ploughing peasants, vehicles on the highway, trains, etc., from a low height, thus murdering in the most despicable manner defenseless civilians—especially women and children.

It has happened several times that members of the crew of such aircraft who had bailed out or made a forced landing, were lynched on the spot by the highly indignant population immediately after their arrest.

No police or criminal proceedings have been taken against citizens who have taken part herein.

[typed] [signed] M. BORMANN

Distribution: Reichsleiter
Gauleiter
Verbaendefuehrer
Kreisleiter[1]

Certified [Signed] FRIEDRICHS

---

30 May 1944

To all Gauleiter and Kreisleiter!

[Initial] TH [Thierack]

Subject: Circular 125/44 Secret

The Chief of the Party Chancellery requests that the Kreisleiter inform the Ortsgruppenleiter only verbally of the contents of this circular.

[typed] signed FRIEDRICHS[2]
Certified [Signature illegible]

TRANSLATION OF DOCUMENT 635-PS PROSECUTION EXHIBIT 109

LETTER FROM LAMMERS TO REICH MINISTER OF JUSTICE THIERACK, 4 JUNE 1944, CONCERNING "PEOPLE'S JUSTICE AGAINST ANGLO-AMERICAN MURDERERS," AND ENCLOSING BORMANN'S CIRCULAR TO NAZI PARTY LEADERS ON THIS SUBJECT

The Reich Minister and Chief of the Reich Chancellery
Reich Chancellery 681 E secret

[Stamp] Secret

Berlin W 8, 4 June 1944
Vosstrasse 6
[Stamp] at present at Field Headquarters

[1] Concerning the scope of the physical distribution of this circular, see the discussion in the judgment of the IMT concerning "The Leadership Corps of the Nazi Party." Under the heading "Structure and component parts," the IMT stated that "The Kreisleiter were the lowest members of the Party hierarchy who were full-time paid employees" (Trial of the Major War Criminals, op. cit., vol. I, p. 257).

[2] Helmuth Friedrichs, Chief of the Division II, the party-political division, of the Nazi Party Chancellery.

To the Reich Minister of Justice, Dr. Thierack
Subject: People's justice against Anglo-American murderers

[Initial] KL [Klemm]

[Handwritten note] Department IV. Circular Decree with the addition that such cases are to be submitted to me, when they arise, for an examination of the question of quashing proceedings.

[Initial] TH [Thierack]

Dear Dr. Thierack,

The Chief of the Party Chancellery informed me about his secret circular letter,[1] a copy of which is enclosed, and requested me to inform you as well. I herewith comply with this and beg you to consider how far you want to inform the Courts and the prosecuting authorities of it. The Reich Leader SS and Chief of the German Police has, as I was further told by Reichsleiter Bormann, so instructed his police leaders.

Heil Hitler!

Yours very devoted
[Signed] DR. LAMMERS

EXTRACTS FROM THE TESTIMONY OF DEFENSE WITNESS HANS HAGEMANN[2]

DIRECT EXAMINATION

DR. SCHILF (counsel for defendant Klemm): What was the last position you held in the administration of justice?

* * * * * * *

WITNESS HAGEMANN: I was attorney general [General staatsanwalt] at Duesseldorf.

Q. Since when had you been attorney general at Duesseldorf?

A. Since 1937.

Q. Herr Hagemann, can you remember that in 1944, the Reich Minister of Justice, Thierack, had issued a so-called circular directive[3] to all attorneys general which contained an instruction to the effect that in cases where the German population had exer-

[1] The circular letter, Document NG–364, Prosecution Exhibit 108, is reproduced above in this section.

[2] Complete testimony is recorded in the mimeographed transcript, 22 September 1947, pages 9302–9315.

[3] The actual directive of Thierack was not found or introduced in evidence. However, see Thierack's handwritten note on Document 635–PS, Prosecution Exhibit 109, reproduced immediately above.

cised lynch justice the prosecution had been instructed to report to the Ministry about such cases?

A. Yes, I remember such a decree.

Q. Can you tell the Tribunal what the text was?

A. No, I cannot tell you that. I can tell you the contents and what it said was that in such cases a report had to be made to the Minister.

Q. Did that decree say anything to the effect that the Minister intended to quash all such cases?

A. I don't remember that passage, but it is possible that it did contain such a passage. Generally speaking, all I remember is the fact that a report had to be made on such cases, and if such a case had been pending with me I would have had a look at the decree, and I would have read it through. However, as no such case ever occurred with me, I don't exactly remember the text because it never became topical for me.

Q. Witness, would you kindly make a little longer pause after I finish my question?

A. Yes, I will.

Q. Was that circular decree a so-called secret decree?

A. Yes, it was.

Q. And how did you keep it? Where did you keep it?

A. Secret decrees were entered in the register by my senior clerk who was in charge of the registry. After that, they were put in the safe.

Q. Witness, in your district—that is to say, within the area of the court of appeals of Duesseldorf—in the fall of 1944, a case is supposed to have occurred where an SA leader shot down two or three Canadian fliers who had been taken prisoners.

A. Yes, I remember that case perfectly well.

Q. Would you please give the Tribunal an account of that case?

A. In September of 1944 parachutists made an attack near Arnhem. In the course of that attack some paratroopers drifted away, and came down near the border between Holland and Germany. There, two Canadian soldiers were taken prisoner, and an SA leader shot and killed them. That is the general outline of the case. I did not hear it from the Chief Public Prosecutor at Cleve who had taken charge of the case, but I heard it from a judge at the court of appeals who informed me of the matter. Thereupon, I told the Chief Public Prosecutor in Duesseldorf to investigate the

matter and immediately make a report to me. He returned; I ordered some additional investigations, and I myself made investigations, too. I interrogated witnesses, for example. I believe the best thing would be for me to tell the Tribunal what the results of all those investigations were.

The two Canadian soldiers had been taken prisoners close to the frontier. Two customs officials took them back. The Canadian soldiers were unarmed and, as I think is the custom with prisoners of war, they held up their hands as they walked along. The two customs officials took them back like that, until they got to Kranenburg, a little place on the German-Dutch frontier. At Kranenburg that SA leader was standing in the street—his name was Kluettgen; next to him stood the Kreisleiter of Cleve, whose name was Hartmann. When Kluettgen saw those two prisoners coming along he told them to halt; he drew his pistol from his pocket and shot at the two Canadian soldiers. Kluettgen was so cold-blooded that when at first his revolver was jammed he put it right, and then shot those two soldiers down. As I found out later, at that time or soon after, he said, "Now I have got two; I now only need another two or three." I can't vouch for the latter figure, I don't know exactly what he meant. However when he said, "Now I need another two or three," he meant this: In an air raid, I believe, Kluettgen had lost five close relatives, and it became evident that that killing was just vengeance for his relatives whom he had lost in that air raid. That is to say, if I may put it that way, he acted in a modification of the old saying "An eye for an eye and a tooth for a tooth." He just changed it and made the "eye for eye" into "number for number."

That clarified the SA Leader Kluettgen's position, but the part played by the Kreisleiter who had been standing next to Kluettgen, remained unclear. I believe I can remember that the Kreisleiter had said something that wasn't quite above-board, something like, "That's right," or "just do away with them," or something like that. However, it was possible to interpret the words in various ways. It is just possible that he had meant to say, "Kluettgen should shoot them," or "Take those two away," because somebody said afterwards that after those two people had been killed, the Kreisleiter had said that that was not what he had intended to happen.

That was the outcome of the investigations.

Now, as to the proceedings that were instituted.

The Chief Public Prosecutor had ordered the police to arrest Kluettgen, but the police refused to carry out the order. Later on, when I was interned, I heard from a Gestapo official that there had been general instructions issued to the police to the effect that

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men from the Ortgruppenleiter upward were to be arrested and proceedings instituted against them only if the Party Chancellery approved, and similar instructions had been issued for people in the SA and the SS. Generally speaking, I did not encounter any difficulties when making investigations. The SA gave its consent for me to interrogate several people. The Kreisleiter, however, refused to make a statement until we obtained the approval, and it was the Party Chancellery which had to give that approval; that is to say, it was Bormann. Although an application was made for such consent, it never arrived.

I made a report to the Ministry about the case. Naturally, I had to make a report because it was an important case, and reports had to be made to the Ministry about all important cases.

I told the Ministry, over the telephone, about the fact that proceedings had been instituted, and I believe it was Dr. Mettgenberg to whom I spoke over the telephone. I told him as much as I knew at that time. Afterwards I made a written report, that I intended to clear up the matter, and I eventually managed to clear it up. I also told the Ministry that I needed its support in order to obtain permission for the Kreisleiter to make a statement.

The Ministry was altogether in agreement with the way I had handled the case. I received written instructions. I understood them to want me to clear up the case completely.

There was no question of quashing the proceedings. Not one word was said of that.

PRESIDING JUDGE BRAND: One moment please, Witness. Tell us, please, what did you mean by clearing up the case? Did you mean prosecute and convict? Or what did you mean?

WITNESS HAGEMANN: What I meant first, was to establish the facts and once they were established to suggest to the Ministry that an indictment should be filed against Kluettgen and, if necessary, also against the Kreisleiter. I could not make a final suggestion at that stage because I did not yet know what part the Kreisleiter had played. That is to say, the Ministry agreed that I should carry out my plan to clear up the case, but because no approval was received from the Party Chancellery to interrogate the Kreisleiter, we could not close the proceedings.

There were, of course, also great difficulties of transportation. The further the war was brought into the country, the more difficult it was to have any correspondence with Berlin.

Q. What was the date of this case?

A. I am afraid I cannot tell you the exact date. I think one should be able to find out from the history of the war. It was that parachute attack near Arnhem. I think I am pretty certain it was

in September. May I say that is the way I remember the case now. The files are in existence.

Q. It was in 1944?

A. Yes, 1944. I did something which, as far as I know, I never did in any other case. I had two copies made of that file, one original file and a copy of it. I gave the original to my senior clerk, and I told him to keep it, not to leave it in the courthouse at night but to take it home with him, and to take it with him to the air-raid shelter in case of an alert. I kept the duplicate myself, and whenever the alert came I took it with me to the air-raid shelter to make sure that if anything happened to either my senior clerk or to myself, one file would always be available, so that there should be no difficulty in prosecuting the case. I was convinced that this was an important case not only from the point of view of guilt and expiation in the individual concrete case, but also that was bound to be of importance for the German armed forces, for, although I was not a soldier, I could well imagine that if the Allied forces should come to hear that the German administration of justice had not prosecuted that case, they would take retaliation measures against German soldiers, or at least might do so. In that event, soldiers who were innocent in this connection might have suffered for what Kluettgen, and possibly also the Kreisleiter Hartmann, had done.

What may be of interest, is the reaction of the German population in Kranenburg. There were some German civilians standing in the street when this happened, who quite openly showed their indignation.

Q. Was any indictment filed against the one who actually did the shooting?

A. No, that was not done, because we had to wait. The role the Kreisleiter played—

Q. Please answer this question. Did you have any difficulty with the securing of the evidence concerning the actual shooting? As you have told us you apparently had plenty of evidence as to that one person.

A. Yes, against this one man I had the evidence, but as it was possible that another man was involved—the Kreisleiter—it was important that we should not just indict one man and deal with him alone, but to indict them together. We always did that in principle.

Q. Well, let me ask you this. Was that a matter of German law, that when you knew one man had committed a crime you didn't prosecute him because perhaps someone else might have helped him?

A. But we did intend to indict him. We only wanted to await the result of the investigations concerning the other person, so that we could indict them both, because if we only indicted one, the proceedings against the other one would have been confronted with a great many difficulties. That was the way in which we proceeded, I should say, almost regularly.

PRESIDING JUDGE BRAND: Very interesting.

DR. SCHILF: Herr Hagemann, I would like to ask one more question. The President has asked you whether you were confronted with any difficulties in prosecuting one person. I am referring to Kluettgen now.

WITNESS HAGEMANN: Yes.

Q. May I ask you to tell us whether you had an opportunity to talk to Kluettgen yourself, or to interrogate him?

A. I asked the legal adviser of the SA, if possible, to make Kluettgen come to see me. At first, Kluettgen had worked near Kranenburg, but afterwards the SA had sent him to the district of Aix-la-Chapelle [Aachen]. He had some special transport mission there, and when he came to Duesseldorf on one of those transportation errands, he came to see me in my apartment one Saturday evening. I was ill; that is why I was at home. I had a short talk with him, and I was not favorably impressed with him. He told me that he had killed those two Canadians because he had been afraid that foreign civilian workers who were loafing around in that district might have set those Canadians free. I wanted to refute that statement, and I did refute it by the testimony obtained from witnesses. However, that motive would have been quite indifferent for the legal evaluation of the case.

As regards the clearing up of the case, it seemed important to me to convict the man and prove to him that that motive could not have been true.

Q. Witness, you have said that the order from the Chief Public Prosecutor at Duesseldorf to the police, to arrest Kluettgen, had not been complied with, and now you say Kluettgen came to see you. Did you, as attorney general, not have the possibility to arrest Kluettgen immediately?

A. No, I did not have that possibility. It was a Saturday evening, I was alone in my apartment, and I had no weapons.

Q. You said that Kluettgen had been transferred to the Aix-la-Chapelle district, and you said that the agency for which Kluettgen worked had done that. In carrying out your investigations, did you find any indications that that was done intentionally in order to remove Kluettgen from your jurisdiction?

A. I did not find indications, and I certainly did not find any proof, but the possibility exists. However, it is also quite possible that Kluettgen was transferred from the Kranenburg district because the population was excited.

Q. Could you just tell the Tribunal approximately when the Allied troops arrived in Duesseldorf or Aix-la-Chapelle, the district where Kluettgen was staying at the time.

A. Yes. I can't tell you exactly when the Allied troops arrived in Aix-la-Chapelle, but they arrived in Oberkassel, on the left bank of the Rhine, at the beginning of March, and as far as I remember, they got to Duesseldorf in April.

Q. Up to that time proceedings were continued, were they?

A. Yes.

Q. And later on, after you had received the support from the Ministry, no instructions to the contrary were issued to you?

A. No contrary instructions were issued to me. The matter was concluded. All that was missing was an interrogation of the Kreisleiter.

Q. And, in accordance with your suggestion, they would then have been indicted?

A. Well, I couldn't make a suggestion because I didn't really know what was the matter with Hartmann yet, but if I had found out, I would then have suggested the indictment of Kluettgen and possibly of the Kreisleiter too. However, as far as the Kreisleiter was concerned, that depended upon those investigations which had not yet been made.

Q. I suppose these facts which you have described to the Tribunal can be gathered from the files which you have mentioned?

A. Yes.

Q. May I ask you when you saw the files for the last time?

A. In the spring of this year.

Q. What has been done with the files?

A. I gave them to the attorney general, Dr. Junker, in Duesseldorf in person.

Q. And presumably they are still there?

A. Yes, I am quite sure they must be.

PRESIDING JUDGE BRAND: I would like to ask a question. The case was pending for investigation from September 1944 until March 1945? Is that what you meant to say?

WITNESS HAGEMANN: Yes.

PRESIDING JUDGE BRAND: Thank you.

DR. SCHILF: Mr. Hagemann, did you ever hear—

PRESIDING JUDGE BRAND: Just a moment. One question.

JUDGE HARDING: What else did the Ministry do about it?

WITNESS HAGEMANN: Well, naturally I don't know what steps the Ministry took, but I assume that the Ministry tried to get the Party Chancellery to give its consent for the Kreisleiter to be interrogated; again and again I suggested to the Ministry to take such a step.

Q. But you heard nothing further from the Ministry, is that right?

A. No, no, I heard no more later on, because—well, I don't really know why they didn't write again. I have already told you that transportation difficulties were great, and that it became more and more difficult to keep in touch by letter or by telegram. For example, since the middle of March—or anyway I think it must have been since the middle of March—we were still in a sort of cauldron, we in Duesseldorf were cut off on all sides from the outside world.

PRESIDING JUDGE BRAND: In March 1945?

WITNESS HAGEMANN: Excuse me. What is it you mean? What happened in March 1945? You mean it was then that Duesseldorf became a cauldron? You mean it was then that we became cut off in Duesseldorf?

Q. Yes.

A. Yes, I think it must have been in March 1945, but naturally the difficulties had been great before that time, I mean the transportation difficulties, and they grew worse and worse.

DR. SCHILF: Mr. Hagemann, did you ever hear that that man Kluettgen was recently sentenced to death by an American Military Tribunal?*

WITNESS HAGEMANN: Yes, Dr. Haensel told me that a few days ago. He told me that he had read in the paper that Kluettgen had been sentenced to death in Dachau by an American Military Tribunal.

* * * * * * *

* Ludwig Kluettgen was tried and sentenced to death by a General Military Government Court at Dachau, Germany, 11 and 12 August 1947. His execution was carried out on 29 October 1948.

CROSS-EXAMINATION

MR. LAFOLLETTE: After you communicated with Dr. Mettgenberg about your trouble with the case, did you ever get an answer back from him?

WITNESS HAGEMANN: You're now referring to the first case, are you? You're referring to the Kluettgen case, are you?

Q. Yes, I'm referring to the Kluettgen case.

A. Yes, I talked to him over the telephone and then I received an order from the Ministry to the effect that they agreed with my plan to clear up the matter and that in particular the Kreisleiter was to be interrogated. I was also instructed that I should make a further report and that probably further directives would be issued to me. Naturally, I had to wait for the instructions from the Minister. Whether it was Dr. Mettgenberg who had signed that order or whether it was Dr. Vollmer who was then ministerial director, I naturally can't tell you, for of course I was interested in the case as such but not in the man who signed it.

Q. And before you could do any more, you had to wait for instructions from the Ministry in all cases where Allied fliers had been shot; is that right?

A. Well, that is the way I remember that circular decree but that is the only case that occurred in my area, and the instructions were to the effect to clear up the matter.

DR. SCHILF: I have no further questions.

PRESIDING JUDGE BRAND: The witness is excused.

EXTRACTS FROM THE TESTIMONY OF DEFENDANT KLEMM[1]

DIRECT EXAMINATION

* * * * * * *

DR. SCHILF (counsel for defendant Klemm): We now come to the next charge of the indictment. You are personally made responsible in the indictment for having assisted in the so-called lynch justice on the part of the German population exercised on bailed-out Allied flyers during the war. May it please the Tribunal, the documents which were introduced against the witness in that connection are NG–364, Prosecution Exhibit 108; 635–PS, Prosecution Exhibit 109; and NG–149, Prosecution Exhibit 110.[2] According to Exhibit 108 which we already discussed a few days ago, Bormann had sent a secret letter from the Fuehrer Head-

[1] Further extracts from the testimony of the defendant Klemm are reproduced above in sections V C 1 a and V C 3 b, and below in sections V D 2 and V F.

[2] These documents are reproduced earlier in this section.

quarters to the Nazi Party which was addressed to Gau and Kreisleiter. He spoke about lynch actions which had already been taken by the people and it says further, and I quote: "no police or criminal proceedings have been taken against citizens who have taken part herein." He is speaking in the past tense. Exhibit 109 shows correspondence between Lammers and Thierack. Lammers informs Thierack about this circular letter sent out by Bormann. First, I want to ask you, in what relationship did you see these statements of Bormann to the Kreisleiter and Gauleiter to Thierack at the time?

DEFENDANT KLEMM: According to the text of Lammers' letter, Exhibit 109, there must have been an enclosure in this letter.

Q. At the time[1] did you obtain knowledge of Exhibit 109 and the enclosure, as you call it, Exhibit 108?

A. Yes, I saw Lammers' letter and I must have seen this circular letter of Bormann's together with it.

Q. Bormann spoke about three of those cases which had occurred in the past. Bormann stated that penal prosecution did not take place. When you saw these two letters—when these Exhibits 108 and 109 were submitted to you—did you know anything about it, that is that in the past the administration of justice, that is the courts abstained from penal prosecution against members of the German population?

A. I consider that that is absolutely impossible. If penal prosecution would have been abstained from, this could have been done only by quashing the trial, and for such a quashing Hitler was competent exclusively or the Minister of Justice to the extent to which this right had been delegated to him by Hitler. This can be seen from the clemency regulations which have already been introduced as a document here, in part. I cannot remember such a case being discussed, and I cannot find anything in these reports about it either. I looked at them with that in mind.

Q. If you say that at the time when you received this letter you did not know any past cases, how should one understand Bormann's letter? He is speaking of the past and says that penal prosecutions did not take place.

A. This can only be explained as follows: According to the letter, before it was sent out, such cases must have occurred. Himmler had already in 1943 instructed his police not to interfere in disputes between the German population and terror fliers which had been shot down.[2] This was already brought out in the IMT

[1] At the time the defendant Klemm was Under Secretary in the Reich Ministry of Justice.

[2] See Klemm Document 68a, Klemm Exhibit 68a, the first document reproduced in this section.

trial. This sentence which Bormann used in his circular letter can be explained in my opinion only as follows, namely; that the police did not forward denunciations to the administration of justice and that in this way a penal prosecution did not take place, but only because the administration of justice did not hear anything about these matters. From the hint that Lammers gives in this letter that Himmler had already informed his police also on the basis of Bormann's circular letter, it is quite clear to me that such denunciations to the administration of justice were also not to be made in the future. But, of course it could happen that the administration of justice found out about such cases on its own and took them up, but incidentally, that Hitler backed this action himself is in my opinion shown in Exhibit 110.

Q. Mr. Klemm, Exhibit 108 and 109 bear your initials. I now want to ask you, were these statements submitted to you before they were submitted to Thierack or after that?

A. I received these documents after Thierack had seen them and after he had already made his notation on them.

Q. This notation by Thierack reads as follows: "IV RV with the addition that such cases for the purpose of examination in regard to quashing shall be submitted to me," that is "to me" Thierack, that is Thierack's notation. What do you have to say about that? How did you understand that notation?

A. The prosecution submitted this document with a supplementary sheet and this says, at least in the German edition of the document, handwritten note on the right upper corner, signed "Klemm." That is not right. There isn't any handwritten notice in the upper right hand corner at all but merely a "Kl," my initials. Below the initials, that is, about the upper one third of the page, there is the notation which has just been quoted which was written by Thierack. The handwritten note is without doubt in Thierack's handwriting. If the original were available and not merely a photostat, one would be able to see that this note was written with a green pencil. That was the color in which ministers had to sign, according to the business regulations for the highest Reich authorities. Whereas in a purple pencil only my initials are on this document.

Every one of the defendants here, if he has been in the ministry, would be able to testify whether that was my handwriting or not.

PRESIDING JUDGE BRAND: What is the exhibit number on that again?

DR. SCHILF: Exhibit 109, Your Honor, 109; 635–PS. But may

I remark it is a later sheet. The prosecution submitted Exhibit [108 and Exhibit] 109 at two different times in two parts.

Now, Mr. Klemm, I want to ask you—

DEFENDANT KLEMM: I want to make an additional explanation. The figure "IV" means department IV. "R-V" means "Rundverfuegung", circular order, with the addition that such cases are to be submitted to me, that is Thierack, and are to be submitted not for quashing but for the purpose of examining the question of quashing if they were pending. Thus, a quashing was not considered from the very beginning.

Q. Did this instruction issued by Thierack have any possibility of inciting the population to lynch Allied fliers, or how did you look at it at the time?

A. After the Minister had issued this instruction to Department IV and thus had arrogated the decision in regard to this to himself, I no longer had a possibility to undertake anything in the matter. This circular order was issued with the stamp "secret" on it if it was sent out at all, and I don't know that. And one cannot talk about inciting the population for the reason that the population did not hear about it at all. However, after Bormann had informed the Party in this manner and after Himmler had issued his instructions to the police, it was the duty of Thierack to take some measures in regard to the prosecutions in the country. I have already stated that the administration of justice was unwilling, and Thierack was unwilling too, to grant freedom from prosecution without any conditions like that. Thus, if the administration of justice wanted to carry out a trial, the Minister had to assert his authority and to protect the local prosecutors against any elements of the Party or the police who would like to prevent such a penal prosecution. If a proceeding was to be quashed, however, only the Minister himself could do that, because of the regulations by law. What were the consequences of this circular order in the administration of justice, I can no longer remember. It may be one or two very special cases were quashed. I do not know whether there were more such cases.

Q. You said that the administration of justice and Thierack, too, turned against Bormann's methods. Can you cite examples for this?

A. The Party did not only require that those people who participated in lynchings should not be punished, but on the contrary, it wanted to have severely punished those people who treated fliers who had been shot down in a humane manner; and they wanted to have them punished with the aid of the regulations

regarding the forbidden contact with prisoners of war. We did not concur with either of those measures. In a case which took place in Magdeburg, the Party attempted to achieve the most severe punishment of a couple which had given food to an enemy flier who had been shot down and who had received a piece of candy from him. This was stopped. We had received a report according to which a couple was arrested because they had allowed an Allied flier who had been shot down, into their apartment. The Canadian—I believe he was a Canadian flier—had been taken prisoner during the air raid, that is, before the all clear signal, by a civilian, and the civilian took him into his apartment. In this apartment the flier received something to drink and the Canadian offered the wife a piece of candy. At first the woman refused it. When he offered it the second time, however, she accepted it. She then put the piece of candy away and said, "That is for the children." The Party had achieved it with the local administration of justice that the married couple was arrested and that an indictment would be filed for illicit contact with prisoners of war in a very serious case. When I heard about this report—I shall shorten this description somewhat—I reported this case very emphatically to Dr. Thierack, and during the very same night he called up the Chief Public Prosecutor in Magdeburg and instructed him to have the married couple released immediately the next morning.

Q. Mr. Klemm, that is sufficient. I shall submit an affidavit about this incident. I only want to ask you now, those were cases in which Germans were prosecuted because they were supposed to have treated Allied prisoners of war too leniently. Can you also cite the opposite cases where the Reich administration of justice prosecuted Germans who participated in lynchings?

A. Around the turn of the year 1944–1945 in Kranenburg that is the district of the district court of appeals, Duesseldorf, the following case occurred. An SA leader had, during the course of the air war, lost three very close relatives of his due to bombing. One noon he passed the town hall in Kranenburg. There was a guard standing, and with him he had two captured paratroopers. This SA leader went over to him and shot the two captured paratroopers. We prosecuted that case and even though the police as well as the Party offices offered considerable resistance, these discussions were advanced energetically. I do not know the final outcome, because later on due to the events of the war this territory was occupied by the Allied troops.

Q. May it please the Tribunal, may I say briefly I have the approval of the Court already to submit these files of the General

Public Prosecutor of Duesseldorf. I do not have them here as yet. When I receive them, I shall then submit them in evidence.

Mr. Klemm, briefly in regard to Exhibit 110, which you have already mentioned, "terror fliers," secret military matter, that is how it is called; and a note. Did you find out anything about that?

A. These are Wehrmacht files and a correspondence with the Foreign Office, and the problem was to not let terror fliers obtain the status of prisoners of war.

Q. Let me interrupt you; you do not have to discuss it. Did you find out about the matter at the time?

A. The administration of justice neither took part in this case nor did we know anything about it.

Q. The prosecution, furthermore, submitted document 1676–PS, Prosecution Exhibit 417.[1] It is an article which appeared in the Voelkischer Beobachter on 28–29 May 1944. The prosecution asserts that from this article of Goebbels' in the German press, one can read an indictment of the population to administer lynch justice. Did you find out about this article at the time?

A. I did not have knowledge of this article at the time. It was not the cause for Thierack's circular letter, which was issued for quite different reasons; as I just described, it was issued for legal considerations. Moreover, according to the affidavit in Document NG–1306, Prosecution Exhibit 440, the issuance of this circular letter must have occurred at a time which shows that it could have had no connection with this article in the newspaper.

* * * * * * *

CROSS-EXAMINATION

* * * * * * *

MR. LAFOLLETTE: * * * Now we will consider the matter of the Allied fliers. That document is Exhibit 108 and 109.[2] NG–364, Prosecution Exhibit 108 was the circular letter from Bormann dated 8 June [30 May] 1944, and Exhibit 109 is Document 635–PS. You testified yesterday—I mean Friday morning—that the notation by Thierack was on Exhibit 108 [Exhibit 109] reading, "IV circular with the addition that such cases are to be submitted to me when they arrive for an examination of the

[1] Translation of entire document appears in Nazi Conspiracy and Aggression, (U.S. Government Printing Office, Washington, 1946) volume IV, pages 186–189.

[2] These documents are reproduced above in this section.

question in quashing." That was on there when the document reached you. We are in agreement on that, are we not?

A. It was an instruction to Division IV to draft such a circular decree with these contents for the purpose of examining whether the case should be quashed.

Q. Yes. Now then, you also said, "From the hint that Lammers gives in this letter—that is Exhibit 109—that Himmler had already informed his police also on the basis of Bormann's circular letter, it is quite clear to me that such denunciations to the administration of justice were also not to be made in the future but of course it could happen that the administration of justice found out about these on its own and took them up, but incidentally Hitler backed that action itself." Do you recall, did you do anything after 4 June 1944 when you received this notation from Thierack about this subject of quashing sentences or did you let the matter drop?

A. I was not able to do anything, since the minister had ordered that this circular decree would be drafted and these cases had to be reported too, because according to the circular letter by Bormann to the Party and according to the information by Lammers that Hitler had instructed the police, the public prosecution had to get into difficulties if it found out about such a case, and if it started an investigation.

Q. Did you personally take any steps to see that there would be no prosecutions against anyone who followed Bormann's instructions?

A. I know for sure, and I have already described, that we did carry out a proceeding against the party and the police. We continued investigations, and furthermore, I testified that I cannot recall with certainty any more whether, on the other hand, one or two cases in which there was a special situation was quashed. I cannot recall that any more with certainty.

Q. But you yourself gave no instructions to prosecutors on this line because that was Thierack's order, wasn't that right?

A. Yes, that was Thierack's order that the public prosecutors were supposed to report on these matters; after they had reported, the Minister had to decide whether the investigation and the case were to be continued or whether the proceedings should be quashed. This means that the instructions for the purpose of examination were for the purpose of examining whether the proceedings should be quashed.

* * * * * * *

D. The Making and Application of Special Measures Concerning Nationals of Occupied Territories, Minority Groups and Races, and Alleged "Asocials"

1. INTRODUCTION

Under National Socialist ideology and practice a large number of German nationals were considered inferior or objectionable on racial and political grounds. After Hitler came to power in January 1933, German nationals were subjected to various discriminatory laws and practices, including protective custody in the hands of the police (usually the Gestapo or Secret State Police) or confinement in concentration camps. After Germany occupied the territory of neighboring countries, these practices were extended to non-German nationals. As the war progressed, the intensity of discrimination and persecution increased.

In the Justice case, one of the most important issues was the manner in which German criminal law was extended to the occupied countries. German penal legislation and special legislation applicable to Poles, Jews, and others was introduced in that part of western Poland usually referred to as the "Incorporated Eastern Territories." Evidence concerning this aspect of the case appears below in section D2. (A similar type of question arose in cases where persons who were not Germans were compelled to work in Germany and accused of treason, of undermining Germany's defensive strength, or of being public enemies. See section E, below.) In the occupied western areas the application of the Night and Fog decree was the principal measure involving the judicial process which affected the life and liberty of non-German nationals. Evidence concerning this matter appears below in section D3.

2. JEWS, POLES, GYPSIES, AND OTHERS

PARTIAL TRANSLATION OF DOCUMENT NG-629
PROSECUTION EXHIBIT 28

[Also Rothenberger Document 3
Rothenberger Defense Exhibit 3]

EXTRACTS FROM A REPORT* ON A CONFERENCE OF DEFENDANT ROTHENBERGER AND VARIOUS COURT PRESIDENTS, 1 FEBRUARY 1939, CONCERNING "RACE POLLUTION," EXCLUSIONS OF JEWS FROM EMPLOYMENT, AND "THE LEGAL TREATMENT OF JEWS"

Report on the conference of [court] presidents on 1 February 1939

* The first part of this report on the conference is reproduced in section B. It dealt with attacks on judicial actions in the official SS magazine and questions of prosecuting those who committed criminal offenses during the widespread violence against Jews during "Crystal Week," 9–11 November 1938.

Present:

Senator Dr. Rothenberger,
Attorney General Dr. Drescher,
Vice President Letz,
District Court Presidents Korn and Dr. Ruether, Bremen,
Local Court President Dr. Blunk,
Local Court Directors Schwarz, Boehmer, Hansen, and von Lehe,
Senior Judges of Local Court Gersdorf and Stender,
Chief Public Prosecutor Lohse, Bremen,
Oberlandesgerichtsrat Dr. Segelken
and the undersigned.*

Senator Dr. Rothenberger and the attorney general reported on the discussions at the meeting of the presidents of the courts of appeal and attorneys general with the Reich Minister of Justice.

* * * * * * *

II a. The Chief Public Prosecutor then spoke again on the treatment of women in cases of race defilement. The Fuehrer refuses an extension of culpability according to the blood protection law [Blutschutzgesetz].

Concerning complicity he pointed out the contradictory opinions of police and justice. The public prosecutors are to work according to the following directives:

If a woman merely denies the intercourse she will not be prosecuted. On the other hand, if the woman was an active accomplice —if she concealed the race defiler for instance—she will be prosecuted. If, at the same time, there are other offenses (perjury) complicity is to be omitted from the indictment. In such cases, however, a report is to be made to the Reich Minister of Justice.

Senator Dr. Rothenberger pointed out once more that it is the Fuehrer's desire that the woman should not be punished. If, by mistake however, any person should be indicted or if according to the results of the main proceedings punishment because of complicity may be expected, the proceedings are to be quashed in all circumstances. He urged that the judges be instructed accordingly.

II b. The Chief Public Prosecutor then discussed the problem of prosecuting women for failing to register illegitimate births. In this case the Fuehrer is against punishment according to article 169 for mere concealment of the identity of the father; because he considers that in most cases the woman's motive should be respected. The woman will be prosecuted, however, if she gives false information concerning the father's identity.

* Document is not signed.

Senator Dr. Rothenberger completed this statement by saying that it was the Fuehrer's express wish that the woman be exempted from punishment; the Fuehrer had not yet made a final decision in the matter of false statements. It should therefore be arranged that in such cases the indictment be temporarily postponed according to article 169. If necessary, a legal regulation may be expected in the near future.

III. Concerning the extent of the cases tried in accordance with the gangster decree, the Chief Public Prosecutor reports that up to now 15 cases have been tried by special court in the Reich territory, most of them in Hamburg. Care must be taken that accomplices do not escape punishment through the carrying out of the trial before a Special Court. The complete verdict must, on principle, be submitted before the death sentence is carried out.

Senator Dr. Rothenberger declared that it would be advisable to make the fullest possible use of the possibilities of the gangster decree. The Hamburg cases were considered suitable in Berlin. The Ministry had now realized that summary courts of the Hamburg type offer the only proper solution; they will therefore be maintained.

Insofar as Berlin exerts pressure concerning the speed with which the verdicts are delivered, this pressure must not go beyond the field of the administration of justice and affect the judges. The verdict must be submitted before the death sentence is carried out. In his opinion a typewritten report on the oral verdict, as prescribed for Hamburg, is sufficient.

He considers that the publication of sensational reports in the press on such trials is extremely undesirable; there was general agreement on this. Senator Dr. Rothenberger promised that he would personally contact the competent authorities in order to stop such reports in the future.

* * * * * * *

V. The Chief Public Prosecutor then reported briefly that civil servants with Jewish blood are on principle excluded from employment and that it is necessary to make a report on exceptions.

No pressure is to be put on civil servants to induce them to subscribe to the Party newspapers.

VI. Senator Dr. Rothenberger then stated the ministry's opinion on various special questions concerning the legal treatment of Jews.

(1) In cases where a Jew asks a bailiff to execute a sentence against an Aryan, the bailiff is not authorized to refuse to do so.

(2) Aryan tenants of a Jewish landlord are obliged to pay rent.

(3) Jews enjoy protection against eviction and tenant's protection to the same extent as Aryans.

(4) The order suspending execution also applies to Jews in accordance with the laws in effect. There may be exceptions in individual cases, when it is purely a matter of opinion, for example when a radio is seized.*

(6) The fact that a debtor is a Jew should as a rule be a reason for arresting him. However, it depends upon the individual case.

(7) Security for the costs of litigation must not be demanded from a Jew to a larger extent than from anybody else.

(8) Naturally, a Jew may be heard as a witness, but extreme caution is to be exercised in weighing this testimony. Senator Dr. Rothenberger requested that no verdict should be passed in Hamburg, when a sentence would exclusively be based on the testimony of a Jew.

Senator Dr. Rothenberger then requested the presiding and supervising judges to recordingly and urgently call the attention of the judges concerned to the questions dealt with.

TRANSLATION OF DOCUMENT NG-590
PROSECUTION EXHIBIT 198

LETTER FROM THE REICH MINISTRY OF JUSTICE, SIGNED BY DEFENDANT METTGENBERG, TO THE PRESIDENT OF THE DISTRICT COURT AND THE CHIEF PUBLIC PROSECUTOR IN HAMBURG, 1 APRIL 1939, CONCERNING THE REDESIGNATION OF JEWISH NAMES IN CRIMINAL PROCEEDINGS

Carbon Copy

The Reich Minister of Justice
III g[9] 93/39

Berlin, 1 April 1939

[Stamp]

Hanseatic Court of Appeal
Received: 15 April 1939

Through the President of the Court of Appeal and the Attorney General, to 1412 Bls 1938—

To the
President of the District Court and the
Chief Public Prosecutor
Hamburg

* Paragraph (5) is not included in original document.

907802—51——40

Document reference made for: 400 1a

Subject: Criminal Case against the former physician Albert Israel Leopold for race defilement
11 K Ls 108/38

In the indictment of 17 October 1938 as well as in the verdict of 14 December 1938, Leopold's profession is given as a physician, although his permit expired on 30 September 1938 pursuant to article 1 of the fourth ordinance of the Reich Citizenship Law of 25 July 1938 (Reichsgesetzblatt I, p. 969). This applies also to the report of the Chief Public Prosecutor to the Reich Minister of the Interior of 6 February 1939. In this connection also the given name Israel should have been added to the first name Albert pursuant to article 2, section 1 of the second ordinance of 17 August 1938 for the implementation of the law concerning changes of family names and first names.*

I ask you to take the necessary steps and especially to take care that in criminal cases against Jews which were filed prior to 1 January 1939 the names given will be rectified as far as this has not already been done.

BY ORDER

[typed] Signed: DR. METTGENBERG

1. 1 copy to the president of the district court with the request to make further use of it.
2. 2 copies to the attorney general
3. Wegl

19 April 1939

PARTIAL TRANSLATION OF DOCUMENT NG-880 PROSECUTION EXHIBIT 459

LETTER FROM MINISTRY OF JUSTICE, SIGNED BY DEFENDANT SCHLEGELBERGER, TO MINISTER OF INTERIOR AND THE FUEHRER'S DEPUTY, 3 FEBRUARY 1940, TRANSMITTING DRAFTS OF DECREES FOR INTRODUCING GERMAN LAW INTO INCORPORATED EASTERN TERRITORIES, AND A MEMORANDUM OF THE REICH CHANCELLERY INITIALED BY LAMMERS AND DEFENDANT KLEMM

The Reich Minister of Justice
3200/4 1a–9–312

* This ordinance was promulgated in the 1938 Reichsgesetzblatt, part I, page 1044. It provided that beginning 1 January 1939, male Jews must add "Israel" and female Jews "Sara" as their first or middle names unless they already used such names. This provision applied to all German Jews but not to Jews in Austria or Jews of foreign nationality. The aim was to identify Jewish persons as Jews by their names.

Berlin W 8, 3 February 1940
Wilhelmstrasse 65
Telephone 110044,
Long distance 11 6516

Urgent

To:

a. The Minister of the Interior

b. The Fuehrer's Deputy[1]

Berlin W 8
Wilhelmstrasse 64

Subject: Introduction of the German Court Constitutional Law, and German Criminal Law in the Incorporated Eastern Territories

To *a.* In reply to communication dated 19 January 1940.
I East 40/40
4024

Enclosures: 3 drafts

I request agreement as soon as possible to the drafts enclosed—

(*a*) An order concerning the abolition of the district court of appeal at Marienwerder, and the modification of the court district.

(*b*) An order concerning the court organization and court constitution in the Incorporated Eastern Territories.

(*c*) An order concerning the taking effect of legal regulations in the sphere of the administration of criminal law in the Incorporated Eastern Territories.[2]

An additional draft concerning the introduction of legal regulations in the sphere of the administration of civil law will be dispatched at the same time.

I have likewise asked the Reich Minister of Economics and the Reich Minister for Public Enlightenment and Propaganda for their agreement with regard to article 1, I, Nos. 8, 10, and 11 of draft (c). Furthermore, I have asked for the agreement of the Reich Protector for Bohemia and Moravia concerning article 1, II, No. 2 of draft (c). The organization of the courts in the Incorporated Eastern Territories was completed several months ago, and German courts are working everywhere there and applying German law, without this application of law having found its legal basis. The Reich governor of the Reich Gau Wartheland in a

[1] At this time the Reich Minister of the Interior was Frick and the Fuehrer's Deputy was Hess. Both were tried in Nuernberg before the International Military Tribunal.

[2] Only the third draft (*c*) is reproduced herein.

letter dated 11 December 1939 told me that it is now desirable for the application of German law by German courts to receive a legal basis. Likewise the Reich governor of the Reich Gau Danzig/West Prussia had me informed that it would conform to his wishes if the German law were henceforth introduced legally in the Incorporated Eastern Territories. The introduction of German law is also necessary, because the regulation for the prevention of acts of violence in the Incorporated Eastern Territories, prepared by the Ministry of the Interior, tacitly implies the application of German criminal law and court constitutional law.

I note the following concerning the individual drafts:

1. Draft (*a*)—In this draft I have summarized those regulations from the draft of an order concerning court organization in the Incorporated Eastern Territories which I had dispatched together with a letter dated 26 October 1939—Ia–9–1961, according to which the district court of appeal at Marienwerder is to be abolished. At the same time the draft contains the measures necessary in this connection, and those for the relevant delineation of the court districts in the territory of the former Free City of Danzig.

2. Draft (*b*)—This draft regulates the court organization in the Incorporated Eastern Territories, with the exception of the territory of the former Free City of Danzig; at the same time it introduces court constitutional regulations, valid in the old Reich, into these parts of the territory.

3. Draft (*c*)—Reference to article 1—The temporary modifications of the law concerning criminal procedure contained in article 1, II, Nos. 1 and 2, are expressly desired by both Reich governors, and are essential with regard to the special circumstances in the Incorporated Eastern Territories.

The modification of the regulation of the Special Court dated 21 March 1933* provided for in article 1, IV, entitles the Special Courts in the Incorporated Eastern Territories temporarily to assume the character of a civilian court martial to a still greater extent.

Reference to articles 5 and 7—As, according to article 5, the execution of punishment is provided for to a certain extent on the basis of Polish verdicts, a reopening of the trial must be rendered possible for which German law is applicable. In addition there is a necessity to carry out anew legally closed Polish criminal proceedings in cases which have to be given special consideration. However, this should only occur in accordance with my order as set forth in article 5, section 2.

* The text of the decree of 21 March 1933 is reproduced on page 218.

Reference to article 6—The regulation shall make it possible that dangerous habitual criminals and dangerous sexual criminals be rendered harmless by the subsequent order for protective custody or castration.

Reference to article 10—Thus, the actual German criminal law is also declared applicable to those crimes which were committed before the decree became effective in the Incorporated Eastern Territories. But in accordance with article 1, II, number 1, prosecution need not be enforced; also the public prosecutor only prosecutes if public interest requires subsequent punishment.

In consideration of the fact that the introduction of German law in the Incorporated Eastern Territories is imperative for reasons of legal security, may I request that the affair be expedited?

As deputy
[Signed] DR. SCHLEGELBERGER

Enclosure c

Order regarding the Coming into Force of Legal Regulations in the Field of Administration of Justice in Penal Law within the Annexed Eastern Territories February 1940

By virtue of article 8 of the decree of the Fuehrer and Chancellor regarding the formation and administration of the Incorporated Eastern Territories of 8 October 1939 (Reich Law Gazette I, p. 2042) in the version of the decree of 2 November 1939 (Reich Law Gazette I, p. 2135) the following is decreed regarding the administration of justice in penal law within the annexed Incorporated Eastern Territories excepting the territory of the former Free City of Danzig:

Article 1

Coming into force of regulations of criminal law

It is ordered that within the sphere of administration of justice in criminal law the following laws and orders as well as the regulations decreed for the purpose of changing and supplementing them and the introductory, regulatory, and temporary regulations, in as much as it is not ruled otherwise:

I

1. The Criminal (Penal) Code for the German Reich.

2. The law against the criminal use of explosives which are dangerous to the public of 9 June 1884 (Reich Law Gazette, p. 61).

3. The law regarding the punishment of deprivation of electrical work of 9 April 1900 (Reich Law Gazette, p. 228).

4. The ordinance of the Reich President against unauthorized use of vehicles and bicycles of 20 October 1932 (Reich Law Gazette I, p. 496).

5. The law to ward off political illegal actions of 4 April 1933 (Reich Law Gazette I, p. 162).

6. The law to guarantee law and order of 13 October 1933 (Reich Law Gazette I, p. 723).

3200/4 Ia 2 312

I.P.O. 845

7. The law concerning insidious attacks against the State and the Party and for the protection of the Party uniform and insignia of 20 December 1934 (Reich Law Gazette I, p. 1269)[1].

8. The law against economic sabotage of 1 December 1936 (Reich Law Gazette I, p. 999)[2].

9. The law against highway robbery by means of car traps of 22 June 1938 (Reich Law Gazette I, p. 651).

10. The order on extraordinary measures concerning radio of 1 September 1939 (Reich Law Gazette I, p. 1683)[3].

11. Article 1 of the war economy decree of 4 September 1939 (Reich Law Gazette I, p. 1009)[4].

12. The order against public enemies of 5 September 1939 (Reich Law Gazette I, p. 1679)[5].

13. The Articles 1 and 4 of the ordinance for the protection against juvenile major criminals of 4 October 1939 (Reich Law Gazette I, p. 2000).

14. The order supplementing penal provisions for the protection of the Military Efficiency of the German people of 25 November 1939 (Reich Law Gazette I, p. 2319)[6].

15. The order against violent criminals of 5 December 1939 (Reich Law Gazette I, p. 2378)[7].

II

The Reich Code of Criminal Procedure, but for the present with the following provisos:

[1] Document 1393–PS, Prosecution Exhibit 508, reproduced above in section IV B.
[2] Reproduced in part as a part of Document NG–715, Prosecution Exhibit 112, on page 182.
[3] Reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 185.
[4] Ibid., p. 187.
[5] Ibid., p. 188.
[6] Reproduced in part as a part of Doc. NG–715, Pros. Ex. 112, on p. 192.
[7] Ibid., p. 193.

1. Article 152, paragraph 2 of the Reich Code of Criminal Procedure (compulsory prosecution) and the regulations of articles 172 to 177 of the Reich Code of Criminal Procedure (proceedings to enforce legal action) do not apply. The public prosecutor prosecutes acts which he deems necessary to be punished in the public interest.

2. The regulations of articles 374 to 394 and 395 to 406 of the Reich Code of Criminal Procedure (private prosecution, concurring action) only apply, if the injured person is a German national, racial German, national of the Protectorate Bohemia and Moravia or of a state which is not at war with Germany. The regulations of Reich law according to which an office of the state is authorized to join in the bringing of a civil action as coplaintiff remain unaffected.

3. Reopening [of proceedings] to the previous status [Wiedereinsetzung in den vorigen Stand] in case of failure of appearance at set term [Versaeumung einer Frist] (articles 44 to 47 of the Reich Code of Criminal Procedure) has to be granted even if the person failing to appear was prevented from appearing through no fault of his own.

III

1. The law concerning the indemnification of persons acquitted in the retrial of 20 May 1898 (Reich Law Gazette, p. 345).

2. The law concerning the compensation for innocently suffered pretrial detention of 14 July 1904 (Reich Law Gazette, p. 321).

3. The law concerning restricted information from the penal record and the canceling of penal entries of 9 April 1920 (Reich Law Gazette, p. 507).

4. The juvenile court law of 16 February 1923 (Reich Law Gazette I, p. 135).

5. The penal register order in the version of 17 February 1934 (Reich Law Gazette I, p. 140).

6. The law concerning interrogation of members of the National Socialist German Labor Party and its formations of 1 December 1936 (Reich Law Gazette I, p. 994).

7. The regulation concerning fees for witnesses and experts in the version of 21 December 1925 (Reich Law Gazette I, p. 471).

8. The law concerning court costs in the version of 5 July 1927 (Reich Law Gazette I, p. 152), insofar as it refers to penal matters.

9. The regulation concerning fees for attorneys at law in the version of 5 July 1927 (Reich Law Gazette I, p. 162), insofar as it refers to penal matters.

IV

1. The order of the Reich government concerning the formation of Special Courts of 21 March 1933 (Reich Law Gazette I, p. 136).*

2. Parts I, III, and IV of the order concerning the extension of the competency of Special Courts of 20 November 1938 (Reich Law Gazette I, p. 1632), but for the present with the following measures:

Article 16, paragraph 2 of the order of the Reich government concerning the formation of Special Courts of 21 March 1933 (Reich Law Gazette I, p. 136) does not apply. The Special Court will decide upon a reopening of the proceedings.

Article 2

Temporary annulment of the existing law

The penal law which at present has been valid in the annexed Incorporated Eastern Territories, except the area of the hitherto Free City of Danzig and which opposes the new law or which regulates the same subject, is canceled with the coming into force of the new law.

Article 3

Application of the new law

Insofar as a regulation coming into force cannot be applied directly, it has to be applied according to the meaning.

If a regulation coming into force refers to a regulation not yet valid in the annexed Incorporated Eastern Territories, this reference has to be interpreted according to the law valid there.

Article 4

Application of the law hitherto valid

The general regulations of the Criminal (Penal) Code for the German Reich have to be applied directly or according to meaning to criminal offenses which have to be judged according to the law valid up to now.

Insofar as a regulation of the law hitherto valid remains in force for the time being refers to a regulation which is going to be

* Reproduced as a part of Doc. NG–715. Pros. Ex. 112, on p. 218.

abolished, the corresponding regulation of the new law has to take its place.

Article 5

Reopening of the procedure

The reopening of the procedure against valid judgments of foreign courts is determined by the law coming into force.

The Reich Minister of Justice can order that procedures which have been finished by a valid judgment of foreign courts are to be reopened.

Article 6

Supplemental order of security and improvement measures

Part 5, Nos. 2 and 3 of the law against dangerous habitual criminals and concerning security and improvement measures of 24 November 1933 (Reich Law Gazette I, p. 995) is valid, with the proviso that * * * takes the place of 1 January 1934 as key date.

Article 7

Execution of sentence [*Strafvollstreckung*]

Punishments or other measures which have been passed as valid by a foreign court are only being executed if in each case the public prosecutor orders the execution. It is he who orders the way and the amount of the punishment or any other measure to be executed.

Article 8

Execution of sentence [*Strafvollzug*]

The execution of imprisonment sentences and the security and improvement measures concerning deprivation of liberty is determined by the principles of execution of sentence under the Reich law (part I of the order concerning the execution of terms of detention and security and improvement measures, which are connected with confinement of 14 May 1934, Reich Law Gazette I, p. 383).

Article 9

Fines

Legally passed fines are payed over to the Reich Treasury.

Article 10

Validity

The penal laws defined in article 1 under I and the articles 1 to

15 of the Juvenile court law of 16 February 1923 (Reich Law Gazette I, p. 135) apply also to criminal offenses that have been committed in the annexed Incorporated Eastern Territories before the coming into force of the order with the exception of the area of the hitherto Free City of Danzig.

Article 11

Authorization

The Reich Minister of Justice is authorized to issue the regulations and temporary regulations necessary for the carrying-out and completion of this order. He may administratively adjudicate upon cases of doubt which arise from the introduction of the new law.

Article 12

Effective date of the order

This order comes into force on....., 1940.

Berlin, ..., February 1940

The Reich Minister of the Interior
The Reich Minister of Justice

Berlin, 14 February 1940

Reference: Reich Chancellery 2573 B

Subject: Introduction of the German civil and commercial law in the Incorporated Eastern Territories

1. Comment—The Minister of Justice transmits a letter addressed to the Supreme Reich Agencies containing two drafts of the orders concerning the introduction of the German civil and commercial law in the Incorporated Eastern Territories. He asks for the submission of wishes for possible alterations. The drafts provide for the introduction of the entire civil and commercial law in the Incorporated Eastern Territories, excluding only the tenant protection law, the hereditary farm law, and the law for the clearance of debts and reduction of interest. Fundamentally, the German law as applicable in the Reich proper must be introduced; it will, however, be adapted by special supplementary regulations for the districts formerly under the jurisdiction of Austrian law.

The Minister of Justice justifies this by stating that the judges *de facto* already apply the German law, since they are in practice unable to interpret the Polish law. Although it was suggested

during a conference of the under secretaries in the autumn of this year that more discretion should be used when introducing the German law for the present, the competent Reich governors now deem the introduction necessary; Reich Governor Greiser expressed this also in writing, as may be seen from the letter from the Minister of Justice, dated 3 February 1940, a copy of which is enclosed. The Minister of Justice asks that the introduction be effected at an early date.

No comments are necessary.

2. Duly submitted to the Reich Minister.

[Initial] L [Lammers] 16 February

3. To be filed.

[Initial] KL [Klemm] 14 February

[Initial] F [Ficker] February 13

TRANSLATION OF DOCUMENT NG-1612
PROSECUTION EXHIBIT 519

DECREE OF 13 JUNE 1940 CONCERNING ORGANIZATION OF COURTS IN THE INCORPORATED EASTERN TERRITORIES

1940 REICHSGESETZBLATT, PART I, PAGE 907

By virtue of the decree of the Fuehrer and Reich Chancellor concerning organization and administration of the eastern territories of 8 October 1939 (Reichsgesetzblatt I, p. 2042), the following is hereby ordered:

Article 1

The courts in the Incorporated Eastern Territories shall render judgments in the name of the German people.

Article 2

The following statutes shall take effect in the incorporated territories:

1. The Geman law on the organization of courts.

2. The law on the jurisdiction of courts, with respect to changes in the division of courts, of 6 December 1933 (Reichsgesetzblatt I, p. 1037).

3. The decree concerning a uniform organization of courts, of 20 March 1935 (Reichsgesetzblatt I, p. 403).

4. The law concerning the distribution of functions in the courts of 24 November 1937 (Reichsgesetzblatt I, p. 1286).

5. The decree concerning qualifications for the offices of judge, public prosecutor, notary public, and attorney, of 4 January 1939 (Reichsgesetzblatt I, p. 5).

6. Decree concerning preparation for the offices of judge and public prosecutor, of 16 May 1939 (Reichsgesetzblatt I, p. 917).

7. Decree concerning measures in the organization of courts and the administration of justice, of 1 September 1939 (Reichsgesetzblatt I, p. 1658), and the implementing orders issued hitherto on 8 September and 4 October 1939 (Reichsgesetzblatt I, pp. 1703, 1944).

8. Decree concerning simplification of the legal examinations of 2 September 1939 (Reichsgesetzblatt I, p. 1606).

Article 3

This decree shall take effect as of 15 June 1940.

Berlin, 13 June 1940

DR. GUERTNER
Reich Minister of Justice

FRICK
Reich Minister of the Interior

TRANSLATION OF SCHLEGELBERGER DOCUMENT 60 SCHLEGELBERGER DEFENSE EXHIBIT 26

DECREE OF 6 JUNE 1940 ON THE INTRODUCTION OF GERMAN PENAL LAW IN THE INCORPORATED EASTERN TERRITORIES[1]

1940 REICHSGESETZBLATT, PART I, PAGE 844

On the basis of articles 8 and 12 of the decree of the Fuehrer and Reich Chancellor on the organization and administration of the Incorporated Eastern Territories of 8 October 1939 (Reichsgesetzblatt I, p. 2042), the following is decreed on the administration of criminal law in the Incorporated Eastern Territories:[2]

* * * * * * *

[1] Part of the background of this decree is shown by the letter of defendant Schlegelberger to the Reich Minister of the Interior and to the Fuehrer's deputy of 3 February 1940, which transmitted a proposed draft for this decree (NG-880, Pros. Ex. 459) reproduced in part earlier in this section.

[2] Articles I and III of this decree were omitted from the document as offered in evidence by defense counsel. Article I is entitled, "Introduction of Reich Legal Regulations" and lists a large number of Reich laws most of which are contained in article 1 of the proposed draft of the Reich Ministry of Justice (NG-880, Pros. Ex. 459) reproduced in part earlier in this section.

Article II

Special regulations with regard to criminal law for the Incorporated Eastern Territories

Section 8

(1) Anyone committing an act of violence against a member of the German armed forces or their auxiliaries, the German police including their auxiliary forces, the Reich labor service, or a German authority, or office, or organization of the NSDAP will be punished with the death penalty.

(2) In less serious cases, particularly when the perpetrator has allowed himself to be carried away by excusable violent excitement, a sentence of hard labor for life or for a certain period of time, or imprisonment is to be imposed.

Section 9

Anyone who willfully damages the equipment of German authorities, or things which further the work of the German authorities or serve the public welfare will be punished with the death penalty, and in less serious cases with hard labor for life or for a certain period of time, or with imprisonment.

Section 10

Anyone who instigates or incites disobedience of a decree or order issued by German authorities will be punished with the death penalty, and in less serious cases with hard labor for life or for a certain period of time or imprisonment.

Section 11

Anyone who commits an act of violence against a German on account of his being a member of the German ethnic community will be punished with the death penalty.

Section 12

Whoever willfully commits arson (arts. 306 to 308 of the Reich Penal Code) will be punished with the death penalty.
[Page 846]

Section 13

Whoever conspires to commit a crime punishable in accordance with sections 8 to 12 [herein] or enters into serious negotiation thereon, and offers to commit such a crime or accepts such an offer will be punished with the death penalty, and/or in less serious cases with hard labor for life or for a certain period of time or imprisonment.

Section 14

(1) Anyone who receives authentic information of the project or carrying out of a crime punishable in accordance with sections 8 to 12 at a time when the carrying out or the success can still be averted and omits to give the authorities or person threatened due warning will be punished with the death penalty, and/or in less serious cases with hard labor for life or for a certain period of time or imprisonment.

(2) If the person upon whom it is incumbent to give warning, and who omits to do so is a relative of the perpetrator punishment can be waived if he has earnestly tried to restrain his relative from committing the act or to prevent its success.

Section 15

(1) Anyone who has failed to comply with the surrender obligation as stipulated in the decree of the Commander in Chief of the Army of 12 September 1939 (Ordinance Gazette for the Occupied Territories in Poland, p. 8) or is otherwise caught in unauthorized possession of a firearm, a hand grenade, or explosives will be punished with the death penalty; the same applies for the unauthorized possession of ammunition or other implement of war if by their nature or quantity public security is endangered.

(2) A sentence of hard labor or imprisonment will be passed if the perpetrator subsequently makes the delivery voluntarily, before the case has been brought before the court or an inquiry against him has been instituted. In this case punishment may even be waived.

(3) The person who has authentic cognizance of illegal possession of weapons, ammunition, explosives, or implements of war and fails to inform the official authorities accordingly without delay will receive capital punishment, in less severe cases hard labor for life or for a certain period or a term of imprisonment.

Section 16

(1) The provisions of sections 8 to 15 are not applicable to—

1. German nationals, ethnic Germans and nationals of the Protectorate of Bohemia and Moravia.

2. Nationals of states which are not participating in the present war against Germany.

(2) The Reich governors and provincial presidents are authorized to exempt from the regulations of sections 8 to 15 other ethnic groups too.

* * * * * * *

Berlin, 6 June 1940

Reich Minister of the Interior
FRICK

Reich Minister of Justice
DR. GUERTNER

TRANSLATION OF DOCUMENT NG-144
PROSECUTION EXHIBIT 199

LETTER FROM DEFENDANT SCHLEGELBERGER TO LAMMERS, 17 APRIL 1941, CONCERNING "PENAL LAWS FOR POLES AND JEWS IN THE INCORPORATED EASTERN TERRITORIES"

[Handwritten] submitted (last time)
Reich Chancellery
4.79 blb BBT 740 to 419/140

[Stamp] Reich Chancellery 5850 B 17 Apr. 1941
One Enclosure
The Reich Minister of Justice
9170 Eastern Territories 2-II a 2 996/41

Berlin W 8, 17 April 1941
Wilhelmstr. 65
Telephone 11 00 44
Long distance 11 65 16

To: The Reich Minister and Chief of the Reich Chancellery
Subject: Penal laws against Poles and Jews in the Incorporated Eastern Territories

[Handwritten] see statement of 22 April

Reply to letter of 28 November 1940
Reich Chancellery 17 428 B
1 Enclosure

I worked on the premise that special conditions in the Incorporated Eastern Territories also require special measures for the administration of the penal laws against Poles and Jews. As soon as the decree issued on 5 September 1939 by the Commander in Chief of the Army had introduced the Special Courts in the Incorporated Eastern Territories, I tried to make these courts, with their particularly prompt and energetic procedure, centers for combating all Polish and Jewish criminals. That I succeeded is shown by the very impressive numbers of cases dealt with by the Special Courts during the first 10 months of their activity in the Incorporated Eastern Territories. The Special Court in

Bromberg, for instance, has sentenced 201 defendants to death, 11 to penal servitude for life, and 93 to terms of penal servitude amounting to 912 years in all, thus an average 10 years' penal servitude for each individual. Only crimes of lesser significance were indicted at the local courts. On the other hand, the criminal courts were eliminated as far as possible as an appeal to the Reich Supreme Court against their judgment is permitted, and I wanted to prevent courts which were not entirely familiar with the special conditions in the eastern territories—even though it be the highest court in Germany—from giving a decision in these matters.

The aim of creating a special system of law [Sonderrecht] for Poles and Jews of the eastern territories was systematically pursued by the decree of 6 June 1940,* which formally introduced the German penal law applied in the eastern territories from the very beginning. In the sphere of the code of criminal procedure, compulsory prosecution no longer exists; the public prosecutor prosecutes only such acts which he thinks it necessary to punish in the public interest. The procedure of compulsory prosecution (arts. 172, et seq., of the Code of Criminal Procedure) was rescinded as it seems intolerable that Poles and Jews should in this way compel the German prosecutor to issue an indictment. Poles and Jews were also prohibited from raising private actions and accessory actions.

In article II of the introductory decree [of 6 June 1940], special cases for action [Sondertatbestaende] were annexed to the special system of law in the sphere of legal proceedings—cases which had been agreed upon with the Reich Minister of the Interior because they had become necessary. It was intended from the beginning that such special cases for action should be increased as soon as necessity arose. The decree for the execution and completion of the introductory decree mentioned in the letter from the Fuehrer's deputy was meant to meet the requirements which had become known in the meantime; whereas the decrees mentioned also in said letter concerning the introduction of the right of extradition, and of the law concerning the use of weapons by persons entitled to the protection of forestry and game laws, are only remotely connected with the criminality of Poles and Jews, and are intended exclusively to develop the general coordination of law in the eastern territories. I shall try to bring about an agreement with the Fuehrer's deputy in regard to both the last mentioned decrees, as well as the decree for the execution of the law for the cancellation of sentences, and the decree concerning criminal records.

* Document Schlegelberger 60, Schlegelberger Exhibit 26, reproduced in part earlier in this section.

On being informed of the Fuehrer's intention to discriminate basically in the sphere of penal law between the Poles (and probably the Jews as well) and the Germans, I prepared—after preliminary discussions with the presidents of the district courts of appeal and the attorneys general of the Incorporated Eastern Territories—the attached draft* concerning the administration of the penal laws against Poles and Jews in the Incorporated Eastern Territories and in the territory of the former Free City of Danzig.

This draft amounts to a special system of law both in the sphere of actual penal law and that of criminal procedure. In this connection, the suggestions made by the Fuehrer's deputy were taken into consideration to a great extent. Paragraph (3) of No. 1 contains a statement of facts in general terms, through which penal proceedings can be taken in future against any Pole or Jew belonging to the eastern territories who is guilty of punishable activities directed against the German race, and every kind of punishment is provided. This ordinance is supplemented by No. 1, paragraph (2), which is already contained in the preliminary ordinance, and which threatens the death sentence in cases of violence committed against a German by reason of his belonging to the German ethnic group. Furthermore, the cases in No. 1, paragraph (4) which are also contained in the preliminary ordinance, are only complements, which would perhaps no longer have been necessary in view of the new general statement of facts, but which I have included in order not to arouse a false impression that the scope of the acts liable to punishment according to this draft is more restricted than in the existing legislation. Finally, No. 2 makes it clear that a Pole will in any case also be punished for such acts as are punishable if committed by a German. Furthermore, the ordinance admits a wider application of the law in a manner appropriate to the requirements of the eastern territories. (Art. 2, Penal Code.)

I have already been in agreement with the opinion held by the Fuehrer's deputy, that a Pole is less sensitive to the imposition of an ordinary prison sentence. Therefore, I had taken administrative measures to insure that Poles and Jews be separated from other prisoners and that their imprisonment be rendered more severe. No. 3 goes still further and substitutes for the terms of imprisonment and hard labor prescribed by Reich law other prison sentences of a new kind, viz, the prison camp and the more rigorous prison camp. For these new kinds of punishment, the prisoners are to be lodged in camps outside of prisons and are to be employed there on hard and very hard labor. There

* Schlegelberger's draft (NG–331, Pros. Ex. 343) is reproduced following this letter.

907802—51——41

are also administrative measures which provide for special disciplinary punishment (imprisonment in an unlighted cell, transfer from a prison camp to a more rigorous prison camp, etc.).

The new kinds of punishment in No. 3 apply to all offenses committed by Poles and Jews, thus also to cases when the criminal commits a crime specified by the Penal Code. On the other hand, No. 3, paragraph (3), insures that the minimum penalty prescribed by German penal law and a mandatory penalty may be lessened if the crime was directed entirely against the criminal's own nation.

The part concerned with procedure contains first the special regulations of the preliminary decree existing up to now. In addition, Poles and Jews sentenced by a German court are not to be allowed in the future any legal remedy against the judgment; neither will he have a right of appeal, or be allowed to ask for the case to be reopened. All sentences will take effect immediately. In future, Poles and Jews will also no longer be allowed to object to German judges on the grounds of prejudice; nor will they be able to take an oath. Coercive measures against them are permissible under easier conditions. Furthermore, an important point is that according to No. 10, paragraph (2), the locally competent court of appeal decides concerning a nullity plea, which insures that no court outside the eastern territories has anything to do with proceedings against Poles and Jews. Further, No. 12 gives the court and the prosecution an independent position, meeting all requirements, with regard to the law concerning the constitution of the courts and the Reich law of criminal procedure.

No. 13 makes the factual special legislation against Poles and Jews and the elimination of compulsory prosecution apply also in cases where the Polish or Jewish criminal does, in fact, reside in the eastern territories, but the crime has been committed in another part of greater Germany.

In my opinion, a special penal law against Poles and Jews in such a form would neither restrict the liberty of action of German offices and officials, nor allow Poles and Jews to profit from its introduction insofar as they would be able then to lodge unwarranted actions and complaints against German officials. Factual penal law provides for such an increase in severity in the penalties threatened that these will act as the strongest possible deterrent. Any hole in the law through which a Polish or Jewish criminal might slip is also closed. In the sphere of criminal procedure, the draft shows clearly the difference in the political status of Germans on one side and Poles and Jews on the other.

The introduction of corporal punishment, as discussed by the Fuehrer's deputy, has not been included in the draft, either as a criminal sentence or a disciplinary measure. I cannot agree to this form of punishment as in my judgment it would not correspond to the level of civilization of the German people.

Criminal proceedings based on this draft will accordingly be characterized by the greatest possible speed, together with immediate execution of the sentence, and will therefore in no way be inferior to civilian court martial proceedings. The possibility of applying the most severe penalties in every appropriate case will enable the penal law administration to cooperate energetically in the realization of the Fuehrer's political aims in the eastern territories.

I intend to have the draft submitted to the Ministerial Council for the Defense of the Reich for approval. I should like, however, to discuss the matter verbally with you prior to that, and to request you if possible to get the Fuehrer's decision as to whether he agrees with the essentials of the intended regulations.

Acting Minister of Justice
[Signed] SCHLEGELBERGER[1]

TRANSLATION OF DOCUMENT NG–331 PROSECUTION EXHIBIT 343

DRAFT OF A PROPOSED ORDINANCE CONCERNING PENAL LAW FOR POLES AND JEWS IN THE INCORPORATED EASTERN TERRITORIES, PREPARED BY DEFENDANT SCHLEGELBERGER AND SUBMITTED TO THE CHIEF OF THE REICH CHANCELLERY ON 17 APRIL 1941[2]

Ordinance concerning the administration of justice regarding Poles and Jews in the Incorporated Eastern Territories

Of.....1941

The Ministerial Council for Reich Defense decrees the following law:

1. *Substantive Penal Law*

I

(1) Poles and Jews living in the Incorporated Eastern Territories have to conduct themselves according to the German laws and to the instructions issued for them by the German authorities.

[1] Defendant Schlegelberger testified concerning this document and his draft of a proposed ordinance (NG–131, Pros. Ex. 343, immediately following). The pertinent extracts from Schlegelberger's testimony are reproduced near the end of this section. The decree ultimately issued by the Ministerial Council for the Defense of the Reich was dated 4 December 1941. It is reproduced on page 632.

[2] The transmittal letter from Schlegelberger to Lammers (NG–144, Pros. Ex. 199) appears immediately above. File notes of the Reich Chancellery concerning Schlegelberger's draft (NG–130, Pros. Ex. 200) are reproduced just below.

They have to refrain from every act detrimental to the sovereignty of the German Reich or to the prestige of the German people.

(2) They will be punished by death if they commit an act of violence against a German on account of his membership in the German ethnic community.

(3) They will be punished by death, in less severe cases with an imprisonment, if they manifest an attitude hostile to Germany by hateful or inflammatory activity. Especially, if they talk in a way which is inimical to Germany or if they tear down or damage public announcements posted by German authorities or offices. Also, if they lower or damage the prestige or the welfare of the German Reich or the German people by their conduct in general.

(4) They will be punished by death, in less severe cases with imprisonment—

1. If they commit an act of violence against any member of the German armed forces or its auxiliaries, the German police including its auxiliaries, the Reich labor service, a German authority or office or an organization of the NSDAP;

2. If they deliberately cause damage to installations of the German authorities, or offices, or to things which are used in the course of their work or are established for the public interest;

3. If they encourage or stimulate disobedience against a decree or ordinance issued by the German authorities;

4. If they enter a conspiracy for committing any action punishable according to paragraphs 2, 3, and 4 No. 1–3. Also if they enter into earnest conferences about such actions or declare themselves willing to commit such or if they accept any such offer. Or, if they get reliable information about such an action or plan at a time when danger still can be averted and fail to report it in time to the authorities or to the threatened person;

5. If they are found in illegal possession of a firearm, of a hand grenade, of a weapon for stabbing or hitting, of explosives, munitions, or other war equipment. Also, if they receive reliable information about a Pole or Jew being in illegal possession of such things and fail to report this fact without delay to the authorities.

II

Poles and Jews will also be punished if they violate the German penal laws or if they commit an action which deserves punishment according to the basic principles of German penal law, in accordance with the requirements of national existence in the Incorporated Eastern Territories.

III

(1) Punishment will be meted out to Poles and Jews in the form of prison terms, fines, or confiscation of property. Prison terms will be meted out in the form of prison camp terms ranging from 3 months up to 10 years. In serious cases prison terms will consist of aggravated prison camp terms ranging from 2 to 15 years.

(2) The death penalty will be imposed whenever the law threatens such punishment. Also in cases where the law does not provide for the death sentence, this penalty will be imposed, if the committed action testifies to an exceptionally vicious character or if for other reasons the crime is a very serious one. In such cases the death penalty will be permissible also in the case of juvenile criminals.

(3) A lesser punishment than the minimum term of a penalty as prescribed by the German penal code and any degree of punishment mandatorily prescribed are not to be imposed except in cases where the crime is directed exclusively against the ethnic group of the perpetrator himself.

(4) *Any fine which cannot be collected will be replaced by a prison camp term ranging from 1 week to 1 year.*

2. *Penal Procedure*

IV

The public prosecutor will prosecute crimes committed by Poles and Jews, the punishment of which he thinks necessary in the public interest.

V

(1) Poles and Jews are to be judged by the Special Court or by the district judge.

(2) The public prosecutor is authorized to bring about indictment in all matters before the Special Court. He may file a suit before the district judge if no severer punishment than 5 years prison camp or 3 years aggravated prison camp is to be expected.

(3) The competency of the People's Court remains untouched.

VI

(1) Each sentence has to be executed immediately. The public prosecutor, however, may appeal to the Oberlandesgericht from sentences passed by the district judge. The period set for motions in arrest of judgment is 2 weeks.

(2) Also, the public prosecutor alone is entitled to the right of complaining. Complaints are decided upon by the Oberlandesgericht.

VII

Poles and Jews cannot refuse German judges as being prejudiced.

VIII

(1) Arrest and preliminary custody are always permissible if there is a strong suspicion of the accused having committed the crime.

(2) In the course of the preliminary proceedings the public prosecutor also may order arrest and the use of other permissible means of coercion.

IX

Poles and Jews serving as witnesses do not take the oath during proceedings. To all untrue, unsworn evidence presented in court regulations regarding perjury and unwittingly false oath are to be applied, according to their sense, to false depositions in court not made under oath.

X

(1) The reopening of the proceedings can only be ordered by the public prosecutor. Request for reopening of the proceedings contrary to a sentence passed by the Special Court are decided upon by the latter.

(2) The nullity plea is up to the public prosecutor, it is decided upon by the Oberlandesgericht.

XI

Poles and Jews neither can file private suits nor bring about action as coplaintiffs.

XII

The proceedings are conducted by court and public prosecutor on the basis of the German law for penal procedure in full accordance with their sense of duty. They may deviate from the regulations given in the law about the constitution of courts and in the legal principles for Reich penal proceedings, in all cases where it seems practical for the carrying through of the proceedings rapidly and energetically.

3. *Civilian Court Martial Proceedings*

XIII

As far as the Incorporated Eastern Territories are concerned, the Reichsstatthalter (Oberpraesident), with the consent of the Reich Minister of the Interior and the Reich Minister of Justice, for the area under his jurisdiction or single parts of it, may order that Poles and Jews be sentenced, until further notice, by a civilian court martial. This will take place in cases of serious violence committed against Germans as well as on account of other crimes which seriously endanger the German construction work.

As sentence, sentence of death will be imposed by the civilian court martial. The civilian court martial may also refrain from punishment and may instead pronounce transfer to the Secret State Police.

All details regarding the members of the civilian courts martial and their procedure will be settled by the Reichsstatthalter (Oberpraesident), with the consent of the Reich Minister of the Interior.

4. *Extent of the Area of Jurisdiction*

XIV

(1) The regulations I to IV of this ordinance will equally affect Poles and Jews, who had their place of residence, or permanent abode, within the territory of the former Polish state on 1 September 1939, and who have committed the crime within any other territory of the German Reich outside the Incorporated Eastern Territories.

(2) In addition, the court of the place of residence or abode at the respective time, is locally competent. For that court the regulations, given under V–XII, also apply.

(3) Paragraphs 1 and 2 are not applicable to crimes which are sentenced by courts of the Government General.

5. *Concluding Regulations*

XV

Poles in the sense of the ordinance are all proteges and stateless persons who belong to the Polish racial community.

XVI

Article II of the ordinance of 6 June 1940,* concerning the introduction of German penal law into the Incorporated Eastern

* Document Schlegelberger 60, Schlegelberger Ex. 26, reproduced earlier in this section.

Territories, (Reich Law Gazette I, p. 844) does not apply any more to Poles and Jews.

XVII

The Reich Minister of Justice, in full accord with the Reich Minister of the Interior, is authorized to issue the legal and administrative instructions necessary for the carrying through and supplementation of this ordinance. Dubious questions, regarding the administrative procedure, are to be decided by him.

XVIII

This decree comes into force on the fourteenth day after its publication.

Berlin, the.....1941

The Chairman of the Ministerial Council for the Defense of the Reich

The Plenipotentiary General for the Administration of the Reich

The Reich Minister and Chief of the Reich Chancellery

TRANSLATION OF DOCUMENT NG-130
PROSECUTION EXHIBIT 200

FILE NOTE OF THE REICH CHANCELLERY, 22 APRIL 1941, CONCERNING SCHLEGELBERGER'S DRAFT OF A PROPOSED DECREE ON PENAL LAW FOR POLES AND JEWS IN THE INCORPORATED EASTERN TERRITORIES

Berlin, 22 April 1941

Reich Chancellery 5850 B

Subject: Penal Law for Poles and Jews in the Incorporated Eastern Territories

1. *Note*—The Minister of Justice transmits a draft of a decree of the ministerial council on criminal law applicable to Poles and Jews in the Incorporated Eastern Territories and in the city of Danzig.* Through the decree of 6 June 1940 the German criminal law has been introduced in the eastern territories to its fullest extent. On 20 November 1940 the Fuehrer's deputy, in a detailed statement, took the position that this was a mistake, in as much as the Poles would thereby be placed under the German criminal law. The Fuehrer's deputy demanded that a special criminal law

* This draft by defendant Schlegelberger (NG-331, Pros. Ex. 343) is reproduced immediately above.

and a special criminal procedure be provided for Poland. The particulars are contained in the note of 26 November 1940.

The proposals, contained in the draft of the decree of the Minister of Justice and explained in the letter accompanying it, are far-reaching in compliance with the wishes of the Fuehrer's deputy.* The draft establishes a draconic special criminal law for Poles and Jews, giving a wide range for the interpretations of the facts of the case, with the death penalty applicable throughout. The conditions of imprisonment are also much more severe than provided for in the German criminal law. (Instead of imprisonment in jail or in penitentiary—prison camps and special prison camps.) Beside this special criminal law, in a subsidiary way, the German criminal law is applicable. (II.) Provisions of criminal law which might be used to obstruct the procedure have been eliminated (the opportunity of the defendant for an appeal, compulsory indictment, the challenge of a judge, compare also art. XII, S. 2). The Minister of Justice differs only in two points from the suggestions of the Fuehrer's deputy—

a. The Fuehrer's deputy considered it more appropriate to authorize the Reich governors [Reichsstatthalter] (and therefore also the two provincial presidents) to introduce the special criminal law, whereas the Minister of Justice provides for its introduction by a Reich decree.

b. The Fuehrer's deputy considers the introduction of corporal punishment—the Minister of Justice declines to do so. The Minister of Justice intends to introduce this draft and have it passed by the ministerial council. Under Secretary Schlegelberger desires to discuss this matter first with the Reich Minister and would be pleased if the Reich Minister would secure the Fuehrer's decision concerning the principal features of the intended regulation.

[Illegible handwriting]
[Initial] F [Ficker]

[Stamps] resubmitted office 3/5

2. Submitted to the Reich Minister.

[Initial] L [Lammers]

25 April

This matter should be first discussed with Under Secretary Schlegelberger, [Handwritten] who would be ready to come to [Hitler's] headquarters. On information of Ministerial Counsellor Schaefer, (Reich Ministry of Justice), Under Secretary Schlegel-

* Schlegelberger's explanatory letter of 17 April 1941 (NG–144, Pros. Ex. 199) is reproduced above in this section.

berger will at this meeting also have some information on the Governor General's attitude.*

[Initial] L [Lammers] 3 May

[Stamp] Resubmitted
Office 5/5

[Initial] L [Lammers] 12 May

[Stamp] Resubmitted
Office 12/5

1. A report to the Fuehrer is not to be considered. First of all a discussion with Under Secretary Schlegelberger is necessary.

[Initial] L [Lammers] 13 May

[Stamp] Resubmitted
Office 20/5/41

[Initial] L. [Lammers] 22 May

In the meantime an opinion of the Reich Leader H [Himmler] has been received.

TRANSLATION OF DOCUMENT NG–136
PROSECUTION EXHIBIT 345

MEMORANDUMS OF THE REICH CHANCELLERY, 27 MAY 1941, CONCERNING CRIMINAL LAW TO BE INSTITUTED IN THE INCORPORATED EASTERN TERRITORIES, INCLUDING COPIES OF LETTERS TO DEFENDANT SCHLEGELBERGER, BORMANN, AND HIMMLER

[Handwritten] see Rk. 8621 B.
To Rk. 7592 B, 7760 B

Fuehrer Headquarters, 27 May 1941

After the report to the Reich Minister

Subject: Civilian court martial and right of pardon in the Warthegau. Administration of criminal law in the Incorporated Eastern Territories

1. Remarks:

[Handwritten marginal note.] To Rk 7592 B:

It may be pointed out in completion that a ruling in regard to the Warthegau will bring about not only a corresponding ruling for the Gau Danzig-West Prussian but also for the new territories of East Prussia and Silesia. Thus, for example, in the last named

* Hans Frank, Governor General of Poland, was a defendant before the International Military Tribunal. See Trial of the Major War Criminals, op. cit., volumes I–XLII.

territories the right of pardon for capital crimes also must be transferred to the Provincial president.

[Handwritten marginal notes.]
Rk 7760 B1b
blue[1]

In the meantime a letter from the Reich Leader SS (signed Heydrich) on this subject has been received here. The Reich Leader SS agrees to the special penal code for Poles in material matters—as provided for in the draft of the decrees submitted by the Minister of Justice—but in addition he asks for civilian court martial under police jurisdiction and requests that this be presented to the Fuehrer when the Reich Minister makes his intended report.

[Handwritten marginal notes.]
pink
yellow

The introduction of civilian courts martial in the Incorporated Eastern Territories is an old desire of the Reich Leader SS and was proposed in the draft of a decree of the ministerial council of the General Plenipotentiary for the Reich administration, dated 21 February 1940—compare Rk 3215 B–40—; see note of 27 February 1940. The introduction was rejected as the time on the basis of objections made by the Reich Marshal to civilian courts martial—compare Rk. 5026 B of 21 March 1940.

[Handwritten marginal note.]

Justice 3
(Copy number 2) (copy number 2)
(to Rk 7411 h40 letter 13) (Justice 12)
pale violet

The Fuehrer's decision corresponds to the desire of the Reich Leader SS as far as the Warthegau is concerned in the meantime. It is not considered advisable to report this to the Reich Leader SS unless the minister in charge has been notified of the Fuehrer's decision. The Reich Leader SS further requests a copy of the comments of the Minister of Justice dated 17 April 1941—Rk. 5850 B.[2] He should be referred to the Minister of Justice concerning this request.

[Handwritten marginal note.] pale violet

[Initial] F [Ficker]

The Reich Minister and Chief of the Reich Chancellery
Fuehrer Headquarters, 27 May 1941

Rk. 7760B

[1] Words denoting colors are explained in the testimony of defendant Klemm on pp. 589 ff.
[2] Document NG–144, Prosecution Exhibit 199, reproduced earlier in this section.

[Handwritten notes]
see Rk 8621 B
No. 934 29/5
2/4 written Ho
2/3 read Ho Hi/
4/ forwarded Ho 28/5
2/3 forward 29.5. Km
to 2 m. 1 photo copy of Rk 7760 B
to 3 m. 1 copy of 2 and
1 photo copy of Rk 7760 B

Urgent!

2. To the Reich Minister of Justice.
(Copy for 2.)

Subject: Administration of criminal law in the Incorporated Eastern Territories

In reference to your letter of 17 April 1941
—9170 Eastern Territory 2–II a–2–996/41

[Handwritten marginal note.] pale violet

The Gauleiter and Reichsstatthalter Greiser reported to the Fuehrer that an increasing number of acts of sabotage were committed in his Gau by Poles. In the Landkreis Lódz it even happened a few days ago that while the Reichsstatthalter was speaking in an old Swabian settlement, a German policeman was stoned to death in a neighboring village. In this case the Reichsstatthalter, according to his report to the Fuehrer, gave orders that not only the culprits but 12 hostages as well should be executed on the spot and under the eyes of the entire village population, who were assembled at the spot. In view of these sabotage acts the Reichsstatthalter asked the Fuehrer for authority to reestablish civilian courts martial. He proposed to appoint the local representative of authority as president, with police officer and a security police leader as members of the court. No sentences other than death or concentration camp are to be given by these civilian courts martial. There must be no possibility of appeal. The Fuehrer decided that Gauleiter and Reichsstatthalter Greiser be given authority as requested to set up the civilian courts martial which he had proposed.

The Reichsstatthalter further reported to the Fuehrer that he had asked you to delegate to him the right of pardon in regard to Poles punished by the courts. The Fuehrer has decided that this desire of the Reichsstatthalter is also to be complied with.

I beg to inform you of these decisions taken by the Fuehrer and to ask you to take the necessary implementing steps without delay. I leave it to you to consider whether it is advisable to include this ruling on the basis of the above-mentioned decisions of the

Fuehrer, in whole or in part, in the draft of the decree which you have prepared concerning the administration of criminal law against the Poles and Jews in the Incorporated Eastern Territories and in the territory of the former Free City of Danzig. I ask you to report to the Fuehrer, for my attention, on the measure you have taken. [Handwritten] as soon as possible

A photo copy of a letter received here from the Reich Leader SS and Chief of the German Police in the Ministry of the Interior is enclosed for your information.* May I leave it to your discretion to send to the Reich Leader SS and Chief of the German Police a copy of your comments, as requested in the last sentence of the letter.

[In margin] Bzf. Photo copy
of Rk. 7760 B

(Name of the Reich Minister)

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3. To Reichsleiter Martin Bormann, at present Obersalzberg.

Subject: Administration of criminal law in the Incorporated Eastern Territories

In answer to the letter of 24 May 1941—Bo/Si—.

Esteemed Mr. Bormann!

For your information I beg to submit herewith a copy of my letter of today's date to the Reich Minister of Justice, concerning the establishment of civilian courts martial and the transference of the right of appeal in the Reichsgau Wartheland.

Bzf. copy of
2.
also photo of
Rk 7760 B

Heil Hitler!

Respectfully
(Name of the Reich Minister)

---

4. To the Reich Leader SS and Chief of the German Police,
Reich Ministry of the Interior,
Berlin SW 11
Prinz-Albrecht-Strasse 8

* The enclosure was not a part of this document as offered in evidence.

Subject: Administration of criminal law in the Incorporated Eastern Territories

Reference: Letter of 16 May 1941–S–II A 2 (new) No. 127/41–173–1

I have forwarded a photo copy of your letter of 16 May 1941 to the Reich Minister of Justice for his information. I have asked him to forward to you a copy of his comments as requested in the last sentence of your letter.

(name of the Reich Minister)

5. After sending it off
Min. Dir. Kritzinger for information.

6. Follow up after 1 month.

[Initial] L [Lammers]
(name of the Reich Minister)

[Initial] F [Ficker]
27 May

PARTIAL TRANSLATION OF DOCUMENT NG–1615
PROSECUTION EXHIBIT 521

DECREE OF 31 MAY 1941 CONCERNING THE INTRODUCTION OF THE NUERNBERG RACIAL LAWS IN THE INCORPORATED EASTERN TERRITORIES

1941 REICHSGESETZBLATT, PART I, PAGE 297

By virtue of article 8 of the Decree of the Fuehrer and Reich Chancellor, of 8 October 1939 (Reichsgesetzblatt I, p. 2042), it is hereby ordered:

Article 1

In the Incorporated Eastern Territories the following are applicable:

(1) The Reich Citizenship Law of 15 September 1935* (Reichsgesetzblatt I, p. 1146).

(2) Article 2, paragraph 2; article 4, paragraphs 1 and 3; article 5; article 6, paragraph 1; and article 7 of the first amendment of the Reich Citizenship Law of 14 November 1935 (Reichsgesetzblatt I, p. 1333).

* * * * * * *

* The text of the Reich Citizenship Law is reproduced on page 180.

Article 3

In the Incorporated Eastern Territories the Law for the Protection of German Blood and German Honor of 15 September 1935[1] (Reichsgesetzblatt I, p. 1146), and the first decree concerning the execution of this law of 14 November 1935 (Reichsgesetzblatt I, p. 1334), as well as the decree supplementing the first executive decree for the Law for the Protection of German Blood, of 16 February 1940 (Reichsgesetzblatt I, p. 394) shall be applicable.

Article 4

(1) This decree shall take effect 1 week after promulgation.

(2) Part I, article 7 of the Decree concerning the introduction of the German Criminal Law in the Incorporated Eastern Territories, of 6 June 1940[2] (Reichsgesetzblatt I, p. 844), shall be applied to violations of the provisions for the Protection of German Blood and German Honor.

Berlin, 31 May 1941

The Reich Minister of the Interior
As deputy: DR. STUCKART[3]

The Chief of the Party Chancellery
M. BORMANN

The Acting Reich Minister of Justice
DR. SCHLEGELBERGER[4]

PARTIAL TRANSLATION OF DOCUMENT NG-715 PROSECUTION EXHIBIT 112

SECOND EXECUTIVE DECREE, 31 MAY 1941, FOR THE EXECUTION OF THE LAW FOR THE PROTECTION OF GERMAN BLOOD AND HONOR

1941 REICHSGESETZBLATT, PART I, PAGE 297

By virtue of article 6 of the Law for the Protection of German Blood and German Honor of 15 September 1935 (Reichsgesetzblatt I, 1935, p. 1146), the following is hereby decreed:

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[1] Id.

[2] Document Schlegelberger 60, Schlegelberger Exhibit 26, reproduced in part above in this section.

[3] Stuckart was a defendant in the Ministries Case (United States *vs.* Ernst von Weizsaecker, et al., Vols. XII–XIV, this series).

[4] On the same day, 31 May 1941, the three persons signing this decree also signed a "second decree for the execution of the Law for the Protection of German Blood and Honor," which is reproduced immediately below.

Article 1

The protection afforded to German blood or to blood racially related to German blood by the Law for the Protection of German Blood and German Honor of 15 September 1935 (Reichsgesetzblatt I, p. 1146), and its first executive decree of 14 November 1935 (Reichsgesetzblatt I, p. 1334), as amended by the supplementing decree of 16 February 1940 (Reichsgesetzblatt I, p. 394), shall not extend to former Polish nationals, unless they have acquired German nationality or have been entered in the list of German nationals [deutsche Volksliste] by virtue of the decree of the Fuehrer and Reich Chancellor concerning the organization and administration of the eastern territories of 8 October 1939 (Reichsgesetzblatt I, p. 2042).

Article 2

(1) This decree shall be applicable in the Incorporated Eastern Territories, too.

(2) It shall take effect one day after promulgation.

Berlin, 31 May 1941.

The Acting Reich Minister of the Interior
As deputy: DR. STUCKART

The Chief of the Party Chancellery
M. BORMANN

The Acting Reich Minister of Justice
DR. SCHLEGELBERGER

TRANSLATION OF DOCUMENT NG–505
PROSECUTION EXHIBIT 71

CIRCULAR LETTER FROM DEFENDANT SCHLEGELBERGER TO THE PRESIDENTS OF THE COURTS OF APPEAL AND ATTORNEYS GENERAL, 24 JULY 1941, ENTITLED "MILD SENTENCES AGAINST POLES"

The Reich Minister of Justice
9170 Eastern territories 2–III
4 1137.41

Berlin W 8, 24 July 1941
Wilhelmstrasse 65

1. To the Presidents of the Courts of Appeals and the Attorneys General (with the exception of Prague).

2. Through the Reich Protector of Bohemia and Moravia to—

The Presidents of the Courts of Appeals and the Attorney General in Prague.

Subject: Mild sentences against Poles

Attached: 1 compilation
8 additional copies for the Chief Public Prosecutors

Despite my constant allusions to this matter during conferences and in individual instructions, I am time and again notified of sentences by which Poles in the Reich proper are given entirely insufficient prison sentences for sexual and other serious crimes. Such sentences reveal an incomprehensibly lenient attitude toward the Polish nation which confronts us with implacable enmity. They constitute a danger to the security of the German people and justify the reproach that the administration of criminal law has not proved adequate to the necessities of war.

To make this point clear, the attachment lists a few of such sentences against Polish criminals which have been changed by special instructions or which I had to have altered by way of the nullity plea.

I want to express my firm expectation that the officials of the justice administration will not fail to recognize the serious danger this constitutes for our people; and, last but not least, for the stability of the administration of criminal law. I, therefore, expect that from now on measures will be taken against Polish criminals in the Reich proper with all the necessary firmness and with the heaviest sentences in accordance with article 4 of the decree against public enemies.* Elements clearly criminal and sexual criminals of Polish nationality must, as a rule, be punished by death. That the application of article 4 of the decree against public enemies is principally justified in the case of crimes committed by Poles in the Reich proper has been recognized by the Reich Supreme Court in its decision C 258. 41 of 19 June 1941 with the following explanations:

> "If * * * it is noted that entire groups of culprits * * * possess fewer inhibitions with regard to certain crimes than the German people in general, the protection of law and order demands greater watchfulness as to the resulting dangers. The demand for retribution and the deterrent effect would be seriously impaired if the administration of justice would grant such culprits any right of obtaining mild penalties.

* Reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 188.

907802—51——42

The established fact that the defendant, a Pole, sexually assaulted a German girl should have caused * * * the court to examine the question of whether or not the characteristics of a crime, as defined in article 4 of the decree against public enemies, were present. There is reason to assume that the defendant in his assault on a juvenile female fellow worker made use of the absence, caused by war conditions, of male workers who might otherwise have been able to come to her aid, and that the circumstances of his crime, in addition, are of such reprehensible kind that they reveal a criminal possessing the essential characteristics of a public enemy * * *."

In addition to this, it must be considered that Poles are now entering Germany only as a result of the wartime shortage of German labor and that as a result of the decrease of police forces, likewise due to the war, the necessary police supervision over Poles which would have been possible under normal peacetime conditions is no longer guaranteed.

The Acting Minister
[Typed signature] DR. SCHLEGELBERGER*

Certified: [Signed] BIERWITH
Administrative Assistant
[Ministerialskanzleiobersekretaer]

[Stamp]

Ministery of Justice
Office of the Minister

* This circular letter was discussed during the direct examination of defendant Schlegelberger in connection with a number of other documents reproduced above in section C 2 a.

Tribunal handing down the sentence	Perpetrator	Crime	Penalty	Sentence handed down on	Remarks
Jury at the district court of Bielefeld.	Maziarz	Attempt to rape two German women.	1 year, 3 months, of hard labor, lunatic asylum.	23 September 1940	Shot because of resistance on 16 November 1940.
Penal chamber of the district court of Lueneburg.	Wojcieck	Sexual crime committed by violence.	1 year of imprisonment.	21 October 1940	Nullity plea, sentence was repealed and referred back by Reich Supreme Court because section 4 of the decree against public enemies has not been applied.
Penal chamber of the district court of Guestrow.	Wojtas	Attempt to rape wife of employer.	1 year of imprisonment.	5 November 1940	Shot because of resistance on 1 March 1941.
Penal chamber of the district court of Prenzlau.	Czaika	Sexual crime against a child.	2 years of hard labor.	20 December 1940	Shot because of resistance on 10 March 1941.
Penal chamber of the district court of Rostock.	Wojitarowicz	Sexual offense against a child.	2 years of hard labor.	17 January 1941	Shot because of resistance on 17 February 1941.
Penal chamber of the district court of Cottbus.	Chlabicz	Numerous burglaries committed during the blackout after having escaped from the penitentiary.	10 years of hard labor, security detention.	5 February 1941	Transfer to Gestapo has been ordered.
Jury at the district court of Munich.	Dziubczyk	Rape.	6 years of hard labor.	28 February 1941	Shot because of resistance on 8 March 1941.
Jury at the district court of Bielefeld.	Franz Golembiowski ...	Sexual offense against a child.	8 years of hard labor.	4 April 1941	Transfer to Gestapo has been ordered.
Penal chamber of the district court of Stargard (Pomerania).	Aplas	Attempt to rape.	1 year and 6 months of hard labor.	16 July 1940	Transfer to Gestapo has been ordered.

9170 Eastern Territories / 2–IIIa–4—1137.41

PARTIAL TRANSLATION OF DOCUMENT NG–715
PROSECUTION EXHIBIT 112

DECREE OF 4 DECEMBER 1941 CONCERNING THE ADMINISTRATION OF PENAL JUSTICE AGAINST POLES AND JEWS IN THE INCORPORATED EASTERN TERRITORIES*

1941 REICHSGESETZBLATT, PART I, PAGE 759

The Ministerial Council for the Defense of the Reich herewith decrees:

1. *Substantive Criminal Law*

I

(1) Poles and Jews in the Incorporated Eastern Territories are to conduct themselves in conformity with the German laws and with the regulations introduced for them by the German authorities. They are to abstain from any conduct liable to prejudice the sovereignty of the German Reich or the prestige of the German people.

(2) The death penalty shall be imposed on any Pole or Jew if he commits an act of violence against a German on account of his membership in the German ethnic community.

(3) A Pole or Jew shall be sentenced to death, or in less serious cases to imprisonment, if he manifests anti-German sentiments by malicious or inciting activities particularly by making anti-German utterances, or by removing or defacing official notices of German authorities or agencies, or if he, by his conduct, lowers or prejudices the prestige or the well-being of the German Reich or the German people.

(4) The death penalty or, in less serious cases, imprisonment, shall be imposed on any Pole or Jew—

1. If he commits any act of violence against a member of the German armed forces or its auxiliaries, of the German police force or its auxiliaries, of the Reich labor service, of any German authority or agency or of an organization of the NSDAP;

2. If he purposely damages installations of the German authorities or agencies, objects used by them in performance of their duties, or objects of public utility;

3. If he solicits or incites another person to disobey any decree or regulation issued by the German authorities;

* A supplementary decree of 31 January 1942, signed by defendant Schlegelberger and Dr. Pfundner of the Reich Ministry of Interior, is reproduced later in this section (NG–665, Pros. Ex. 346).

4. If he conspires to commit an act punishable under paragraphs (2), (3), and (4), subparagraphs *1* through *3*, or if he enters into serious negotiations about committing such an act, or if he offers to commit such an act, or accepts such an offer, or if he obtains credible information of such act, or of the intention of committing it, and fails to notify the authorities or any person threatened thereby at a time when danger can still be averted; and

5. If he is found to be in unlawful possession of a firearm, a handgrenade, or any weapon for stabbing or hitting, of explosives, ammunition or other implements of war, or if he has credible information that a Pole or a Jew is in unlawful possession of such an object, and fails to notify the authorities forthwith.

II

Punishment shall also be imposed on Poles or Jews if they act contrary to German criminal law or commit any act for which they deserve punishment in accordance with the fundamental principles of German criminal law and in view of the interests of the State in the Incorporated Eastern Territories.

III

(1) Penalties provided for Poles and Jews are—imprisonment, fine, or confiscation of property. The term of imprisonment is to be not less than 3 months and not more than 10 years in a penal camp; for more serious offenses, imprisonment consists of 2 to 15 years in a penal camp in which a more severe regimen is enforced.

(2) The death sentence shall be imposed in all cases where it is prescribed by the law. Moreover, in those cases where the law does not provide for the death sentence, it shall be imposed if the act shows a particularly base attitude or is particularly serious for other reasons; in these cases the death sentence may also be passed upon juvenile offenders.

(3) The minimum penalty or a fixed penalty prescribed by German criminal law cannot be reduced unless the criminal act is directed against the offender's own people exclusively.

(4) If a fine cannot be recovered, it shall be substituted by imprisonment in a penal camp from 1 week to 1 year.

2. *Criminal Procedure*

IV

The public prosecutor shall prosecute a Pole or a Jew if he considers that punishment is in the public interest.

V

(1) Poles and Jews shall be tried by a Special Court or by the local court.

(2) The public prosecutor can file the indictment with a Special Court in all cases. He can file the indictment with the local court if the punishment to be imposed is not likely to be heavier than 5 years in a penal camp, or 3 years in a more rigorous penal camp.

(3) The jurisdiction of the People's Court remains unaffected.

VI

(1) Every sentence will be carried out without delay. The public prosecutor may, however, appeal from the sentence of the local court to the court of appeal. The appeal has to be lodged within 2 weeks.

(2) The right to lodge complaints is also reserved exclusively to the public prosecutor. Complaints will be decided upon by the court of appeal.

VII

Poles and Jews cannot challenge a German judge on account of alleged partiality.

VIII

(1) Arrest and temporary detention are allowed whenever there are good grounds to suspect that a punishable act has been committed.

(2) During the preliminary investigations, the public prosecutor may also order arrest and any other coercive measures permissible.

IX

Poles and Jews are not sworn in as witnesses in criminal proceedings. If the unsworn deposition made by them before the court is false, the provisions as prescribed for perjury and false sworn statements shall be applied accordingly.

X

(1) Only the public prosecutor may apply for the reopening of proceedings. In a case tried before a Special Court, the decision on an application for the reopening of the proceedings rests with this court.

(2) The right to lodge a nullity plea rests with the attorney general. The decision on the plea rests with the court of appeal.

XI

Poles and Jews neither can file private suits nor bring about action as coplaintiffs.

XII

The court and the public prosecutor shall conduct proceedings within their discretion according to the principles of the German Law of Criminal Procedure. They may, however, dispense with the provisions of the Judicature Act and the Law of Criminal Procedure, whenever this may be expedient for the rapid and more efficient conduct of proceedings.

3. *Civilian Court Martial Proceedings*

XIII

(1) Subject to the consent of the Reich Minister of the Interior and the Reich Minister of Justice, the Reich governor (or provincial governor) may, until further notice, enforce martial law in the Incorporated Eastern Territories, either in the whole area under his jurisdiction or in parts thereof, upon Poles and Jews guilty of grave excesses against Germans or of other punishable acts which seriously endanger the German work of reconstruction.

(2) The courts established under martial law impose the death sentence. They may, however, dispense with punishment and refer the case to the Secret State Police (Gestapo).

(3) Subject to the consent of the Reich Minister of the Interior, the constitution and procedure of the courts established under martial law shall be regulated by the Reich governor.

4. *Extent of Application of this Decree*

XIV

(1) The provisions contained in sections I–IV of this decree apply also to those Poles and Jews who, on 1 September 1939, were domiciled or had their residence within the territory of the former Polish state, and who committed the punishable act in any part of the German Reich other than the Incorporated Eastern Territories.

(2) The case may also be tried by the court within whose jurisdiction the former domicile or residence of the perpetrator is situated. Sections V–XII apply accordingly.

(3) Paragraphs 1 and 2 do not apply to punishable acts tried by the courts in the Government General.

5. *Concluding Regulations*

XV

Within the meaning of this decree, the term "Poles" includes protected and stateless persons who belong to the Polish racial community.

XVI

Article II of the decree of 6 June 1940, concerning the introduction of German Criminal Law in the Incorporated Eastern Territories (Reichsgesetzblatt I, p. 844) no longer applies to Poles and Jews.[1]

XVII

The Reich Minister of Justice is authorized to issue rules and administrative regulations concerning the execution and implementation of this decree and to decide in all cases of doubt, in agreement with the Reich Minister of the Interior.

XVIII

This decree shall come into force on the fourteenth day after its promulgation.

Berlin, 4 December 1941

The President of the Ministerial Council
for the Defense of the Reich
REICH MARSHAL GOERING

The Plenipotentiary for the Administration of the Reich
FRICK

The Reich Minister and Chief of the Reich Chancellery
DR. LAMMERS

SCHLEGELBERGER DOCUMENT 61
SCHLEGELBERGER DEFENSE EXHIBIT 27

EXTRACTS FROM AN ARTICLE BY DR. ROLAND FREISLER, UNDER SECRETARY IN THE REICH MINISTRY OF JUSTICE, JANUARY 1942, CONCERNING CRIMINAL JURISDICTION FOR POLES[2]

The German Criminal Code for Poles by Dr. jur. Roland

[1] Document Schlegelberger 60, Schlegelberger Exhibit 26, reproduced earlier in this section.

[2] This article was published in the periodical "German Justice [Deutsche Justiz], Administration of Justice and Judicial Policy," 104th year, Edition A, Number 2, Berlin, 9 January 1942, (p. 25 ff.).

Freisler, State Secretary of the Reich Ministry of Justice, member of the Presidency of the Academy for German Law.

* * * * * * *

II

The objective Criminal Jurisdiction for Poles

* * * * * * *

It is not contradictory to justice if criminal jurisdiction for Poles is different from the German criminal jurisdiction. Even if *one* people within a state can be subject to *one* [system of] law only, it is yet quite possible that for another nationality within the same state another [system of] law is applicable. Whether this condition should be brought to bear must be determined by the necessities of the State. It is essential of course that the other national group can perceive the law in force for its members in order to be able to abide by it.

For there must be a standard whereby it can regulate its behavior. By this standard the conduct of its nationals can be judged fairly. There is nothing contrary to justice if the one criminal law in its general aspect is milder, the other, viewed as a whole is severer. After all there is justice in a sphere of severity as well as in a sphere of leniency.

If the administration of criminal justice for Poles devotes exactly the same care to the investigation of the facts of a case, as does the administration of criminal justice for Germans, viz, avoiding everything which even very remotely might resemble a judgment on suspicion, if, besides, it judges the established facts just as conscientiously according to the law applicable to Poles, as it judges the established facts in the case of Germans according to the general German penal law, and if, finally, it endeavors to render the right judgment in the award of punishment within the compass of the penal law applicable for Poles, as within the compass of the penalties pursuant to the general German penal law for Germans, the criminal jurisdiction for Poles is just, regardless of the different evaluation of actions of Germans and Poles, which might be necessary in many cases. The political task of the administration of criminal jurisdiction is not at all incompatible with justice.

The directives for arriving at a just decision, especially in the case of the law pursuant to Number II, in the criminal jurisdiction for Poles are deprived by viewing the German people and Reich as a whole in regard to the necessities of the State, the

judicial comprehension of which is given by the political aim of German work in the Incorporated Eastern Territories. Looking at the individual Poles who have been committed for trial it follows from the general, legally established subordination law to which he is subject pursuant to Number I, and which should dominate and guide his whole conduct. By considering both points, i.e., State necessity and the duty of subordination, no divided result can be arrived at in any individual case, because the duty of subordination of the Pole in the Incorporated Eastern Territories is a State necessity, and because on the other hand the extent of this duty of subordination in itself is determined by the aim of the German construction work, i.e., by State necessity.

The German administration of criminal jurisdiction for Poles exercised in the fulfillment of the Polish task of the German folkdom in the Incorporated Eastern Territories will be characterized by justice just as it is in every other German administration of justice.

* * * * * * *

The penal code for Poles has only one form of detention—the punitive camp. Therefore, this takes the place of confinement in a fortress, imprisonment, penal servitude as provided by the general German penal code. In the penal registers the punitive camp term will be recorded as "penitentiary" [Zuchthaus]. This does not mean, however, that it will be like penitentiary [service] in every respect. Thus not every term in a punitive camp will be regarded as "penitentiary"; only a term of increased severity in a punitive camp in the meaning of the regulations for the noninclusion of the period of detention in custody in the term of imprisonment for the duration of the war, will be regarded as "penitentiary." However, where no special ruling is applicable, it will have to be concluded from the recording of the term in a punitive camp in the penal register that its legal status is that of penitentiary [service], as far as this can be applied to the State legal status of a Pole.

The judge may also pronounce a sentence of detention of increased severity in a punitive camp. In doing so, however, he does not choose another method of punishment. Legally the sentence of increased severity term in a punitive camp has to be considered as being the same as pronouncement of punishment of increased severity in a legal system, which allows the judge the possibility of sentences of increased severity.

* * * * * * *

From the much increased minimum duration of terms of increased severity in a punitive camp (2 years) and from its increased limit (15 years) it follows that the judge is expected to make use of it in serious cases, which is also especially emphasized in the decree.

In case of death sentences the same methods of execution are in force, as applied by the German Criminal (Penal) Code.

By adding fines, confiscation of property, imprisonment, and capital punishment the penal code for Poles intends to complete the punitive methods applicable to Poles.

III

Law of procedure against Poles

d. Preliminary proceedings.

* * * * * * *

By the general principle of every German administration of criminal jurisdiction, viz, that it must serve to establish actual facts and their true judgment—a principle which is adhered to without exception and unalterably the freedom of judgment in the arrangement of the preliminary proceedings finds its unchangeable limit (the same has to be said with regard to the trial). From this it follows as a matter of course that the public prosecutor in the preliminary proceeding will have to examine all evidence, extenuating as well as aggravating, and investigate it.

It is just as self-evident that in the place of preliminary proceedings by the public prosecutor and the decision of the public prosecutor concerning the indictment and abatement there can be no Klageerzwingungsverfahren* on the part of a private person in consideration of the principle of liberty of decision with regard to prosecution or nonprosecution, just as prosecuting authority no private person can appear as prosecutor, replacing the public prosecutor neither independently nor as coprosecutor; consequently the Pole can be neither plaintiff nor coplaintiff. In order to avoid any misinterpretation in this direction this has been expressly stated already in the decree establishing a penal code. In the decree establishing the penal code for Poles it is stated expressly: "The public prosecutor prosecutes crimes of Poles and Jews * * *." (Number IV) "Poles and Jews can take neither civil action nor act as coplaintiffs." (Number XI). From the first of these two legal provisions it follows also that against the Pole no civil action nor action as a coplaintiff can be taken; the public prosecutor alone is competent to prosecute.

* Proceedings started by the injured in order to force the public prosecutor to lodge an indictment.

If the liberty of decision in determining the procedure as well as the main trial is stressed time and again, on the other hand it must nevertheless be emphasized that the establishment of the true facts of the case is the purport and the rendering of a just verdict the aim of every criminal proceeding against Poles. Therefore, nothing may be disregarded which may serve to establish the truth and to arrive at a just verdict. For this it is essential that the accused is heard,—as long as he does not use this possibility granted him for propaganda—and that he can defend himself in connection with the accusation, that he may offer evidence of any kind, that he can express himself with regard to the findings of the evidence heard, and that he may have the last word. In cases where difficulties arise from difference of language it is of course essential that the possibility of understanding is secured, if necessary with the help of an interpreter. The judge and all the officials of the administration of justice always and without exception will speak German. Likewise all evidence, as far as it is not declared with certainty as being unsuitable right away, must be fully investigated.

The giving of the opportunity to the public prosecutor and the judge to use their own discretion in the arrangement of proceedings was possible only because it may be assumed that no German public prosecutor and no German judge in any proceeding conducted by him will ignore these principles.

Should that happen, however, in an isolated case, it is to be expected that the public prosecutor will appeal against a decision arrived at during a trial exhibiting such fundamental defects with the legal measures at his disposal. The senates of the four district courts of appeal, which are the highest authority in Polish matters, guarantee that they display in these cases by the way in which they deal with appeals that such high principles may not be left out of consideration and that they express this clearly in the reasons given for the verdict, although this is not absolutely necessary for the establishment of the sentence itself, because it is not a revised judgment but a sentence on appeal * * *.

f. Execution of a sentence.

* * * * * * *

Even if every sentence can be carried out immediately nevertheless it is self-evident that the authority carrying out sentences will not proceed to the execution if in a specific case the possibility exists that the condemning verdict can undergo a substantial change by legal measures to the advantage of the condemned person or even be changed into acquittal. It is completely self-evident that the severest penalty will not be put into effect before it has

the force of law; this is also impossible because the decision of the supreme authority as to the execution or nonexecution can only be brought about after the sentence becomes valid. It has also to be expected that the executing authority will stay the execution of the penalty if that authority or the public prosecutor—perhaps because of new evidence—later arrives at the conclusion that the condemning sentence cannot be upheld, or at least reckons with the not too distant possibility of such a result of an appeal or of a retrial.

The decree contains no specification that the court of appeal, or court of retrial, or its president can order a stay of execution of a sentence. The legislator believed he could abstain from such a specification, because the attorney general will see to it in the way of administration that such a stay is brought about at the suggestion of the president. It is not necessary that everything should be ordered in the way of legislation that can be safeguarded in the way of administration.

g. Legal means—The public prosecutor can "lodge an appeal against sentences passed by the judge of a local court with the district court of appeal. The period of time within which an appeal is to be lodged is 2 weeks." (Number VI) The extension of the time limit is explained not only by the poor rail and postal communication which are sometimes even worse in the Incorporated Eastern Territories than in other parts of the Reich. Its explanation is to be found above all in the fact that it is also the duty of the public prosecutor to examine whether an appeal is to be lodged on behalf of the condemned person. The condemned person will quite often suggest this to him. The public prosecutor will then require a certain amount of time in order to examine whether the new statements and evidence, which the defendant has perhaps given him when he suggested such an appeal. For that the summary examination of evidence offered will often be necessary and will take a few days. Just when the public prosecutor is confronted with the question whether he is to lodge an appeal on behalf of the condemned person he will do well to hold himself more than ever aloof from the bad custom of lodging an appeal "as a precaution." For in this case he would raise false hopes and in addition, even if he does not subsequently maintain the appeal, would in the eyes of the condemned divest the judgment of some of its authority. He must therefore have time for a summary examination. From this resulted the extension of the time limit for the lodging of an appeal.

TRANSLATION OF DOCUMENT NG-665
PROSECUTION EXHIBIT 346

SUPPLEMENTARY DECREE, 31 JANUARY 1942, CONCERNING THE ADMINISTRATION OF PENAL JUSTICE AGAINST POLES AND JEWS IN THE INCORPORATED EASTERN TERRITORIES

1942 REICHSGESETZBLATT, PART I, PAGE 52

Pursuant to article XVII of the decree concerning the Administration of Penal Justice against Poles and Jews in the Incorporated Eastern Territories of 4 December 1941* (Reichsgesetzblatt Part I, page 759), the following is decreed:

Article I

Articles I to III of the decree of 4 December 1941 (Reichsgesetzblatt I, p. 759) may be equally applied with the consent of the public prosecutor to offenses committed before the decree came into force.

Article II

(1) The court may rule in every case that Poles and Jews be interrogated by a commissioned or requested judge; article 251, paragraph 2, of the Reich Code of Criminal Procedure and article 252, paragraph 3, of the Austrian Code of Criminal Code of Criminal Procedure will remain unchanged.

(2) This regulation equally applies to Poles and Jews who, on 1 September 1939, resided or were abiding in the territory of the former Polish State and who are interrogated as witnesses in other parts of the German Reich.

Berlin, 31 January 1942

The Acting Reich Minister of Justice
DR. SCHLEGELBERGER

The Reich Minister of the Interior
As deputy: PFUNDNER

PARTIAL TRANSLATION OF DOCUMENT NG-1106
PROSECUTION EXHIBIT 462

EXTRACT FROM THE MINUTES OF A CONFERENCE BETWEEN DEFENDANT ROTHENBERGER AND THREE JUDGES OF THE HAMBURG COURTS, 23 JANUARY 1942, CONCERNING THE EXEMPTION OF DESTITUTE JEWS FROM COURT FEES

Notes on a discussion held on 23 January 1942

* * * * * * *

* This decree is reproduced as a part of Document NG-715, Prosecution Exhibit 112, on page 632.

II. Present: Senator Dr. Rothenberger, Local Court Judge Dr. Schwarz, Presiding Judge Korn of the District Court, Judge Dr. F. Priess of the District Court of Appeal

[Marginal note] copy made out for: 3715–1b 1/17 a-c extract

The senator [the defendant Rothenberger] reported that the question of the Armenrecht* concerning Jews has come into the foreground again. With the district court there were two cases pending. He requested that contacts with the judges of the district court and of the local court be taken up at once so that a uniform line is followed to the effect that the Jews be denied the benefits of the Armenrecht. It would be entirely out of the question that Jews be granted the benefits of the Armenrecht subsequent to the present development. This would apply especially to Jews who had been evacuated, but in his opinion also to those who had not been evacuated. With regard to the matter it had to be considered whether or not any material claims of the Jews could still be answered in the affirmative. Concerning this question, it might, however, be practical to maintain a certain reserve.

Presiding Judge Korn of the district court had raised certain objections to the denial, because up to now it was lacking any legal basis.

Hamburg, 27 January 1942

For information—1. To Councillor of the Local Court for information and further action (with regard to II)

2. To High Judicial Inspector Bellair for further action
27 January 1942

[Illegible initials]
323–1b 2/1

TRANSLATION OF DOCUMENT NG–589
PROSECUTION EXHIBIT 372

UNDATED REPORT FROM THE DISTRICT COURT IN HAMBURG CONCERNING GRANTING OF BENEFITS FOR DESTITUTE PERSONS TO A JEW, TOGETHER WITH TWO LETTERS OF DEFENDANT ROTHENBERGER AND AN INTEROFFICE MEMORANDUM, 13 FEBRUARY–22 MAY 1942

Excerpts from the File Prenzlau against Behrens and Lundin—
2 0.84/41

The Jewish plaintiff Israel Prenzlau proposed that Armenrecht

* Under German law, "Armenrecht," or the benefits of the *forma pauperis*, are to be granted to plaintiffs or defendants who are destitute. The benefits consist, principally, of the exemption from court fees and the assignment of an *ex officio* lawyer, free of cost, where representation by counsel is required by law.

be granted him in an intended lawsuit against Karl Behrens and Paul Lundin in consideration of a claim which is supposed to have arisen from the withdrawal of the Jewish co-associate from the G.m.b.H. [limited liability company].

On 30 June 1937 the plaintiff withdrew from the Prenzlau, Behrens, and Lundin G.m.b.H. The firm is now continuing its business as a trading company with unlimited liability of the partners. At the time of the withdrawal, it had not yet been ascertained that a former employee had defrauded the firm for the amount of 80,000 reichsmarks. He maintains that he retains his share of the claim against Hahn, or rather those firms which by default have rendered possible the loss to the G.m.b.H. of so large an amount. The defendants, in the course of the Armenrecht proceedings, have offered 3,000 reichsmarks in settlement of the claim, subject to approval by the Gau economic adviser. The Gau economic adviser, after only a preliminary short comment, gave the following interpretation on 6 November 1941:

"In reply to your inquiry I state my point of view in detail.

"In a lawsuit between a German national and a Jew I consider the settling of a dispute by legal measures inadmissible for political reasons. The German national as party in the lawsuit, pursuant to his clearly defined legal standard derived from his political training since 1933, can expect that the court will decide the case by a verdict that is to meet a conclusive decision on the case. What is expected is a decision which was arrived at not from purely legal points of view, as result of a legal trend of thoughts, but which is an expression of the way in which National Socialist demands, concerning the Jewish question, are realized by German lawyers. Evading this decision by a compromise might mean encroaching upon the rights of a fellow citizen in favor of a Jew. This kind of settlement would be in contradiction to the sound sentiments of the people, I therefore consider it as inadmissible."

The defendants thereupon refused a settlement with the plaintiff and now deny they owe him anything.

On 6 December 1941 the district court [Hamburg] granted Armenrecht. Subsequently, action was brought in as follows:

1. To disclose to the plaintiff what the payments have been, which have been made so far to the parties entitled to redress pursuant to the claim against Hahn.

2. To pay defendant 22 percent of the total amounts received, with 4 percent interest from the day the action was filed.

The court intends now to issue a conclusion based on evidence.

3715–1b 1 17 13 February 1942

To the President of the District Court
Hamburg
1 Document

With regard to the pending case Prenzlau against Behrens and Lundin I do not intend to approach the economic adviser of the Gau for the time being, seeing from the documents that the ultimate beneficiary of the claim—the son of the plaintiff—emigrated in the year 1938 and his property has therefore surely been confiscated. I fail to understand why the court granted Armenrecht to the assignee, a Jew, without first consulting the authority for sequestration of property. The cession most probably will become meaningless as it was transferred in trusteeship by the son to the father shortly before his emigration.

Please discuss the matter with the judge.

[Typed signature] DR. ROTHENBERGER

Written: 13 February 1942
Read:
Mailed: 14 February 1942

Note

The senator discussed in Berlin the question of granting Armenrecht to Jews. A ruling will probably be issued shortly. Every case coming on hand must first be submitted to the senator. President Korn and President Dr. Segelken have been informed by me to this effect.

Hamburg, 24 February 1942

[Illegible initial]

[Handwritten notes]
Local Court Judge Dr. Bartsch for information.
25 February 42
Seen 25 February 1942
[Signed] SEN

907802—51——43

22 May 1942

3715–1b/1/17/

To the President of the District Court
Hamburg

Subject: Granting of Armenrecht to Jews

Reference: Your letter A.R. 53/42

1 Document

I hereby return the document Prenzlau against Behrens and Lundin 2648/41–20 H 28/41 sent to me with report of 7 May.

With his circular ordinance of 5 March 1942—3715 IV b 3 332, with which you are familiar, the Reich Minister of Justice has annulled his circular ordinance of 23 June 1939—3740 IV b 1118, stating that the granting of Armenrecht to Jews could be taken into consideration only in such cases where the carrying out of the lawsuit is in the common interest. In consequence thereof I consider it adequate that the Armenrecht granted to plaintiff Prenzlau be cancelled.

Please have this taken into consideration by the court in a form which you deem appropriate.

[Typed signature] Dr. Rothenberger

22 May 1942
Written: 22 May 1942
Read:
Mailed: 23 May 1942

TRANSLATION OF DOCUMENT 4055–PS
PROSECUTION EXHIBIT 401

LETTER FROM DEFENDANT SCHLEGELBERGER TO LAMMERS, 12 MARCH 1942, EXPRESSING CONCERN ABOUT CONTEMPLATED ANTI-JEWISH MEASURES; REPLY FROM LAMMERS, 18 MARCH 1942; LETTER FROM SCHLEGELBERGER TO SEVEN GOVERNMENT AND PARTY AGENCIES ON "THE FINAL SOLUTION OF THE JEWISH PROBLEM," 5 APRIL 1942; FILE NOTE ON SITUATION OF BERLIN JEWS, 21 NOVEMBER 1941

Berlin, 12 March 1942

The Acting Reich Minister of Justice

Dear Reich Minister Dr. Lammers:

I have just been informed by my Referent about the result of the meeting of 6 March regarding the treatment of Jews and descendants of mixed marriages. I am now expecting the official

transcript. According to the report of my Referent, decisions seem to be under way which I am constrained to consider absolutely impossible for the most part. Since the results of these discussions are to constitute the basis for the decision of the Fuehrer, and since a Referent from your Ministry participated likewise in these discussions, I urgently desire to discuss this matter with you on time. As soon as I have received the transcript of the meeting, I shall take the liberty in calling you to ask you if and when a discussion may take place.

With sincerest regards and Heil Hitler!

Yours devotedly
[Typed signature] DR. SCHLEGELBERGER

To the Reich Minister and Chief of the Party Chancellery
Dr. Lammers,
Berlin

01/108
The Reich Minister and Chief of the Reich Chancellery

Berlin W 8
Vosstrasse 6
18 March 1942

Pk 3614 B — at present Fuehrer Headquarters

Under Secretary Professor Dr. Schlegelberger,
Acting Reich Minister of Justice

Subject: Total solution [Gesamtloesung] of the Jewish question

In reply to the letter of 12 March 1942

Dear Dr. Schlegelberger:

I will be very glad to comply with your request and to discuss this question with you. I shall probably be visiting Berlin again toward the end of the month and will then have you informed about a suitable date.

Heil Hitler!

yours sincerely,
[Signed] DR. LAMMERS

The Acting Reich Minister of Justice

Berlin W 8, 5 April 1942
Wilhelmstrasse 65

Secret Reich Matter

IV b 40 g RE

To:[1]

1. The Chief of the Party Chancellery
   Attention: SS Oberfuehrer Klopfer
2. The Reich Minister of the Interior
   Attention: Under Secretary Dr. Stuckart
3. The Chief of the Security Police and the SD
   SS Obergruppenfuehrer Heydrich
4. The Deputy for the Four Year Plan
   Attention: Under Secretary Neumann
5. The Foreign Office
   Attention: Under Secretary Luther
6. The Reich Minister for the Occupied Eastern Territories
   Attention: Gau Leader and Under Secretary Dr. Meyer
7. The Race and Settlement Main Office of the Reich Leader SS
   Attention: SS Gruppenfuehrer Hofmann

Subject: Final solution [Endloesung] of the Jewish problem

1. The final solution of the Jewish problem presupposes a clear-cut and permanently applicable definition of the group of persons for whom the projected measures are to be initiated. Such a definition applies only when we desist from the beginning from including descendants of mixed marriages of the second degree in these measures. The measures for the final solution of the Jewish problem should extend only to full-blooded Jews and descendants of mixed marriages of the first degree, but should not apply to descendants of mixed marriages of the second degree.[2]

2. With regard to the treatment of Jewish descendants of mixed marriages of the first degree, I agree with the conception of the Reich Minister of the Interior which he expressed in his letter of 16 February 1942, to the effect that the prevention of propagation of these descendants of mixed marriages is to be preferred to their being thrown in with the Jews and evacuated. It follows therefrom that evacuation of those half-Jews who are no more capable of propagation, is excluded from the beginning. There is no national interest in dissolving the marriages between such half-Jews and a full-blooded German.

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[1] Of the seven persons to whose attention the copies of this letter were sent, two were tried in Nuernberg—Dr. Stuckart in the Ministries Case (United States *vs.* Ernst von Weizsaecker, et al., vols. XII–XIV, this series); and SS General Hofmann in the RuSHA Case (United States *vs.* Ulrich Greifelt, et al., vols. IV–V, this series). The activities of Luther, Under Secretary in the Foreign Office, were often brought into issue in the Ministries Case.

[2] First degree presumably those with two non-Aryan grandparents and second degree with only one.

Those half-Jews who are capable of propagation should be given the choice to submit to sterilization or to be evacuated in the same manner as Jews. In the case of sterilization, as well as in that of evacuation of the half-Jew, the German-blooded partner will have to be given the opportunity to effect the dissolution of the marriage. I see no objection to the German partner's obtaining the possibility of divorcing his or her sterilized or evacuated partner in a simplified procedure without [having to observe] the limitation of article 53 of the marriage law.

3. An exception might be worthy of consideration with respect to those half-Jews whose descendants are becoming members of the German national community, and who are finally absorbed by it. If these descendants are to be incorporated into the German national community as full fledged members—which has to be the aim in case of a genuine final solution of the Jewish question—it seems advisable to protect them from being treated as inferiors or from having feelings of inferiority which could arise easily out of the knowledge and the bad conscience that their immediate ancestors have been affected by the planned defensive measures of the national community. For this reason, it should be considered whether or not half-Jews whose living descendants are not half-Jews should be spared from evacuation as well as sterilization.

4. I have no scruples against facilitation of divorce of marriages between racial Germans and Jews. This facilitation should also be extended to marriages with persons who are considered as Jews. The divorce will have to be granted upon the request of the German-blooded partner in a simplified procedure. I have considerable scruples about compulsory divorces, for instance, on motion of the public prosecutor. Such compulsion is unnecessary because the partners will be separated in any case by the deportation of the Jewish partner. An enforced divorce, moreover, is without avail, because, though it cuts the marriage ties, it does not cut the inner tie between the partners; moreover, it does not relieve the German partner from the scorn to which he is exposed by clinging to his marriage. Finally, a clinging to marriage on the part of the German-blooded partner is to be expected only in the case of older marriages which have endured throughout many years. In cases in which the Jewish partner, as a rule, is not evacuated but confined to an old people's ghetto, the German-blooded partner who disclaims his membership in the German community should not be prohibited from being admitted to the ghetto.

[Typed signature] DR. SCHLEGELBERGER

01/11o

Note—In view of the present position of the Jews, discussions are pending in the building whether Jews are to be deprived of the right to participate in a lawsuit and whether some other ruling is to be made concerning their representation before court. The decisive factor is whether the immediate removal of all Jews can be counted upon. About 77,000 Jews live in Berlin alone. About 7,000 of these have been removed so far. The Labor Exchange for Jews, 15 Fontane-promenade—Government Counsellor Epphaus—and the Secret State Police (Dept. Burgstrasse—official in charge, Pruefer) have "reserved" the Jews, who at present are difficult to replace, who are working in armament factories and other war essential concerns. Furthermore, Jews living in privileged mixed marriages have not so far been removed. On the other hand, all Jewish legal consultants [Konsulenten] in Berlin have been ordered to leave. These Jews are today "reserved." Accordingly, it must be assumed that a considerable number of Jews will remain on Reich territory, and particularly in Berlin, for some time to come.

Berlin, 21 November 1941

[Typed signature] LUTTERLOH
Ministerialdirigent

Senior Government Counsellor Dr. Gramm

Please inform the Under Secretary.

PARTIAL TRANSLATION OF DOCUMENT NG-270 PROSECUTION EXHIBIT 155

EXTRACTS FROM AN ARTICLE IN STREICHER'S* "DER STUERMER," 2 APRIL 1942, CONCERNING THE KATZENBERGER TRIAL AND JUDGMENT

Der Stuermer

DEATH TO THE RACE DEFILER

A Trial before the Nuernberg Special Court

Race defiler Katzenberger—13–14 March 1942—page 2, column 1

* * * * * * *

The prosecutor reads the charge. The Jew Katzenberger had committed "race defilement" with the now 31-year-old business

* Julius Streicher, editor of "Der Stuermer" and Gauleiter of Franconia, the province in which Nuernberg is located, was sentenced to death by the International Military Tribunal.

proprietress Irene S., of Nuernberg, of German blood, from 1932 until the year 1940 (!) by exploiting this woman's financial difficulties. He did not even shrink back from exploiting—for his Talmudic practices—the conditions caused by the war and the absence of the husband S. who has been conscripted for military service. Irene S. is charged with attempting to withhold the deserved punishment from the Jew by committing perjury in the pre-trial interrogation.

How Katenberger defends himself (p. 2, col. 1)

* * * * * * *

How will Katzenberger try to deceive the Court and escape avenging justice?

The Jew Katzenberger developed special tactics of his own. He pretends not to have engaged in "race defiling," but to have entertained merely "fatherly" relations with Irene S. * * * Only out of "pure fatherly" sentiment has he thrown cigarettes to her through the window and given her lots of shoes.

* * * * * * *

Before the verdict (p. 2, col. 4)

After the presentation of evidence has been concluded, the prosecutor rises. With sharp words he characterizes the defendant as a criminal, who did not even shrink back from exploiting war conditions for his shameless activities. As a race defiler and public parasite in the sense of the law, Katzenberger has forfeited his life. Therefore, the death sentence should be pronounced against him. The other defendant, Irene S., should be sentenced to 2 years' hard labor and loss of civil rights for 2 years.

* * * * * * *

In his final statement the Jew Katzenberger eventually tries at least to save what can be saved.

Once more he tries to act the "benefactor," in order to appeal to the pity of the judges. With an impudence which only a Jew can muster, he characterizes all that has been presented against him, as "backstairs' gossip" and finally even wants to claim Frederick The Great as his principal witness. But the president does not permit a Jewish race defiler to soil the figure of the great Prussian King. The court then adjourned for deliberation.

Sentenced to death! (p. 3, col. 1)

When the court reenters the courtroom to announce the verdict

one can already see from the earnest looks of the judges that the fate of the Talmudic criminal has been sealed.

As a race defiler and public parasite Katzenberger is sentenced to death.

The co-defendant Irene S. gets 2 years hard labor and loss of civil rights for perjury. President of the District Court of Appeal R. points to words in the findings of the verdict, which prove to what extent the German judges are imbued with the tremendous importance of the racial laws. The president brands the depravity of the defendant and stamps him as an evil public parasite. "Racial defilement is worse than murder! Entire generations will be affected by it into the remotest future!" President of the district court of appeal R. in his speech also refers to the guilt of Jewry in this war. "If today German soldiers are bleeding to death, then the guilt falls upon that race which from the very beginning strived for Germany's ruin, and still hopes today that the German people will not emerge from this struggle." In the case of Katzenberger the court had to pronounce the death sentence. The physical destruction of the perpetrator was the only possible atonement.

The end (p. 3, col. 1)

With the findings of the verdict the sentence of the Special Court has become effective.

Why the "Stuermer" describes the Katzenberger trial in detail (p. 3, col. 2)

* * * * * * *

The Jew Katzenberger was sentenced to death as a race defiler and public parasite. This sentence (it is not the first of this kind in the Reich) was pronounced in Nuernberg and thus honors the city whose name was bestowed upon the racial laws of 15 September 1935. For the "Stuermer" however, this sentence signifies a special satisfaction, because it was the "Stuermer" which, in a special edition of the year 1938, had demanded the death penalty for race defilers.

* * * * * * *

If today Jewish race defilers are really sentenced to death, then this proves that the "Stuermer" has been a good prophet for many years.

Race defilers are public parasites (p. 3, col. 4)

* * * * * * *

Jewish race defilers therefore will have to take care in the future. They do not risk their freedom only but also their heads and necks. The patience of the German people has become exhausted. It does not treat Jewish public parasites more tenderly any longer than the public parasites from our own ranks. In this sense the Katzenberger trial has received a significance which goes far beyond the Nuernberg courtroom.

Everything for the German people (p. 3, col. 4)

The world Jewry will discover that Germany knows how to defend herself with the severe measures against Jewish race defilers. Now it will again write using the old long-tried tactics, about the "medieval conditions" prevailing in Germany. It will again glorify those "poor, deplorable, harmless Jews," who become the victims of National Socialist legislation. It will give vent to spite and malice toward Germany.

TRANSLATION OF DOCUMENT NG-154
PROSECUTION EXHIBIT 152

OPINION AND SENTENCE OF THE NUERNBERG SPECIAL COURT IN THE KATZENBERGER CASE, 13 MARCH 1942, IN WHICH DEFENDANT ROTHAUG WAS PRESIDING JUDGE*

Sg No. 351/41

Verdict

In the name of the German People

The Special Court for the district of the Court of Appeal in Nuernberg with the District Court Nuernberg-Fuerth in the proceedings against Katzenberger, Lehmann Israel, commonly called Leo, merchant and head of the Jewish religious community in Nuernberg, and Seiler, Irene, owner of a photographic shop in Nuernberg, both at present in arrest pending trial the charges being racial pollution and perjury—in public session of 13 March 1942, in the presence of—

The President—Dr. Rothaug, Senior Judge of the District Court;

Associate Judges—Dr. Ferber and Dr. Hoffmann, Judges of the District Court;

Public Prosecutor for the Special Court—Markl; and

* This is one of a number of opinions and sentences by extraordinary German courts which were received in evidence. In some of these cases one of the defendants sat as presiding judge or as a member of the court. In some the defendant Lautz or one of his representatives acted as prosecutor. For an opinion and sentence of the Nuernberg Special Court in which the defendant Oeschey presided, see the Kaminska case, decided on 29 October 1943 (NG-457, Pros. Ex. 201), reproduced later in this section.

Official Registrar: Raisin, clerk,
pronounced the following verdict:

Katzenberger, Lehmann Israel, commonly called Leo, Jewish by race and religion, born 25 November 1873 at Massbach, married, merchant of Nuernberg; Seiler, Irene, nee Scheffler, born 26 April 1910 at Guben, married, owner of a photographic shop in Nuernberg, both at present in arrest pending trial have been sentenced as follows:

Katzenberger—for an offense under section 2, legally identical with an offense under section 4 of the decree against public enemies in connection with the offense of racial pollution to death and to loss of his civil rights for life according to sections 32–34 of the criminal (penal) code.

Seiler—for the offense of committing perjury while a witness to 2 years of hard labor and to loss of her civil rights for the duration of 2 years.

The 3 months the defendant Seiler spent in arrest pending trial will be taken into consideration in her sentence.

Costs will be charged to the defendants.

Findings

I

1. The defendant Katzenberger is fully Jewish and a German national; he is a member of the Jewish religious community.

As far as his descent is concerned, extracts from the birth registers of the Jewish community at Massbach show that the defendant was born on 25 November 1873 as the son of Louis David Katzenberger, merchant, and his wife Helene née Adelberg. The defendant's father, born on 30 June 1838 at Massbach, was, according to an extract from the Jewish registers at Thundorf, the legitimate son of David Katzenberger, weaver, and his wife Karoline Lippig. The defendants' mother Lena Adelberg, born on 14 June 1847 at Aschbach, was, according to extracts from the birth register of the Jewish religious community of Aschbach, the legitimate daughter of Lehmann Adelberg, merchant and his wife, Lea. According to the Thundorf register, the defendant's parents were married on 3 December 1867 by the district rabbi in Schweinfurt. The defendant's grandparents on his father's side were married, according to extracts from the Thundorf register, on 3 April 1832; those on his mother's side were married, according to an extract from the register of marriages of the Jewish religious community of Aschbach, on 14 August 1836.

The extracts from the register of marriages of the Jewish religious community at Aschbach show, concerning the marriage of the maternal grandparents, that Bela-Lea Seemann, born at Aschbach in 1809, was a member of the Jewish religious community. Otherwise the documents mentioned give no further information so far as confessional affiliations are concerned that parents or grandparents were of Jewish faith.

The defendant himself has stated that he is certain that all four grandparents were members of the Jewish faith. His grandmothers he knew when they were alive; both grandfathers were buried in Jewish cemeteries. Both his parents belonged to the Jewish religious community, as he does himself.

The court sees no reason to doubt the correctness of these statements, which are fully corroborated by the available extracts from exclusively Jewish registers. Should it be true that all four grandparents belonged to the Jewish faith, the grandparents would be regarded as fully Jewish according to the regulation to facilitate the producing of evidence in section 5, paragraph 1 together with section 2, paragraph 2, page 2 of the ordinance to the Reich Civil Code of 14 November 1935 Reichsgesetzblatt, page 1333. The defendant therefore is fully Jewish in the sense of the Law for the Protection of German Blood.* His own admissions show that he himself shared that view.

The defendant Katzenberger came to Nuernberg in 1912. Together with his brothers, David and Max, he ran a shoe shop until November 1938. The defendant married in 1906, and there are two children, ages 30 and 34.

Up to 1938 the defendant and his brothers, David and Max, owned the property of 19 Spittlertorgraben in Nuernberg. There were offices and storerooms in the rear building, whereas the main building facing the street was an apartment house with several apartments.

The co-defendant Irene Seiler arrived in 1932 to take a flat in 19 Spittlertorgraben, and the defendant Katzenberger has been acquainted with her since that date.

2. Irene Seiler, née Scheffler, is a German citizen of German blood.

Her descent is proved by documents relating to all four grandparents. She herself, her parents, and all her grandparents belong to the Protestant Lutheran faith. This finding of the religious background is based on available birth and marriage certificates of the Scheffler family which were made part of the trial. As far

* "Law for the Protection of German Blood and Honor," 15 September 1935, one of the two original Nuernberg laws, is reproduced on page 180 (NG-715, Pros. Ex. 112).

as descent is concerned therefore, there can be no doubt about Irene Seiler, née Scheffler, being of German blood.

The defendant Katzenberger was fully cognizant of the fact that Irene Seiler was of German blood and of German nationality.

On 29 July 1939, Irene Scheffler married Johann Seiler, a commercial agent. There have been no children so far.

In her native city, Guben, the defendant attended secondary school and high school up to Unterprima [eighth grade of high school], and after that, for 1 year, she attended the Leipzig State Academy of Art and Book Craft.

She went to Nuernberg in 1932 where she worked in the photographic laboratory of her sister Hertha, which the latter had managed since 1928 as a tenant of 19 Spittlertorgraben. On 1 January 1938, she took over her sister's business at her own expense. On 24 February 1938, she passed her professional examination.

3. The defendant Katzenberger is charged with having had continual extra-marital sexual intercourse with Irene Seiler, née Scheffler, a German national of German blood. He is said to have visited Seiler frequently in her apartment in Spittlertorgraben up to March 1940, while Seiler visited him frequently, up to autumn 1938, in the offices of the rear building. Seiler, who is alleged to have got herself in a dependent position by accepting gifts of money from the defendant Katzenberger and by being allowed delay in paying her rent, was sexually amenable to Katzenberger. Thus, their acquaintance is said to have become of a sexual nature, and, in particular, sexual intercourse occurred. They are both said to have exchanged kisses sometimes in Seiler's flat and sometimes in Katzenberger's offices. Seiler is alleged to have often sat on Katzenberger's lap. On these occasions Katzenberger, in order to achieve sexual satisfaction, is said to have caressed and patted Seiler on her thighs through her clothes, clinging closely to Seiler, and resting his head on her bosom.

The defendant Katzenberger is charged with having committed this act of racial pollution by taking advantage of wartime conditions. Lack of supervision was in his favor, especially as he is said to have visited Seiler during the black-out. Moreover, Seiler's husband had been called up, and consequently surprise appearances of the husband were not to be feared.

The defendant Irene Seiler is charged with having, on the occasion of her interrogation by the investigating judge of the local Nuernberg Court on 9 July 1941, made deliberately untrue statements and affirmed under oath that this contact was without sexual motives and that she believed that to apply to Katzenberger as well.

Seiler, it is alleged, has thereby become guilty of being a perjuring witness.

The defendants have said this in their defense—

The defendant Seiler—When in 1932 she arrived in the photographic laboratory of her sister in Nuernberg, she was thrown completely on her own resources. Her sister returned to Guben, where she opened a studio as a photographer. Her father had recommended her to the landlord, the defendant Katzenberger, asking him to look after her and to assist her in word and deed. This was how she became closely acquainted with the Jew Katzenberger.

As time went on, Katzenberger did indeed become her adviser, helping her, in particular, in her financial difficulties. Delighted with the friendship and kindness shown her by Katzenberger she came to regard him gradually as nothing but a fatherly friend, and it never occurred to her to look upon him as a Jew. It was true that she called regularly in the storerooms of the rear house. She did so after office hours, because it was easier then to pick out shoes. It also happened that during these visits, and during those paid by Katzenberger to her flat, she kissed Katzenberger now and then and allowed him to kiss her. On these occasions she frequently would sit on Katzenberger's lap which was quite natural with her and had no ulterior motive. In no way should sexual motives be regarded as the cause of her actions. She always thought that Katzenberger's feelings for her were purely those of a concerned father.

Basing herself on this view she made the statement to the investigating judge on 9 July 1941 and affirmed under oath, that when exchanging those caresses neither she herself nor Katzenberger did so because of any erotic emotions.

The defendant Katzenberger—He denies having committed an offense. It is his defense that his relations with Frau Seiler were of a purely friendly nature. The Scheffler family in Guben had likewise looked upon his relations with Frau Seiler only from this point of view. That he continued his relations with Frau Seiler after 1933, 1935, and 1938, might be regarded as a wrong [Unrecht] by the NSDAP. The fact of his doing so, however, showed that his conscience was clear.

Moreover, their meetings became less frequent after the action against the Jews in 1938. After Frau Seiler got married in 1939, the husband often came in unexpectedly when he, Katzenberger, was with Frau Seiler in the flat. Never, however, did the husband surprise them in an ambiguous situation. In January or February 1940, at the request of the husband, he went to the Seiler's apartment twice to help them fill in their tax declarations. The last talk

he ever had in the Seiler apartment took place in March 1940. On that occasion Frau Seiler suggested to him to discontinue his visits because of the representations made to her by the NSDAP, and she gave him a farewell kiss in the presence of her husband.

He never pursued any plans when being together with Frau Seiler, and he therefore could not have taken advantage of wartime conditions and the blackout.

II

The court has drawn the following conclusions from the excuses made by the defendant Katzenberger and the restrictions with which the defendant Seiler attempted to render her admissions less harmful:

When, in 1932, the defendant Seiler came to settle in Nuernberg at the age of 22, she was a fully grown and sexually mature young woman. According to her own admissions, credible in this case, she was not above sexual surrender in her relations with her friends.

In Nuernberg, when she had taken over her sister's laboratory in 19 Spittlertorgraben, she entered the immediate sphere of the defendant Katzenberger. During their acquaintance she gradually became willing, in a period of almost 10 years, to exchange caresses and, according to the confessions of both defendants, situations arose which can by no means be regarded merely as the outcome of fatherly friendliness. When she met Katzenberger in his offices in the rear building or in her flat, she sat often on his lap and, without a doubt, kissed his lips and cheeks. On these occasions Katzenberger, as he admitted himself, responded these caresses by returning the kisses, putting his head on her bosom and patting her thighs through her clothes.

To assume that the exchange of these caresses, admitted by both of them, were on Katzenberger's part the expression of his fatherly feelings, on Seiler's part merely the actions caused by daughterly feelings with a strong emotional accent, as a natural result of the situation, is contrary to all experience of daily life. The subterfuge used by the defendant in this respect is in the view of the court simply a crude attempt to disguise as sentiment, free of all sexual lust, these actions with their strong sexual bias. In view of the character of the two defendants and basing itself on the evidence submitted, the court is firmly convinced that sexual motives were the primary cause for the caresses exchanged by the two defendants.

Seiler was usually in financial difficulties. Katzenberger availed himself of this fact to make her frequent gifts of money, and repeatedly gave her sums from 1 to 10 reichsmarks. In his ca-

pacity as administrator of the property on which Seiler lived and which was owned by the firm he was a partner of, Katzenberger often allowed her long delays in paying her rental debts. He often gave Seiler cigarettes, flowers, and shoes.

The defendant Seiler admits that she was anxious to remain in Katzenberger's favor. They addressed each other in the second person singular.

According to the facts established in the trial, the two defendants offered to their immediate surroundings, and in particular to the community of the house of 19 Spittlertorgraben, the impression of having an intimate love affair.

The witnesses Kleylein, Paul and Babette; Maesel, Johann; Heilmann, Johann; and Leibner, Georg observed frequently that Katzenberger and Seiler waved to each other when Seiler, through one of the rear windows of her flat, saw Katzenberger in his offices. The witnesses' attention was drawn particularly to the frequent visits paid by Seiler to Katzenberger's offices after business hours and on Sundays, as well as to the length of these visits. Everyone in the house came to know eventually that Seiler kept asking Katzenberger for money, and they all became convinced that Katzenberger, as the Jewish creditor, exploited sexually the poor financial situation of the German-blooded woman Seiler. The witness Heilmann, in a conversation with the witness Paul Kleylein, expressed his opinion of the matter to the effect that the Jew was getting a good return for the money he gave Seiler.

Nor did the two defendants themselves regard these mutual calls and exchange of caresses as being merely casual happenings of daily life, beyond reproach. According to statements made by the witnesses Babette and Paul Kleylein, they observed Katzenberger to show definite signs of fright when he saw that they had discovered his visits to Seiler's flat as late as 1940. The witnesses also observed that during the later period Katzenberger sneaked into Seiler's flat rather than walking in openly.

In August 1940, while being in the air-raid shelter, the defendant Seiler had to put up with the following reply given to her by Oestreicher, an inhabitant of the same house, in the presence of all other inhabitants: "I'll pay you back, you Jewish hussy." Seiler did not do anything to defend herself against this reproach later on, and all she did was to tell Katzenberger of this incident shortly after it had happened. Seiler has been unable to give an even remotely credible explanation why she showed this remarkable restraint in the face of so strong an expression of suspicion. Simply pointing out that her father, who is over seventy, had advised her not to take any steps against Oestreicher does not

make more plausible her restraint shown in the face of the grave accusation made in public.

The statements made by Hans Zeuschel, assistant inspector of the criminal police, show that the two defendants did not admit from the very beginning the existing sexual situation as being beyond reproach. The fact that Seiler admitted the caresses bestowed on Katzenberger only after having been earnestly admonished, and the additional fact that Katzenberger, when interrogated by the police, confessed only when Seiler's statements were being shown to him, forces the conclusion that they both deemed it advisable to keep secret the actions for which they have been put on trial. This being so, the court is convinced that the two defendants made these statements only for reason of opportuneness intending to minimize and render harmless a situation which has been established by witnesses' testimony.

Seiler has also admitted that she did not tell her husband about the caresses exchanged with Katzenberger prior to her marriage —all she told him was that in the past Katzenberger had helped her a good deal. After getting married in July 1939 she gave Katzenberger a "friendly kiss" on the cheek in the presence of her husband on only one occasion, otherwise they avoided kissing each other when the husband was present.

In view of the behavior of the defendants toward each other, as repeatedly described, the court has become convinced that the relations between Seiler and Katzenberger which extended over a period of 10 years were of a purely sexual nature. This is the only possible explanation of the intimacy of their acquaintance. As there were a large number of circumstances favoring seduction no doubt is possible that the defendant Katzenberger maintained continuous sexual intercourse with Seiler. The court considers as untrue Katzenberger's statement to the contrary that Seiler did not interest him sexually, and the statements made by the defendant Seiler in support of Katzenberger's defense the court considers as incompatible with all practical experience. They were obviously made with the purpose of saving Katzenberger from his punishment.

The court is therefore convinced that Katzenberger, after the Nuernberg laws had come into effect, had repeated sexual intercourse with Seiler, up to March 1940. It is not possible to say on what days and how often this took place.

The Law for the Protection of German Blood defines extramarital sexual intercourse as any form of sexual activity apart from the actual cohabitation with a member of the opposite sex which, by the method applied in place of actual intercourse, serves to satisfy the sexual instincts of at least one of the partners. The

conduct to which the defendants admitted and which in the case of Katzenberger consisted in drawing Seiler close to him, kissing her, patting and caressing her thighs over her clothes, makes it clear that in a crude manner Katzenberger did to Seiler what is popularly called "Abschmieren" [petting]. It is obvious that such actions are motivated only by sexual impulses. Even if the Jew had only done these so-called "Ersatzhandlungen" [sexual acts in lieu of actual intercourse] to Seiler, it would have been sufficient to charge him with racial pollution in the full sense of the law.

The court, however, is convinced over and above this that Katzenberger, who admits that he is still capable of having sexual intercourse, had intercourse with Seiler throughout the duration of their affair. According to general experiences it is impossible to assume that in the 10 years of his tête-a-tête with Seiler, which often lasted up to an hour, Katzenberger would have been satisfied with the "Ersatzhandlungen" which in themselves warranted the application of the law.

III

Thus, the defendant Katzenberger has been convicted of having had, as a Jew, extra-marital sexual intercourse with a German citizen of German blood after the Law for the Protection of German Blood came into force, which according to section 7 of the law means after 17 September 1935. His actions were guided by a consistent plan which was aimed at repetition from the very beginning. He is therefore guilty of a continuous crime of racial pollution according to sections 2 and 5, paragraph 11 of the Law for the Protection of German Blood and German Honor of 15 September 1935.

A legal analysis of the established facts shows that in his polluting activities, the defendant Katzenberger, moreover, generally exploited the exceptional conditions arising out of wartime circumstances. Men have largely vanished from towns and villages because they have been called up or are doing other work for the armed forces which prevents them from remaining at home and maintaining order. It was these general conditions and wartime changes which the defendant exploited. As he continued his visits to Seiler's apartment up to spring 1940, the defendant took into account the fact that in the absence of more stringent measures of control his practices could not, at least not very easily, be seen through. The fact that her husband had been drafted into the armed forces also helped him in his activities.

Looked at from this point of view, Katzenberger's conduct is particularly contemptible. Together with his offense of racial pollution he is also guilty of an offense under section 4 of the decree

907802—51——44

against public enemies. It should be noted here that the national community is in need of increased legal protection from all crimes attempting to destroy or undermine its inner solidarity.

On several occasions since the outbreak of war the defendant Katzenberger sneaked into Seiler's flat after dark. In these cases the defendant acted by exploiting the measures taken for the protection in air raids and by making use of the black-out. His chances were further improved by the absence of the bright street lighting which exists in the street along Spittlertorgraben in peacetime. In each case he exploited this fact being fully aware of its significance, thus during his excursions he instinctively escaped observation by people in the street.

The visits paid by Katzenberger to Seiler under the cover of the black-out served at least the purpose of keeping relations going. It does not matter whether during these visits extra-marital sexual intercourse took place or whether they only conversed because the husband was present, as Katzenberger claims. The motion to have the husband called as a witness was therefore overruled. The court holds the view that the defendant's actions were deliberately performed as part of a consistent plan and amount to a crime against the body according to section 2 of the decree against public enemies. The law of 15 September 1935 was promulgated to protect German blood and German honor. The Jew's racial pollution amounts to a grave attack on the purity of German blood, the object of the attack being the body of a German woman. The general need for protection therefore makes appear as unimportant the behavior of the other partner in racial pollution who, however, is not liable to prosecution. The fact that racial pollution occurred at least up to 1939–1940 becomes clear from statements made by the witness Zeuschel to whom the defendant repeatedly and consistently admitted that up to the end of 1939 and the beginning of 1940 she was used to sitting on the Jew's lap and exchanging caresses as described above.

Thus, the defendant committed an offense also under section 2 of the decree against public enemies.

The personal character of the defendant likewise stamps him as a public enemy. The racial pollution practiced by him through many years grew, by exploiting wartime condition, into an attitude inimical to the nation, into an attack on the security of the national community during an emergency.

This was why the defendant Katzenberger had to be sentenced, both on a crime of racial pollution and of an offense under sections 2 and 4 of the decree against public enemies, the two charges being taken in conjunction according to section 73 of the penal code.

In view of the court the defendant Seiler realized that the contact which Katzenberger continuously had with her was of a sexual nature. The court has no doubt that Seiler actually had sexual intercourse with Katzenberger. Accordingly the oath given by her as a witness was to her knowledge and intention a false one, and she became guilty of perjury under sections 154 and 153 of the penal code.

IV

In passing sentence the court was guided by the following considerations:

The political form of life of the German people under national socialism is based on the community. One fundamental factor of the life of the national community is the racial problem. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong.

Katzenberger practiced pollution for years. He was well acquainted with the point of view taken by patriotic German men and women as regards racial problems and he knew that by his conduct the patriotic feelings of the German people were slapped in the face. Neither the National Socialist Revolution of 1933, nor the passing of the Law for the Protection of German Blood in 1935, neither the action against the Jews in 1938, nor the outbreak of war in 1939 made him abandon this activity of his.

As the only feasible answer to the frivolous conduct of the defendant, the court therefore deems it necessary to pronounce the death sentence as the heaviest punishment provided by section 4 of the decree against public enemies. His case must be judged with special severity, as he had to be sentenced in connection with the offense of committing racial pollution, under section 2 of the decree against public enemies, the more so, if taking into consideration the defendant's personality and the accumulative nature of his deeds. This is why the defendant is liable to the death penalty which the law provides for such cases as the only punishment. Dr. Baur, the medical expert, describes the defendant as fully responsible.

Accordingly, the court has pronounced the death sentence. It was also considered necessary to deprive him of his civil rights for life, as specified in sections 32–34 of the penal code. When imposing punishment on the defendant Seiler, her personal character was the first matter to be considered. For many years, Seiler indulged in this contemptible love affair with the Jew Katzenberger. The national regeneration of the German people in 1933 was alto-

gether immaterial to her in her practices, nor was she in the least influenced when the Law for the Protection of German Blood and Honor was promulgated in September 1935. It was, therefore, nothing but an act of frivolous provocation on her part to apply for membership in the NSDAP in 1937 which she obtained.

When by initiating legal proceedings against Katzenberger the German people were to be given satisfaction for the Jew's polluting activities, the defendant Seiler did not pay the slightest heed to the concerns of State authority or to those of the people and decided to protect the Jew.

Taking this over-all situation into consideration the court considered a sentence of 4 years of hard labor as having been deserved by the defendant.

An extenuating circumstance was that the defendant, finding herself in an embarrassing situation, affirmed her—as she knew—false statement with an oath. Had she spoken the truth she could have been prosecuted for adultery, aiding, and soliciting. The court therefore reduced the sentence by half despite her guilt, and imposed as the appropriate sentence 2 years of hard labor. (Sec. 157, par. I, No. 1, of the Penal Code.)

On account of the lack of honor of which she was convicted, she had to be deprived of her civil rights too. This has been decided for a duration of 2 years.

Taking into consideration the time spent in arrest pending trial: Section 60, Penal Code. Costs: Section 465, Code of Criminal Procedure.

[Signed] ROTHAUG

DR. FERBER

DR. HOFFMANN

Certified:

Nuernberg, 23 March 1942

The Registrar of the Office of the Special
Court for the district of the Nuernberg Court
of Appeal with the District Court Nuernberg-Fuerth

[Stamp]

District Court [Illegible signature]

Nuernberg-Fuerth Justizinspektor

PARTIAL TRANSLATION OF DOCUMENT NG–129
PROSECUTION EXHIBIT 355

LETTER FROM DEFENDANT SCHLEGELBERGER AND GREISER, REICH GOVERNOR OF THE WARTHEGAU (POLAND) TO LAMMERS, 15 DECEMBER 1941, STATING THAT GREISER'S AUTHORITY CONCERNING THE EXECUTION OF DEATH SENTENCES AND PARDONING OF POLES AND JEWS IS NO LONGER RESTRICTED

Berlin, 15 December 1941

II a–2–3020/41

To the Reich Minister and Chief of the Chancellery of the Reich

Subject: Letter of the cosignatory Reichsstatthalter of the Reichsgau Wartheland, dated 13 November 1941

Since the cosignatory Reichsstatthalter of the Reichsgau Wartheland has been notified by the cosignatory Reich Minister of Justice, that until further notice, that is for the duration of war, the delegation of authority to the Reichsstatthalter in the Reichsgau Wartheland to order the execution of death penalties against Poles and Jews, as well as for pardoning of Poles and Jews who have been sentenced to death, is no longer restricted, the contents of the communication of 13 November is of no further consequence.

[Signed] SCHLEGELBERGER

[Signed] GREISER

Rk 1000 B

TRANSLATION OF DOCUMENT NG–128
PROSECUTION EXHIBIT 354

LETTER FROM THE PROVINCIAL PRESIDENT OF UPPER SILESIA TO LAMMERS, 26 JANUARY 1942, REQUESTING THE POWER OF AMNESTY FOR POLES AND JEWS SENTENCED TO DEATH

BK 1279 28 January 1942 [Initial] FI [Ficker]

Provincial President
Of the Province of Upper Silesia
O. P. I b 3

[Handwritten] on hand RM 1,000 B 1ob
BBT 145
Katowice, 26 January 1942
Hindenburgstrasse
Telephone: 34 921
[Initial] Ma 28/1
[Initial] Gg

[Illegible initial]

28/1

To the Chief of the Reich Chancellery
Reich Minister Dr. Lammers
Reich Chancellery
Berlin

Dear Reich Minister:

The decree of 4 December 1941, 1b (Reich Law Gazette I, p. 759), concerning penal measures against Poles and Jews in the Incorporated Eastern Territories aims at punishing quickly and effectively criminal acts committed by Poles and Jews within the Incorporated Eastern Territories. Its success, however, is doubtful as long as it is necessary to obtain a decision from the Reich Minister of Justice before granting amnesties [Gnadenrecht] to Poles and Jews sentenced to death. In view of the peculiar criminal and political situation in Upper Silesia, which is marked by the growing Polish resistance movement, such delays—especially in wartime—are intolerable.

I therefore request you to take steps to have transferred to the power of granting amnesties—at least for the duration of the war—to Poles and Jews within the province of Upper Silesia who have been legally sentenced to death.

I should like to point out especially that according to an article in the periodical "Deutsches Recht," 1941, (p. 2472), the Gauleiter and Reichsstatthalter in the Reichsgau Wartheland [Greiser]* has already been granted similar powers.

Heil Hitler!

Yours

N 89 Justice 12

[Signed] BRACHT

TRANSLATION OF DOCUMENT NG–126
PROSECUTION EXHIBIT 356

LETTER FROM DEFENDANT SCHLEGELBERGER TO LAMMERS, 26 MAY 1942, TRANSMITTING A COPY OF SCHLEGELBERGER'S DECREE DELEGATING THE RIGHT TO PARDON POLES AND JEWS TO REICH GOVERNORS AND PROVINCIAL PRESIDENTS

[Stamp]

Reich Chancellery 7996B–2 June 1942

[Initial] FI [Ficker]

* See Document NG–129, Prosecution Exhibit 355, reproduced immediately above.

1 enclosure

Reich Minister of Justice
9170 East /2—IIa–2–1054/42

Berlin W 8, 26 May 1942
Wilhelmstrasse 65
Telephone: 11 00 44
Long distance: 11 65 16

[Initial] KR [Kritzinger]

To the Reich Minister and Chief of the Reich Chancellery

Subject: Delegation of the right of pardon in the case of Jews and Poles

Reference: Letter of 16 March 1942—Reich Chancellery 2477 B.

1 enclosure

I enclose for your information a copy of my decree of 28 May 1942, by which I, in agreement with the Reich Minister and the Chief of the Presidential Chancellery, delegated the exercise of the right of pardon in the case of Poles and Jews sentenced by general courts in the Incorporated Eastern Territories to the Reich governors and provincial presidents of these provinces for the duration of the war.

The Acting Minister
[Signed] DR. SCHLEGELBERGER

[Handwritten notes]

1. Submitted to the Reich Minister.

[Initial] L [Lammers] 6 June

2. File!

[Initial] KR [Kritzinger] 3 June

[Initial] F [Ficker] 2 June

[Decree delegating Right to pardon Poles and Jews to Reich Governors and Provincial Presidents]

I delegate for the duration of the war the exercise of the right to pardon Poles and Jews sentenced by the general courts in the Incorporated Eastern Territories (including the Special Courts), as far as the Fuehrer has delegated it to me and no other delegation has yet been made by me, to the Reich governors (attorneys general) each for his respective province, in the Reich provinces of Wartheland and Danzig-West Prussia and the provincial presidents of the provinces of Upper Silesia and East Prussia.

Berlin, 28 May 1942

The Acting Reich Minister of Justice
[Signed] Dr. Schlegelberger

(Seal)

to 9/70 East /2—II a–2–1054/42
7886 B 341357

TRANSLATION OF DOCUMENT NG–744
PROSECUTION EXHIBIT 500

LETTER FROM THE REICH MINISTRY OF JUSTICE, SIGNED BY FREISLER, TO PRESIDENTS OF DISTRICT COURTS OF APPEAL AND OTHERS, 7 AUGUST 1942, CONCERNING "POLES AND JEWS IN PROCEEDINGS AGAINST GERMANS"

The Reich Minister of Justice
4110–IV a–4–1586

Berlin W 8, 7 August 1942
Wilhelmstrasse 65
Telephone: 11 00 44
Long distance: 11 65 16

To the
Presidents of the District Courts of Appeal,
Attorneys General at the District Courts of Appeal

For information to:

(*a*) The Presidents of the Reich Supreme Court and of the People's Court,

(*b*) The Chief Reich Prosecutors at the Reich Supreme Court and at the People's Court.

Subject: Poles and Jews in proceedings against Germans

Enclosures: Copies for the Presidents of the District Courts, Chief Public Prosecutors, Local Courts, and Public Prosecutors at the Local Courts

The Penal Ordinance for Poles of 4 December 1941* (Reichsgesetzblatt I, p. 759) was intended not only to serve as a criminal law against Poles and Jews, but beyond that also to provide general principles for the German administration of law to be adopted in all criminal proceedings against Poles and Jews irrespective of the role which the Poles and Jews play in the individual proceedings. The regulations of article IX, for instance, according

* Reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 632.

to which Poles and Jews are not to be sworn in apply to proceedings against Germans as well.

I have found that the special legal status of the Poles and Jews who are subject to the penal ordinance for Poles is not always taken into account. Reference is therefore made to the following points:

1. Proceedings against Germans should be carried on whenever possible without calling Poles and Jews as witnesses. If, however, such a testimony cannot be evaded, the Pole or Jew must not appear as a witness against the German during the trial, he must always be interrogated by a judge who has been appointed or requested to do so, (art. II, par. 1 of the Order for Execution of 31 Jan. 1942*—(Reichsgesetzblatt I, p. 52)).

2. Evidence given by Poles and Jews during proceedings against Germans must be received with the utmost caution especially in those cases where other evidence is lacking. I request that the Fuehrer order published in my circular decree of 3 September 1941–4103–II a –2–2041/41 concerning the interrogation of enemy subjects be applied to Poles and Jews as well.

3. Proceedings against Germans on the basis of charges preferred by Poles and Jews are only justified if sufficient proof is available that such a charge is well founded and if paragraph 153 of the Code of Criminal Procedure appears to be nonapplicable right from the beginning. As a rule, a thorough interrogation of the person preferring charges will have to take place first. The public prosecutor will also limit his application to the police in the same way. Coercive measures against the accused German as well as his official interrogation should in every case be undertaken only if the suspicion that the German has committed a serious offense has been sufficiently substantiated.

No information about the result of the proceedings is to be given to a Pole or Jew who has preferred charges against a German.

As deputy:
[typed] Signed: DR. FREISLER

Certified.

[Signed] KANNIESS
Senior clerk of Ministerial Chancellery

[Stamp]

Reich Ministry of Justice
Office of the Minister

* This supplementary decree, signed by defendant Schlegelberger and Dr. Pfundner, is reproduced earlier in this section (NG–665, Pros. Ex. 346).

TRANSLATION OF DOCUMENT 662-PS
PROSECUTION EXHIBIT 263

NOTES OF THE REICH MINISTRY OF JUSTICE ON A CONFERENCE OF 9 OCTOBER 1942 ON TRANSFER OF CONVICTS AND "ASOCIALS" IN VARIOUS CATEGORIES TO THE AFRICA BRIGADE, SPECIAL COMMANDOS IN THE EAST, AND TO HIMMLER

Copy

Conference on 9 October 1942

SECRET

I. AFRICA BRIGADE

The Fuehrer has ordered the formation of an Africa Brigade composed of members of the age groups 1908 and younger who had hitherto been classified as unworthy of military service. The military unworthy assigned to the brigade in the African theater should be given the opportunity to redeem themselves, and thereby obtain permanent military worthiness. Those called up by virtue of the Fuehrer's orders are to be classified as military worthy for the duration of their military service.

For the execution of the Fuehrer's order, the High Command of the Armed Forces has issued the order of 2 October 1942 —*Az 12 i 10.34 AHA/Ag/E (Ia)*—Nr.550/42 g Kdos (top secret). Accordingly, the following will be called up:

1. Military unworthy German citizens of the age group 1908 or younger who have been sent to the penitentiary for 3 years or less and have not been penalized for the same or similar offenses either before or after the original offense.

2. Military unworthy German citizens of the same age group who have been sentenced to the penitentiary for 3 to 5 years for a first offense, and have no previous or later sentences.

3. Military unworthy German citizens of the same age group who have been sentenced to the penitentiary for 3 years (ref. par. 1) *and* who still are *serving their sentences,* in case they have served 1 year with good conduct.

Concerning paragraphs 1–3, those called up must be fit for field and tropical service. Individuals with homosexual tendencies, or who were punished for high treason, or have been ordered to be held in custody for security reasons, or to be castrated are not to be called up. For those unfit to serve who have been sentenced to and have served up to 1½ years in the penitentiary and have otherwise served sentences for only minor offenses, the restoration of military worthiness will continue as a rule through the

pardon channels. These may, as usual, be placed in various units of the army.

The measures necessary in the administration of justice according to this order are put into effect—

Pardon proceedings instigated by the local recruiting authorities on behalf of those sentenced who belong to the age groups of 1908 and younger will not as a rule be continued. The armed forces replacement offices concerned will be informed by the pardoning authorities, to desist from further processing of these requests by order of the High Command of the Armed Forces. Exceptions are proceedings against those, who have been sentenced up to 1½ years' penitentiary (see above). These proceedings will be acted upon in the manner heretofore customary, and if need be, presented to the Reich Minister of Justice for decisions.

The attorneys general will issue a report on the number of convicts who are still in confinement who come under this category for induction. They will simultaneously compile lists which will contain personal particulars of those persons sentenced (name, birth-date and town, occupation, sentence, expiration date, behavior, etc.). The list will be sent to the army office concerned. The named prisoners will await the army's call.

II. SPECIAL COMMANDOS IN THE EAST

The Reich Marshal has expressed the wish to have convicts made available to be used as special commandos in the East, and to carry out sabotage behind the enemy's lines. He refers to convicts who strayed off the straight and narrow and have not committed especially dishonorable deeds, for whose person and deed one may have human understanding. Especially suited are poachers who out of a passion for hunting have trespassed, and smugglers who have risked their lives in battle on the borders against the custom officials.

The poachers are already being turned over to the Reich Leader SS for special duties. The number of smugglers who come under consideration is exceptionally small. A telephonic questioning of the 13 district attorneys located on the borders of the Reich, disclosed only 2 suitable smugglers in confinement and three are being investigated. In the case of the latter, the citizenship is doubtful. There are no similar groups of convicts for this task who could make any difference in amounts. Under these circumstances it appeared practical to give the attorneys general the general task of obtaining the convicts, appropriate for this purpose, and reporting them. Prerequisites are, voluntary enlistment, physical fitness for military service, age 18 to 45 years, confine-

ment of at least 1 year for a deed not especially dishonorable. The following are exceptions:

a. Foreigners, stateless persons, those of non-German blood.

b. Persons who have been punished because of homosexuality or high treason, or against who imprisonment for security reasons or castration has been ordered.

The appropriate request to the attorneys general has been made. The reports are expected before 25 October 1942. They are being checked in the Reich Ministry of Justice. The names of those convicts appearing suitable according to this will be made known to the Reich Marshal. Insofar as they fulfill also the prerequisites for induction into the Africa Brigade, a corresponding reference will be necessary.

III. DELIVERY OF ASOCIAL CONVICTS

[Asoziale Strafgefangen]

Persons in penal institutions designated as asocial persons by judicial decision are to be turned over to the Reich Leader SS.

1. *Persons in custody for reasons of security*—Persons in custody for reasons of security who are in German penal institutions will be put at the disposal of the Reich Leader SS. The execution of sentence will be regarded as interrupted by the delivery.

In detail the following principles should govern proceedings:

a. Persons under court martial sentences will not be delivered. Prisoners sentenced by former Polish courts or by courts of the Government General, will be transferred; before this, however, agreement with the Governor General will be obtained. The workhouse according to Austrian law is not equivalent to security custody [Sicherungsverwahrung].

b. Whether women are also to be delivered is still doubtful. This question will be discussed with SS Gruppenfuehrer Streckenbach. In this regard it will have to be a fundamental point from the beginning that in the case of female Poles, Jews, and gypsies no doubt about the delivery can exist.

c. Foreigners are not affected. Poles, Russians, Ukrainians, Jews, gypsies do not rank as foreigners, however, Latvians, Estonians, do. Czechs sentenced by German courts will be handled like Germans.

d. The sick will be delivered, as soon as they are able to be transported. The question whether prisoners in penal institutions who according to the opinion of the institution are insane should be delivered will be discussed with SS Gruppenfuehrer Streckenbach.

e. The delivery of persons in custody for security reasons will take place as a matter of basic principle also in the case of such prisoners who on account of age or for other reasons no longer seem dangerous. An exception will be made only in the case of persons in security custody, in whose case the institution is convinced that because of their favorable development they can be released within a predictable time. These cases will be laid before section XV for individual checking.

f. Persons sentenced who are still serving penitentiary sentences, but who in addition have been sentenced to security custody, will be put at the disposal of the Reich Leader SS.

g. When delivering prisoners it must be taken into account that the production of industries important to defense should suffer no stoppages. Insofar as necessary workers to replace them must be trained first.

h. The question, to whom the delivery will be made, will be discussed with SS Gruppenfuehrer Strechenbach.

i. In the immediate future only persons who have received final judgment will be taken; the decision on future sentences is in abeyance. For the reception of persons sentenced later, individual institution will be designated, the number of which is to be limited as much as possible.

2. *Jews, gypsies, Russians, and Ukrainians* will be delivered to the Reich Leader SS without exception.

3. *Poles*—Ethnic Poles who are subject to the Polish criminal law regulations or have been delivered to the Polish penal authorities and who have more than 3 years' sentence to serve will be delivered to the Reich Leader SS.

Poles with smaller sentences will remain in custody of the prison system. After serving their sentences they will be reported by name to the police just the same.

4. *Penitentiary prisoners*—Penitentiary prisoners of the German and Czech ethnic groups, who are sentenced to a punishment of over 8 years, will be individually checked to see whether they are according to their personality, asocial, i.e., whether they will be worthless forever to the nation. If the answer to this question is affirmative, they will be delivered to the Reich Leader SS.

The check-up will be undertaken in section XV (Vice President of the People's Court Engert, Oberregierungsrat, Hupperschwiller, Chief Public Prosecutor Meyer). Vice President Engert will regulate the technical execution. The decisions in individual cases are incumbent upon him. Special cases will be reported to the Reich Minister of Justice.

The guiding principles for those in security custody (III, 1) are valid, and furthermore the following is to be observed in this regard.

On the treatment of Czechs sentenced by courts in the Protectorate a conversation with the Reich Protector is necessary. The question whether Alsatians and Lorrainers who have been sentenced in Alsace and Lorraine should be taken must be cleared by negotiation with the chiefs of the civil administration.

Persons originally sentenced to death whose sentences have been commuted to penitentiary sentences over 8 years fall under the scope of the action, insofar as they are regarded as asocial. Under this requirement those sentenced persons are also included who have close relatives in the field, and prisoners for whom, because of their commitment in the removal of aerial bombs, a later commutation is contemplated.

On the treatment of persons sentenced who are lodged in curative or medical institutions, negotiations with SS Gruppenfuehrer Strechenbach must be undertaken.

[typed] Signed: DR. CROHNE
13 October

TRANSLATION OF DOCUMENT NG-558
PROSECUTION EXHIBIT 143

LETTER FROM REICH MINISTER OF JUSTICE THIERACK TO BORMANN, 13 OCTOBER 1942, CONCERNING THE "ADMINISTRATION OF JUSTICE AGAINST POLES, RUSSIANS, JEWS, AND GYPSIES"

T 459
The Reich Minister of Justice

Berlin, 13 October 1942

[Handwritten] Dispatched 13/10.
[Initials] KUE [Kuemmerlein]

To Reichsleiter Bormann
Fuehrer Headquarters

Subject: Administration of criminal justice against Poles, Russians, Jews, and gypsies

Dear Reichsleiter:

With a view to freeing the German people of Poles, Russians, Jews, and gypsies, and with a view to making the eastern territories incorporated into the Reich available for settlements of

German nationals, I intend to turn over criminal proceedings against Poles, Russians, Jews, and gypsies to the Reich Leader SS. In so doing I work on the principle that the administration of justice can only make a small contribution to the extermination* of members of these peoples [Angehoerige dieses Volkstums auszurotten]. Undoubtedly the administration of justice pronounces very severe sentences on such persons, but that is not enough to constitute a material contribution toward the realization of the above-mentioned aim. Nor is any useful purpose served by keeping such persons in German prisons and penitentiaries for years, even if they are utilized as labor for war purposes as is done today on a large scale.

I am, on the other hand, of the opinion that considerably better results can be accomplished by surrendering such persons to the police, who can then take the necessary measures unhampered by any legal criminal evidence. I start from the principle that such measures seem entirely justified in wartime, and that certain conditions which I consider essential are fulfilled. These conditions consist in the prosecution of Poles and Russians by the police only if they resided until 1 September 1939 in the former state territory of Poland or the Soviet Union; and secondly, that Poles who were registered as being of German descent will continue to be subjected to prosecution by the administration of justice as before.

On the other hand, the police may prosecute Jews and gypsies irrespective of these conditions.

But no changes whatsoever are to be made in regard to the prosecution of other foreign nationals by the administration of justice.

The Reich Leader SS, with whom I discussed these views, agrees with them. I also informed Dr. Lammers.

I submit this matter to you, dear Reichsleiter, with the request to let me know whether the Fuehrer approves this view. If so, I would then make my official recommendations through Reich Minister Dr. Lammers.

[Handwritten] After one week.
[Initial] Kue [Kuemmerlein] 10/19, 10/26

Heil Hitler!

yours
[Initial] TH [Thierack]

---

* In discussing this subject with Himmler, the Reich Leader SS, on 18 September 1942, Thierack used the words "special treatment at the hands of the police," and "delivery of asocial elements * * * to the Reich Leader SS to be worked to death." See Thierack's memorandum of his conference with Himmler, Document 654–PS, Prosecution Exhibit 39, reproduced in section V C 3 a.

PARTIAL TRANSLATION OF DOCUMENT NG–787
PROSECUTION EXHIBIT 507

LETTER OF THE REICH MINISTRY OF JUSTICE TO LEADING JUDGES AND PROSECUTORS, 4 APRIL 1944, TRANSMITTING A REPORT OF THE REICH STATISTICAL BUREAU ON "CRIMINALITY IN THE GREATER GERMAN REICH IN THE YEAR 1942," EXCLUSIVE OF CASES HANDLED BY THE PEOPLE'S COURT

The Reich Minister of Justice
4206 III a–4–446

Berlin W 8, 4 April 1944
Wilhelmstrasse 65
Phone: 110044
out of town: 116516

To the Presidents of the Reich Supreme Court and the People's Courts

To the Presidents of the Districts Courts of Appeal and the Chief Reich Prosecutors
at the Reich Supreme Court and the People's Court,
as well as the Public Prosecutors at the Courts of Appeal

Subject: Development of criminality

1 enclosure: 1 copy each of the enclosed report regarding criminality in the Greater German Reich in the year 1942

I am enclosing one copy of the report regarding criminality in the Greater German Reich. Please acknowledge and treat confidentially.

By order:

[Typed] Signed: GRAU
Certified: [Signed] SEEMANN
Judicial Clerk

[Stamp]

Reich Ministry of Justice
Ministerial Chancellery
[Handwritten] To Under Secretary Dr. Klemm

Reich Statistical Bureau

Keep under lock and key
Only for official use.
Publication not permitted

Criminality in the Greater German Reich in the year 1942

1. Total result

Since 1 January 1942 the Reich statistics of criminality comprise territorially the area of the Greater German Reich with the exception of the Alpine and Danube Gaue where the criminal law of the Reich as the exclusive basis of the statistics of criminality

in the Reich, has not yet been introduced in its totality. As to *persons,* the statistics of criminality in the Reich enumerate separately—

a. German nationals and aliens (aliens too will be enumerated separately from 1 January 1943 on).

b. Members of the Protectorate.

c. Poles and Jews sentenced on the basis of the Penal Ordinance for Poles.

d. Other racial Jews.

Taking these individual groups together, a *total* of 457,129 persons were *sentenced** with legally binding effect in the Greater German Reich for crimes and offenses against laws of the Reich (not counting sentences for crimes and offenses against laws of the Reich falling under the jurisdiction of the People's Court) that is, 9.4 percent more than in the year 1941 (417,923). The number of persons *convicted* with legally binding effect amounts to 417,001—91.2 percent of the total number of persons accused; 1941 [amounted] to 377,072—90.2 percent. Punishment was inflicted on 372,502 persons convicted (1941: 346,105)—89.3 percent (91.8 percent) and punishment and corrective measures on 2,449 (3,082)—0.6 percent (0.8 percent).

* Not counting the small number of sentences on the basis of former Polish, Austrian, or Czech law, as well as the decrees of the Reich Protector of Bohemia and Moravia.

Of 29,305 (1941: 30,540) persons sentenced 6.4 percent (7.3 percent) were *acquitted.* In addition corrective measures were decreed in the case of 139 (134) defendants who were acquitted, in the case of 487 (495) corrective measures were decreed independently, and in the case of 35 (54) persons a motion to decree corrective measures independently was refused.

In 10,162 cases (2.2 percent) compared with 9,628 (2.3 percent) in the previous year, *proceedings were quashed* by the court.

In the year reported on 84,318—20.2 percent of the total number of persons convicted, compared with 92,546—24.5 percent in the year 1941, were persons who had been *previously convicted* of crimes or offenses against laws of the Reich.

Total number of persons convicted—

	1941		1942	
	Number	Percent	Number	Percent
I. Crimes and offenses in violation of the Reich Penal Code	232,888	61.8	240,473	57.7
II. Crimes and offenses in violation of other laws of the Reich	144,184	38.2	176,528	42.3

907802—51——45

Thus, the proportion of crimes and offenses in violation of the Reich Penal Code decreased from 1941 to 1942, whereas the proportion of those in violation of other laws of the Reich increases as a result of the growing number of violations of wartime penal legislation.

Detailed information concerning the extent of criminal acts in 1942, *important for reasons of criminal policy as well as numerically* compared with the previous year, is furnished in the chart [1] below.

	1941		1942	
	Total number of persons sentenced	Persons previously convicted among them	Total number of persons sentenced	Persons previously convicted among them
Sexual crimes and offenses against morality	13,591	4,544	10,588	3,074
Thereunder—				
Sodomy and bestiality	3,963	1,522	2,790	936
Indecent assault on persons under 14 years of age	4,374	1,364	3,415	964
Murder	187	50	153	42
Manslaughter	151	37	118	25
Abortion	2,993	482	3,193	425
Slight, dangerous, and serious bodily injury	13,353	3,439	10,024	2,215
Larceny, also in the case of repeated offenses	77,556	21,675	89,656	21,188
Aggravated larceny, also in the case of repeated offenses	12,192	3,936	15,587	3,776
Embezzlement	10,987	4,129	10,179	2,968
Robbery, also in the case of second offenders and extortion equivalent to robbery	300	104	186	59
Extortion	512	182	353	102
Receiving stolen goods, also in the case of repeated offenses	10,956	2,329	14,778	2,619
Simple fraud, also in the case of repeated offenses	16,258	8,005	12,551	5,266
Forgery of Public Documents, etc.	8,052	2,075	9,952	2,069
Arson	121	23	119	20
Major and minor crimes by breach of official duties	2,208	354	2,471	311
Crimes and offenses against the law concerning dealings with food, etc. (Adulteration of foods)	3,433	668	2,801	557
Law concerning fire arms	1,626	304	1,317	206
Law for the protection of German blood and German honor (race pollution)	189	86	109	46
Decree against people's parasites	3,822	1,941	6,349	2,602
Decree concerning Crimes of Violence	282	149	263	131

Thus, we find an *increase*, to a more or less considerable degree, in the following crimes: abortion (+6.7 percent), larceny and aggravated larceny (+15.6 percent and +27.8 percent resp.), and receiving of stolen goods (+34.9 percent). The three last named

criminal acts, the most important of which are directed against property, constitute approximately 50 percent of all crimes and offenses against the Reich Criminal Code recorded for this year. The same offenses constituted only 43.2 percent of the total in 1941. Cases of forgery of public instruments also show an increase (+23.6 percent), partly in consequence of the forging of the numerous identity cards and papers necessitated by the government control of economy. Offenses by breach of official duties, likewise, have increased in number (+11.9 percent). The increase of cases pertaining to the decree against people's parasites is particularly noticeable (+66.1 percent).

On the other hand, all categories of sexual crimes have *decreased* in number (—22.3 percent), particularly unnatural sexual offenses (—29.6 percent) and indecent assault on persons under 14 years of age (—21.9 percent). Decreases are also recorded for the various types of willful bodily injury (24.9 percent), for the two capital crimes, murder and manslaughter (—18.2 percent and 21.9 percent resp.), among the crimes against property, embezzlement (—7.4 percent), for both robbery and extortion equivalent to robbery (—38 percent) as well as extortion (—31.1 percent) to a considerable extent, and, furthermore, for fraud (—22.8 percent). The decline in the number of convictions arising from crimes of violence (—6.7 percent) is also notable.

Sentences imposed in 1942 (1941) (this covers both fines and imprisonment) are as follows: 2,199 (1,085) death sentences, 20,104 (15,981) limited sentences of penitentiary [Zuchthaus] (including severe penal camp) 194,386 (162,768) sentences of imprisonment (including ordinary penal camp) and 162,158 (170,254) fines.

A comparison between this and last year's criminal statistical data for individual groups cannot be drawn because of the introduction of a revised system of enumeration, previously mentioned, that went into effect 1 January 1942. Until then the Reich criminal statistics had not yet provided such an analysis of individual groups.

2. Ethnic members of the German national community and foreigners

a. Sentences

In 1942 a total number of 378,670 persons, both ethnic members of the German national community as well as foreigners were legally sentenced within the Greater Reich for crimes and offenses against Reich laws (not including sentences for crimes and offenses against Reich laws falling within the jurisdiction of the People's Court). Of these, 341,540, or 90.2 percent were legally

convicted. Penalties alone were imposed on 297,324, or 87.1 percent of those convicted, whereas both penalties and measures of security and reform were imposed on 2,332 or 0.7 percent. The number of convicted persons, punishment for whom was set aside in accordance with the juvenile court law amounts to 2,911 or 0.8 percent. However, for the vast majority of these cases measures of reform were ordered and these amounted to 10,233 according to this year's record. Juvenile detention was ordered in the case of 37,717 defendants, which means 11 percent of all convicted ethnic members of the German community (and foreigners), and 71.9 percent of the total number of juveniles within this particular group who were subject to a penalty. In addition, prison sentences of indefinite duration were imposed on 1,256 juveniles.

For the recorded year 26,544 defendants or 7 percent of the total number, were acquitted. Besides, in 135 instances acquittal was granted along with measures of security and reform, in 475 cases such measures alone were imposed, and in 35 cases motions for measures of security and reform were rejected.

Proceedings were *quashed* by courts in 9,941 cases, representing 2.6 percent of the total of persons brought to trial.

212,410 or 62.2 percent of the total of convictions of German nationals (including foreigners) in 1942, represent crimes and offenses in violation of the Reich Penal Code and 129,130 or 37.8 percent represent crimes and offenses in violation of other laws of the Reich.

b. Personal Data on Convicted Persons

Of convicted German nationals (and foreigners) 116,754 or 34.2 percent in 1942, were *female* and 52,423 or 15.3 percent were *juveniles* (ranging in age from 14 to 18). The age group of 18 to 21, normally representing the heaviest criminal quota, participates in the total of convictions only with a number of 34,401 delinquents or 10.1 percent, due to the drafting of many of these age brackets. The number of persons already *previously convicted* for crimes and offenses against laws of the Reich amounts to a total of 77,322 or 22.6 percent of whom 18,478 or 23.9 percent had more than 4 previous convictions. 36,419 of the convicted persons or 10.7 percent were foreigners, of whom 3,064 or 8.4 percent represented juveniles.

c. Individual Criminal Acts

Chart 1 A* affords a view into the criminal structure of 1942. According to this, the various acts of theft form, as previously, the greater part of the total of convictions (91,476 or 43.1 percent;

* Not reproduced herein.

all of whom are persons convicted for crimes and offenses in violation of the Reich Penal Code). If one disposes of insult as a petty and civil offense (13,516 or 6.4 percent), there follows—though at a greater interval—the other two significant offenses against property, i.e., fraud (11,567 or 5.4 percent) and receiving stolen goods (12,115 or 5.7 percent). The fifth place is accorded to sexual offenses (10,205 or 4.8 percent) among which the indecent assaults on persons under 14 as well as sodomy and bestiality (32.7 percent and 26.2 percent resp.) represent comparatively the greater share of all sexual crimes and offenses. Then follow again two offenses against property, i.e., embezzlement (9,328 or 4.4 percent) and forgery of documents (8,628 or 4.1 percent).

In major crimes, murder participates with 117 convictions; manslaughter with 101, and robbery together with extortion equivalent to robbery with 147 delinquents.

If one arranges the above discussed, numerically significant criminal acts in accordance with convicted *adults* and *juveniles* the following results: Of the total number of adult and juvenile persons convicted for crimes and offenses in violation of the Reich Penal Code, the percentage is as follows:

	Adults	Juveniles
Petty larceny	33.8	49.3
Aggravated larceny	3.8	17.5
Embezzlement	4.8	2.7
Receiving stolen goods	6.4	2.5
Fraud	6.0	2.8
Forgery of Public Documents	4.1	3.8
Sexual crimes and offenses	4.7	5.1

In petty and aggravated larceny together, the number of crimes represent approximately two-thirds for juveniles and slightly less than four-tenths for adults.

Due to enactment of laws pursuant to war exigencies, the following other crimes and offenses deserve mentioning: They are arranged in order of the number of their convictions.

	Persons convicted with legally binding effect
Penal ordinances relating to the rationing of consumer goods of 5 April 1940	18,565
Decree amending the penal code for the protection of the military power of the German nation of 25 November 1939	9,263
Amongst them: prohibited contact with prisoners of war (article 4)	9,103
War Economy Decree of 4 September 1939	8,097
Decree against people's parasites of 5 September 1939	5,029
Decree, subject: special measures concerning foreign broadcasts of 1 September 1939	985
Decree relating to crimes of violence of 5 December 1939	194

d. Sentences pronounced

Chart No. 2* gives the particulars about the *sentences pronounced.*

According to it, in 1942, 1,061 *death sentences* were pronounced, among them 18 against juveniles. 15,830 defendants were sentenced to terms in *penitentiary for definite periods of time,* of them 6,543 or 41.3 percent to a period of 3 years and more, 56 terms in penitentiary for a definite period of time were pronounced against juveniles.

Of the total number of *terms of imprisonment* amounting to 143,685—in the year reported on short-term sentences formed 41.5 percent of them, these of medium length 47.3 percent, long-term imprisonments 10.3 percent, and these of undefined length 0.9 percent.

Fines were imposed in 141,464 cases. Detention was pronounced in 378 cases.

In 1942 juvenile arrest was pronounced against 37,717 juveniles, i.e., against 71.9 percent of the total number of juvenile delinquents, among them were 25,562 arrests or 67.8 percent for a definite period of time. The proportion of chronologically defined terms of imprisonment of more than 2 weeks to the total number of arrests is 51.5 percent. 12,155 or 32.2 percent of the juveniles were sentenced to weekend incarceration, and among them 23.6 percent to the loss of three and four of their weekly off-times.

Of the *protective and reformative measures* described in article 42a of the Reich Penal Code, the following have been decreed with legally binding effect in 1942:

Placing into a lunatic asylum	906
Placing into a reformatory institution for alcohol addicts	90
Placing into a workhouse	400
Protective custody	1,414
Sterilization of dangerous sexual offenders	152
Ban on the exercise of trade or profession	298

In greater detail in the period reported on protective and reformative measures were decreed e.g., in the case of convictions for indecent assault on persons under 14 years of age; 232 times or 7.0 percent of the persons convicted for the offenses in question; for repeated petty larceny, 334 times or 7.4 percent; for repeated aggravated larceny, 195 times or 25.1 percent; and for repeated fraud, 271 times or 20.2 percent.

3. Other Groups of Persons

The following gives detailed particulars concerning the number of Protectorate Nationals, Poles and Jews, as well as racial Jews brought to trial in Greater Germany (exclusive of the Alpine and Danube Gaue) in 1942.

* Reproduced at the end of this document.

	Protectorate Nationals	Poles and Jews	Racial Jews
Persons brought to trial	13,060	63,786	1,613
Juveniles brought to trial	482	5,169	44
Percentage of persons brought to trial	3.7	8.1	2.7
Convicted persons	12,117	61,836	1,508
Percentage of persons brought to trial	92.8	96.9	93.5
Acquitted	871	1,816	74
Percentage of persons brought to trial	6.7	2.8	4.6
Persons previously convicted	2,493	4,237	266
Percentage of total convicted	20.6	6.9	17.6
Persons with more than 4 previous convictions among these	766	593	43
Percentage of previously convicted	30.7	14.0	16.2

The figures given above concerning the *convictions* of Poles and Jews, refer exclusively to convictions according to the Penal Ordinance for Poles, that is to say, mainly to such crimes which have been committed in the Incorporated Eastern Territories. However, crimes are also included which have been committed in other districts of the German Reich by Jews and Poles, who on 1 September 1939 had their residence or permanent abode in the territory of the former Polish state (No. XIV of the Penal Ordinance for Poles).*

Contrary to expectations, the *quota* of Poles and Jews *previously convicted* is low; this can first of all be explained by the fact that some of the criminal records were destroyed in the eastern territories; furthermore that during the fighting in autumn 1939, the Poles opened the doors of the penitentiaries and released dangerous criminals who, in most cases, turned criminals again and were brought before the German summary courts; a great number of those retaken, against whom fresh violations of the law could not directly be proved, were sent to concentration camps as a preventive measure. In both instances, therefore, persons who had previous convictions were thus omitted from the census of criminal statistics. Taking these points into consideration, the quota of Poles and Jews previously convicted has still to be regarded as comparatively high.

Particulars concerning the most important *punishable* actions, committed by the above mentioned groups of persons which have led to a conviction, can be obtained from chart I B.

With regard to the penalties imposed upon them by the courts a total of 1,138 Protectorate Nationals, Poles, and Jews, as well as Jews by race were sentenced to death during the current year according to chart 2. These figures include 930 Poles and Jews sentenced under the crimes ordinance for Poles. The total number

* It will be noted that the statistics do not include persons *outside* the Greater German Reich, for example, in the Government General.

of penal servitude sentences, imposed for limited periods of time, against Protectorate Nationals and Jews by race amounts to 2,237 and the jail sentences amount to 7,321. By virtue of the criminal ordinance for Poles the sentence of penal camp for hard labor was imposed in 2,017 cases and that of regular penal camp in 43,180 cases.

The total *fines* imposed, amount to 20,694.

85 defendants had their *property confiscated.*

* * * * * * *

Chart 2

Punishments meted out in the year 1942 on account of crimes and offenses against Reich laws

Sentences	Punishments[1] meted out to—				
	German Nationals (and Foreigners) Total of this total to juveniles		Inhabitants of the Protectorate	Poles[2] and Jews	Racial Jews
Death sentences	1,061	18	186	930	22
Penal servitude sentences:					
For life					
For a certain length of time, in toto	15,850	56	2,112		125
For less than 3 years	9,307	18	1,294		56
For 3 years and more	6,543	38	818		69
Total of jail sentences	143,885	9,695	6,875		646
Of them—					
For less than 3 months	59,736	2,520	2,595		348
For 3 months up to 1 year	88,012	5,315	3,020		218
For one year and more	14,881	504	1,051		80
For an undetermined length of time	1,256	1,256	9		
Severe penal camp total of sentences imposed				2,017	
Of them—					
For less than 5 years				1,257	
For 5 years or more				760	
Ordinary penal camp total of sentences imposed				43,180	
Of them—					
For less than 1 year				32,540	
For 1 year or more				10,640	
Confiscation of property			4	78	3
Fines	141,464	2,021	3,037	16,939	718
Confinement in a fortress					
Arrest	378	31	54		4
Arrest of juveniles in toto	37,717	37,717	134		
namely; for a certain period in toto	25,562	25,562			
of this, for more than 2 weeks	13,165	13,165			
Total of weekend imprisonments	12,155	12,155			
Of this, [those with] 3 and 4 pass privileges	2,866	2,866			

[1] Including dual punishment. Compare also annotation 1 of chart 1.

[Chart 1 is not reproduced herein.]

[2] Sentenced by virtue of the Penal Ordinance for Poles, dated 12 April 1941.

PARTIAL TRANSLATION OF DOCUMENT NG–715
PROSECUTION EXHIBIT 112

THIRTEENTH REGULATION UNDER THE REICH CITIZENSHIP LAW, 1 JULY 1943[1]

1943 REICHSGESETZBLATT, PART I, PAGE 372

Under article 3 of the Reich Citizenship Law of 15 September 1935 (Reichsgesetzblatt I, p. 1146), the following is ordered:

Article 1

1. Criminal acts committed by Jews shall be punished by the police.

2. The decree concerning penal law for Poles [Polenstrafrechtsverordnung] of 4 December 1941[2] (Reichsgesetzblatt I, p. 759) shall no longer apply to Jews.

Article 2

1. The property of a Jew shall be confiscated by the Reich after his death.

2. The Reich may, however, grant compensation to the non-Jewish legal heirs and persons entitled to sustenance who have their domicile in Germany.

3. This compensation may be granted in the form of a lump sum, not to exceed the ceiling price of the property which has passed into possession of the German Reich.

4. Compensation may be granted by the transfer of titles and assets from the confiscated property. No costs shall be imposed for the legal processes necessary for such transfer.

Article 3

The Reich Minister of the Interior with the concurrence of the participating supreme authorities of the Reich shall issue the legal and administrative provisions for the administration and enforcement of this regulation. In doing so he shall determine to what extent the provisions shall apply to Jewish nationals of foreign countries.

Article 4

This regulation shall take effect on the seventh day of its promulgation. In the Protectorate Bohemia and Moravia it shall

[1] Selections from the correspondence of various Reich authorities concerning the drafting of this law are reproduced immediately below in Document NG–151, Prosecution Exhibit 204.

[2] Reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 632.

apply where German administration and German courts have jurisdiction; article 2 shall also apply to Jews who are citizens of the Protectorate.

Berlin, 1 July 1943

The Reich Minister of the Interior
FRICK

Chief of the Party Chancellery
M. BORMANN

Reich Minister of Finance
COUNT SCHWERIN VON KROSIGK

Reich Minister of Justice
DR. THIERACK

PARTIAL TRANSLATION OF DOCUMENT NG–151 PROSECUTION EXHIBIT 204

SELECTIONS FROM CORRESPONDENCE PRECEDING ISSUANCE OF THIRTEENTH REGULATION UNDER REICH CITIZENSHIP LAW, 3 AUGUST 1942–21 APRIL 1943, INVOLVING LIMITATIONS UPON LEGAL RIGHTS OF JEWS, THEIR PUNISHMENT BY POLICE, AND RELATED MATTERS*

1. Letter from the Reich Ministry of Justice to several leading Reich authorities, 3 August 1942

Direct Reich Chancery 10939 B
Reich Minister of Justice
III a–2 1637 42 1506/5

Carbon Copy

Berlin W 8, 3 August 1942

Urgent Letter

To the

a. Reich Minister of the Interior

b. Reich Leader SS and Chief of the German Police

c. Reich Minister for People's Enlightenment and Propaganda

d. Foreign Office

e. Chief of the Party Chancellery, Munich

f. Reich Protector for Bohemia and Moravia

* The thirteenth regulation under the Reich Citizenship Law, dated 1 July 1943 (NG–715, Pros. Ex. 112), is reproduced immediately above.

Subject: Restriction of legal rights [Rechtsmittel]* for Jews in criminal cases

1 Enclosure

Enclosed I submit the draft for an ordinance concerning the restriction of legal rights for Jews in criminal cases with the request to state your opinion in regard to it.

I have emphasized the importance in war of this ordinance, because it indirectly serves national defense. The dissatisfaction which is apparent in wide circles of the German population with regard to the fact that legal rights in criminal cases are still afforded to Jews and that they are still given the right to appeal to the courts in cases of sentences inflicted by the police is liable to weaken the determination of the German people to defend itself in this contest which has been imposed on it.

As Deputy:
[typed] signed: DR. FREISLER

---

2. Draft enclosed with the letter of the Reich Ministry of Justice of 3 August 1942

Copy

[Handwritten] 1508/05

Ordinance concerning the restriction of legal rights for Jews in criminal cases

Of.....1942

The Ministerial Council for the defense of the Reich decrees with force of law:

Article 1

Jews are not entitled to make use of the right of appeal, revision (appeal for nullification pursuant to the former Austrian law which has remained in force), and complaint against decisions in criminal cases.

Jews cannot appeal to courts for a decision against sentences inflicted by the police.

In cases where an appeal for legal rights has been filed already or a decision by a court proposed at the time this ordinance is being enforced, those are considered as cancelled.

* The German word "Rechtsmittel" is a technical term, meaning "writs" (such as writ of appeal, writ of certiorari, writ asking for a revision) which aims at changing a decision of a court, be it a judgment or an interlocutory ruling. In the present case, the term "Rechtsmittel" was usually translated, "legal rights" or "legal remedies."

Berlin,.....1942

The President of the Ministerial Council for the Defense of the Reich,

[Handwritten] GFM [General-Feldmarshall]
Reich Minister and Chief of the Reich Chancellery

To IIIa–2 1637.42 344528

---

3. Letter from the Reich Ministry of the Interior to the Reich Ministry of Justice, 13 August 1942

Reich Chancery 11452B 15 August 1942 [Initial] Fi [Ficker]
Reich Minister of the Interior

Berlin, 13 August 1942
NW 7, Unter den Linden 72
Telephone: 12 00 34
12 00 37

Ib 1200/42 1508/06
7035

Use this reference in your reply. Reference 15/8

Urgent Letter

S.Ang. of 21/8

To the Reich Minister of Justice

Subject: Restriction of legal rights for Jews

Referring to your letter of 3 August 1942 RK. 11405 B im Gg. 1b –III–2 1637.42

The same considerations which have prompted your suggestion to deny legal rights to Jews in criminal cases also apply to administrative matters. I would like to ask you, therefore, to extend the draft of an ordinance concerning the restriction of legal rights for Jews in criminal cases at the same time also to administrative matters, giving it about the following tenor:

Ordinance concerning the restriction of legal rights for Jews
Of.....1942.

The Ministerial Council for the Defense of the Reich decrees with force of law:

Article 1

Jews are not entitled to make use of the right of appeal in criminal or administrative cases.

They cannot appeal, as is otherwise admissible, to the courts for a decision against a decision taken.

Nor can they enter a protest which otherwise might be admissible.

Article 2

In cases where an appeal for legal rights or a protest has been filed already they are considered as canceled.

Article 3

This ordinance is enforced 7 days after its announcement. It is valid also in the Protectorate of Bohemia and Moravia and the Incorporated Eastern Territories.

Berlin,.....1942

The President
of the Ministerial Council for the
Defense of the Reich

Delegate General for the Reich Administration

Reich Minister and Chief of the Reich Chancellery

Copies to the supreme Reich authorities, except the Reich Minister of Justice with the request to state their opinion by 21 August 1942, in case of difference of opinion. Otherwise agreement will be assumed.

As deputy:
[signed] DR. STUCKART

---

4. Letter from the Reich Ministry of Justice, signed by the defendant Schlegelberger, to the Reich Ministry for People's Enlightenment and Propaganda, 13 August 1942

The Acting Reich Minister of Justice — Copy

III a 2 1706.42 — Berlin, 13 August 1942
[Handwritten] 1508/06

Urgent Letter

To the Reich Minister for People's Enlightenment and Propaganda

Berlin

Subject: Restriction of legal rights for Jews

Referring to urgent letter of 12 August 1942* R 1400/23.7.42/ 122/1.9.

I. I thought of meeting at first the most urgent need within the compass of my sphere of activity, viz, that of adjusting the administration of justice from a legal point of view, and moreover I had prepared a corresponding draft for the other administration of justice belonging to my sphere of activity. However, I did not want to take the initiative to make suggestions concerning matters which are beyond the sphere of my department.

The draft enclosed in your urgent letter includes all supreme authorities of the Reich, especially that of the Reich Minister and all ministers whose sphere of work is connected with matters of administrative law. While, as far as the sphere of activity of these ministers is concerned I still adhere to the opinion that I should refrain from making suggestions on my part, I declare that I have no objections against an extension of my draft to matters of administrative law and to decisions by administrative authorities.

II. 34529 114058

II. On the assumption that an extensive regulation of the situation of the Jews with regard to legal and administrative decisions is desired, it seems necessary to me that the question of the admissibility for a Jew to *testify on oath* be legally regulated too, and this regulation had best be included in the same decree.

Therefore, I furthermore suggest that the decree should provide that the Jew is not admissible to testify on oath. Thereby the taking of an oath or the furnishing of an affidavit by Jews is in general impossible.

In my opinion, however, the fact that the Jew is not permitted to take an oath should not make the Jew have a better legal position than the person who is authorized to take an oath. Therefore, I further suggest to include a regulation according to which the testimony of a Jew which could have been made under oath—if it had been given by a person who is permitted to take an oath—should be treated like testimony given under oath as far as criminal cases are concerned. My idea in this connection is that the chiefs of the supreme authorities of the Reich should order administratively that it should be pointed out to the Jew that he could be legally prosecuted if he commits an offense against his duty to give true testimony, but I do not propose to make this a prerequisite of being liable to punishment.

In my opinion, comprehensive settlement of the problem requires furthermore the exclusion, for reasons of foreign policy,

* The letter of 12 August 1942, with enclosed draft, of the Goebbels ministry, was not a part of the document introduced in evidence.

of all Jews from the regulations of this decree who are citizens of a foreign nation.

Therefore, under the assumption that the persons participating in the comprehensive solution of the problem and those supreme authorities of the Reich which are in charge of specialized sectors agree, I would suggest to give the *following wording* to the decree:

Decree concerning the restriction of legal rights for Jews and their inadmissibility to take an oath.

dated.....1942

The Ministerial Council for the Defense of the Reich orders the following to be enforced as a law:

Article 1

Jews are not entitled to lodge a plea for appeal, revision, and complaint (nullity plea and appeal under the still valid parts of Austrian law) against the decisions of the courts.

Jews cannot apply for a judicial decision against penal measures inflicted by the police.

Article 2

Jews cannot make use of the legal rights provided against decisions made by the administrative authorities.

Article 3

Insofar as legal right has already been exercised or an application for legal decision has been requested when this law comes into effect, they are considered to be withdrawn.

Article 4

Jews are not entitled to take an oath.

Article 5

The regulation concerning perjury and false oath applies to untrue statements of Jews not made under oath, if a person entitled to take an oath could have been sworn to this statement. In the same manner the regulations concerning the making of a false declaration in lieu of oath are to be applied to the untrue declaration of a Jew, if the declaration was the substitute for a declaration in lieu of oath or a statement with reference to such a declaration.

Article 6

The regulations do not apply to Jews who are citizens of a foreign nation.

Article 7

The supreme authorities of the Reich are authorized to issue regulations for the execution within their jurisdiction.

[Typed] signed: DR. SCHLEGELBERGER

344531

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5. Letter from Reich Leader SS to Lammers, 25 August 1942

13/9 RK. 12020 B 27 August 1942 [Initial] FI [Ficker]

The Reich Leader SS
and
Chief of the German Police
in the Reich Ministry of the Interior

20/9
S IV B 4 b—Ref. No. 1268/42
Please quote above reference and date in reply.
[Handwritten] Submitted last to RM 11853 tz 1b

Berlin SW 11, 25 August 1942
Prinz-Albrecht-Strasse 8
Tel. 12 00 40
1508/7

Urgent Letter

To the Reich Minister and Chief of the Reich Chancellery

Berlin [Initial] L [Lammers] 30 August

Subject: Limitation of legal rights for Jews

Reference: Urgent letter of the Reich Minister for Popular Enlightenment and Propaganda sent to you on 21 August 1942—R 1400/13 August 1942, 122—1,9.

Considering the fact that up to now, the competent authorities disagree and that moreover a number of further questions must be regarded as not clarified, I consider the suggestions which have been made up to now as not yet arrived at a stage when they could be submitted to the Ministerial Council for the Defense of the Reich, and for this reason I have asked the Reich Minister of Justice to arrange for a discussion for the clarification of these essential questions.

BY ORDER:

[Typed] Signed: SUHR

Certified:

[Illegible signature]
Employee of the Chancery

Resubmitted because of RM 11850 (marked red), Office 13/19

[Stamp]

The Reich Leader SS and Chief of the German Police

[Initial] F [Frick] Sept. 12

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6. Letter from Martin Bormann to the Reich Ministry of Justice, 9 September 1942

National Socialist German Labor Party

Party Chancellery

The Chief of the Party Chancellery

Fuehrer Headquarters
9 September 1942.
III C–Do. 2425/0/1

Copy

To the Minister of Justice
Berlin W 8
Wilhelmstr. 65

Subject: Limitation of legal appeal for Jews. RM 11405 B

Reference: Your letter of 13 August 1942—III a *2* 1706.42—.

The limitation for legal appeal for Jews proposed by you extends in the sphere of court decisions only to the legal appeal in a limited sense—that is to say to appeal, revision, and complaint. This regulation does not represent a comprehensive solution of the problem, since the Jews will still be given the possibility of making use of legal aids [Rechtsbehelfen] in a wider sense.

The considerations which are decisive for your draft also apply to almost all cases of "legal aids." In criminal cases this applies above all to objections against penal rulings and to pleas for resumption of proceedings. In the sphere of civil law it would apply, e.g., to reminders of cost and execution matters, objections to execution orders and judgments by default, as well as to nullity and restitutions suits.

Also, a limitation of the admissibility of suits protesting against executions and suits filed by a third party will have to be taken into consideration, as in these cases, too, the result will be a legal

907802—51——46

aid against a judicial decision. I think it necessary to include all those cases too into the regulation.

I further request you to include into the draft a regulation declaring inadmissible the declining of a judge by a Jew.

I have no objections against the provisions of the draft relative to the disqualification of Jews to take an oath.

Heil Hitler!

[Typed] Signed: M. BORMANN

Certified copy:

[Signed] DOSER

---

7. Letter from the General Plenipotentiary for the Administration of the Reich to a number of leading Reich authorities, 29 September 1942

Copy

RK. 136 2 B 29 Sept. 1942 [Initial] FI [Ficker]
The General Plenipotentiary
for the Administration of the Reich
GBV. 788/42
2425 [Handwritten] Last submitted RK 12853 B

Berlin, 29 September 1942
[Stamp] See document of 8.10.

Urgent Letter

To the:

Head of the Party Chancellery
The Reich Minister of Justice
The Reich Minister for People's Enlightenment and Propaganda
The Foreign Office
The Reich Minister of Finance

[Handwritten] Submitted with RK 442 B. attached October 2

Subject: Ordinance concerning legal restrictions to be imposed on Jews

On the basis of a discussion of 25 September 1942 between the officials in charge, a new draft of an ordinance concerning the restrictions imposed on Jews in the proceedings before the administrative agencies or courts has been drawn up under the title, "Ordinance concerning Legal Restrictions to be Imposed on Jews." Please let me know as soon as possible your opinion about the enclosed new formulation.

If no reply has been received by 14 October, your consent will be taken for granted.

This copy is forwarded for your information and with the request that you take a decision by 14 October.

As deputy:
[Signed] STUCKART

Justice 1
To the other supreme Reich authorities

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8. Draft of proposed decree enclosed with the letter of the General Plenipotentiary for Reich Administration of 25 September 1942

Appendix to GBV 788/42—2425 25 September 1942

Draft of an Ordinance concerning Legal Restrictions to be imposed on Jews of.....1942.

The Council of the Ministers for Reich Defense ordains with the force of law:

Article 1

(1) Jews will have no right of appeal [Rechtsmittel] from the decisions of administrative agencies and courts, nor other legal means [Rechtsbehelfe] to attack the same. Should, at the time when the present ordinance takes effect, an appeal already be lodged, it will be treated as withdrawn.

(2) Other applications from Jews to the administrative agencies or courts are admissible only insofar as the administrative agency or court would be of the opinion that the consideration of the application would be in the common interest.

Article 2

Jews cannot testify under oath.

Article 3

(1) The regulations concerning perjury apply to the untrue, unsworn testimony of a Jew when, the testimony could have been sworn to if it had been made by a person capable of taking an oath.

(2) Similarly, the provisions concerning false assurances in lieu of affidavits apply to a statement made by a Jew, if such a statement was intended to replace an assurance in lieu of affidavit, or a deposition made with reference to such an assurance.

(3) The Jew shall be warned that any such untrue deposition or false statement will be punished according to those provisions.

Article 4

Statements of a Jewish party to the proceedings with respect to the question whether a witness or expert should be put on oath, will be disregarded.

Article 5

In the sentencing of Jews the provisions concerning the deprivation of civil rights will not apply.

Article 6

Jews cannot challenge German judges on grounds of partiality.

Article 7

At the death of a Jew his fortune escheats to the Reich.

Article 8

The Reich Minister of the Interior in agreement with the supreme Reich authorities in interest will issue the necessary legal and administrative provisions for the implementation and amendment of the present ordinance. He will hereby determine how far this ordinance is to apply to Jews of foreign nationality.

Article 9

This ordinance will take effect on the seventh day after its promulgation. It also will apply in the Incorporated Eastern Territories. In the Protectorate of Bohemia and Moravia it will apply within the limits of the German administration and the German jurisdiction.

Berlin

The President of the Council of Ministers for Reich Defense

The Plenipotentiary General for Reich Administration

The Reich Minister and Chief of the Reich Chancellery

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9. Letter from the General Plenipotentiary for Reich Administration to the Reich Chancellery, 3 April 1943

The General Plenipotentiary for Reich Administration
GBV 262/43 1508/10
2425

[Handwritten notes] RK 4482 E
RK 13672B 52 M
2 Enclosures

Berlin, 3 April 1943

To the Reich Minister and Chief of the Reich Chancellery
for Under Secretary Kritzinger

Subject: Ordinance concerning legal restrictions to be imposed on Jews

With reference to today's conference between Under Secretary Kritzinger and Under Secretary Dr. Stuckart, I am forwarding herewith in duplicate—

(1) the draft of the ordinance concerning the legal restrictions to be imposed on the Jews.

(2) the copy of the letter of the Chief of the Security Police and SD of 8 March 1943 (II A 2 No. 22 III/43 176—).*

BY ORDER:

[Signature illegible]

Justice 1 344545

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10. Letter from Kaltenbrunner, Chief of the Security Police and the SD, to Frick, 8 March 1943

The Chief of the Security Police and the SD Copy
II A 2 No. 22 III/43–176

Berlin SW, 11, 8 March 1943
Prinz Albrecht-Strasse 8

Urgent letter

To the Reich Minister of the Interior,
Party member Dr. Frick
Berlin NW 7
Unter den Linden 72

My dear Reich Minister:

Upon request I have been informed by Department I that you have stopped the passing of the ordinance concerning the legal restrictions to be imposed on Jews, as in view of the development of the Jewish question, you no longer consider this ordinance

* This letter is reproduced immediately below.

necessary.* May I therefore point out the following views taken by the Security Police, which are in favor of an immediate passing of the ordinance:

1. Previous evacuations of Jews have been restricted to Jews who were not married to non-Jews. In consequence, the numbers of Jews who have remained in the interior is quite considerable. As the ordinance would also include these Jews as well, the measures it plans are not objectless.

2. The provision of article 7 of the ordinance according to which at the death of a Jew his fortune escheats in its entirety to the Reich results in the accumulation of considerably less work for the State Police. At the present time the procedure used by the State Police in handling the confiscation of such Jewish inheritances must frequently be modified to suit each special case. If the decree were decided on these separate procedures would no longer need to be carried out. The ordinance would therefore bring about an effective reduction in present administrative activity.

3. The provision according to which the application of criminal law against Jews is transferred from the judicial authorities to the police, is based on an agreement between the Reich Leader SS and the Reich Minister of Justice Dr. Thierack. This agreement has been approved by the Fuehrer. For if it is to be put into practice it must be embodied in the form of a law, as the present competence of justice, which is based on criminal procedure, can only be modified by a legal provision.

If the ordinance which is planned does not come into force, this provision as it is planned must then be set down in an independent law which, however, is undesirable.

I beg you to consider the above-mentioned views and to examine whether in spite of them an immediate passing of the ordinance does not seem indicated.

Heil Hitler!

Yours obediently,

[Typed] signed: DR. KALTENBRUNNER

344547

* By this time, measures for the "final solution" of the Jewish question were well under way. See, for example, the following contemporaneous documents reproduced earlier in this volume: 654–PS, Prosecution Exhibit 39 (sec. V C 3 a); 648–PS, Prosecution Exhibit 264 (sec. V B); and NG–558, Prosecution Exhibit 143, reproduced previously in this section. See also the materials contained in the volumes on the Pohl Case, United States *vs.* Oswald Pohl, et al., Volume V, this series, and the Ministries Case, United States *vs.* Ernst von Weizsaecker, et al., Volumes XII–XIV, this series.

11. Note of the Reich Chancellery, 6 April 1943, 1508/11

(14./4.) *To RK. 13672 B,* 4482 E

[Handwritten] 1508/11

Fuehrer Headquarters
6 April 1943

1. *Note*—Under Secretary Stuckart asked me over the telephone to obtain the opinion of the Reich Minister and Chief of the Reich Chancellery as to the draft of the ordinance which had been sent him with the accompanying letter of 3 April. As Under Secretary Stuckart informed me, the Reich Minister of the Interior himself has his doubts as to whether the ordinance is still necessary. When Stuckart approached the Party Chancellery on the question, Reichsleiter Bormann suggested that he should obtain the opinion of the Reich Minister and Chief of the Reich Chancellery.

On 5 April I discussed the affair with Under Secretary Klopfer. The latter is of the same opinion as myself, that with the exception perhaps of articles 6 and 7 of the draft, the ordinance can be dispensed with. As regards article 7 of the draft, Under Secretary Klopfer took my point of view that the possibility must be considered of directing the heritage of deceased Jews either in part or in its totality to their non-Jewish relatives.

The Reich Minister, to whom I reported on 6 April, is of the opinion that we should decline as far as possible from a settlement of the matter by an ordinance.

In order to help on the affair I came to an agreement with Under Secretary Klopfer and suggested to Under Secretary Stuckart that the question of the further consideration of the draft should be raised at a discussion in which, in addition to myself and him, Under Secretary Klopfer and Under Secretary Rothenberger and the Chief of the Security Police Kaltenbrunner should take part. Under Secretary Stuckart agreed to this and suggested that the conference should take place on Wednesday, 14 April, 11 o'clock.

2. RKabR. Dr. Ficker with the request for his consideration.

3. Resubmit 14 April (in Berlin).

[Initial] F [Ficker]
8 April

344549

[Initial] Kr [Kritzinger]

---

12. Note of the Reich Chancellery, 21 April 1943

Reich Chancellery 4611 E
for files Rk. 4748 E

[Handwritten] 1508/12
Berlin, 21 April 1943

1. *Note*—The Under Secretary conference, suggested by us, about the draft on a *decree concerning the limitation of the legal right of Jews,* which was at that time completed in the Reich Ministry of the Interior took place today at the office of Under Secretary Stuckart. Under Secretary Rothenberger, Under Secretary Klopfer, SS Gruppenfuehrer Kaltenbrunner, and I were present as well as Under Secretary Stuckart.

The discussion showed that only articles 6 and 7 of the provisions of the draft of the order are considered necessary in which connection article 7 is to be supplemented by a regulation which makes possible, in the case of a confiscation of property, a settlement in favor of non-Jewish heirs and legal dependents.

It was furthermore considered suitable to have the regulation issued as a supplementary ordinance to the Reich citizens' law.

The regulation accordingly would approximately take the form as shown in appendix II.

[Enclosure] Appendix II.

2. To the Reich Minister with request for consideration.

[Initial] L [Lammers] 28 April

3. RK ab R. Dr. Ficker, respectfully.

[Initial] KR [Kritzinger]

Justice 1

s.Rk 5761
344550

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13. Draft of a decree concerning the Reich Citizenship Law, enclosed with the note of the Reich Chancellery of 21 April 1943

[Handwritten] Supplement to the Reich Citizenship Law and Appendix II

Decree Concerning the Limitation of the Legal Rights of the Jews

[Handwritten] 1508/13 dated.....1943

(*Abbreviated Form*)

Article 1

1. Punishable offenses of Jews will be punished by the police.

2. The decree concerning the administration of penal justice against Poles and Jews of 4 December 1941 (Reich Legal Gazette I, p. 759) no longer applies to Jews.

Article 2

On the death of a Jew, his property is forfeited to the Reich.

[Handwritten] Hardship clause in favor of non-Jewish heirs and legal dependents.

Article 4

The Reich Minister of the Interior, in agreement with the top Reich authorities concerned, issues the legal and administrative regulations which are necessary for the execution and supplementing of this ordinance. In this case he determines how far this order applies to Jews of foreign nationality.

Article 5

This ordinance will come into force on the seventh day after its promulgation. It will also apply to the Incorporated Eastern Territories. In the Protectorate of Bohemia and Moravia it will apply to the sphere of German administration and German jurisdiction.

Article 2 also applies to Jews who are subjects of the Protectorate.

Berlin,.....1943 344551

The President of the Ministerial Council
for the Defense of the Reich

The Plenipotentiary General for the
Reich Administration

The Reich Minister and Chief of
the Reich Chancellery

TRANSLATION OF DOCUMENT NG-1656
PROSECUTION EXHIBIT 535

DRAFT OF PROPOSED MEMORANDUM TO HITLER FROM MINISTRY OF JUSTICE, APRIL 1943, INITIALED BY DEFENDANT ROTHENBERGER AND MINISTERIAL DIRECTOR VOLLMER, CONCERNING IMMINENT PROSECUTION OF A JEWESS FOR SELLING HER MOTHER MILK TO A GERMAN PEDIATRICIAN

The Reich Minister of Justice

Information for the Fuehrer
(1943 No.)

After the birth of her child, a full-blooded Jewess sold her mother milk [Muttermilch] to a pediatrician and concealed that she was a Jewess. With this milk babies of German blood were fed in a nursing home for children. The accused will be charged with deception [Betrug]. The buyers of the milk have suffered damage, for mother's milk from a Jewess cannot be regarded as food for German children. The impudent behavior of the accused is an insult as well. Relevant charges, however, have not been applied for, so that the parents, who are unaware of the true facts, need not subsequently be worried.

I shall discuss with the Reich health leader the racial hygienic aspect of the case.

Berlin,.....April 1943

(Referent: Ministerialrat Dr. Malzan)
To the Under Secretary

[Initial] R [Rothenberger]

[Initial] V [Vollmer] 19 April

TRANSLATION OF DOCUMENT NG-351
PROSECUTION EXHIBIT 132

SECRET JUDGMENT OF FIRST SENATE OF PEOPLE'S COURT CONCERNING TWO POLES, 21 MAY 1943, AND DIRECTIVE OF MINISTRY OF JUSTICE TO DEFENDANT LAUTZ CONCERNING THE MANNER OF CARRYING OUT THE EXECUTION OF ONE OF THE DEFENDANTS

9 J 190/420
1 H 110/43

Copy

SECRET!

In the Name of the German People

In the case against—

1. the porter Paul Stefanowicz, from Berlin, born 5 January 1922 in Olyka (District of Rovno),

2. the laborer Franz Lenczewski, from Berlin, born 1 August 1924 in Sandec (Government General), Poland,
at present in custody pending trial for treasonable intent, et cetera, the People's Court, First Senate, on the basis of the session of 21 May 1943, in which the following participated as judges:

People's Court Senior Judge Laemmle, President
District Court President Dr. Schlemann,

SA Gruppenfuehrer Haas,
SA Brigadefuehrer Hohm,
SA Gruppenfuehrer Koeglmaier,
as representative of the Chief Reich Prosecutor [the defendant Lautz]:

Local Court Judge Dr. Pilz,
found:

As Poles, the defendants harmed the interests of the Reich by leaving their places of work in Berlin in August 1942 and going to the Reich border, with the intention of remaining in Switzerland until the end of the war.

The defendant *Stefanowicz* is therefore condemned to death.

The defendant *Lenczewski,* since he acted under the influence of Stefanowicz, who is mentally greatly superior to him, will receive a sentence of 8 years in a penal camp, and the period of custody for investigation will be included in this term.

Findings

Both defendants are ethnic Poles, were formerly Polish citizens, and on 1 September 1939 resided in the former Republic of Poland.

Both defendants reported for work and were assigned to work in Berlin; Lenczewski in April 1941 in a chocolate factory, Stefanowicz in January 1942 at the Neukoelln hospital.

Of the two defendants, Stefanowicz makes a much more intelligent and bold impression. He belongs to the Polish intelligentsia, which is the stronghold of the Polish spirit of resistance. Consequently in March 1942 shortly after he began his work, he left his place of work and attempted to flee to Denmark. He was arrested in Flensburg, however, and after 2 months in a labor reformatory camp he was returned to his place of work in Berlin. There he was noted for his anti-German attitude. According to his own statement, the nurses threatened that his attitude would bring him into the concentration camp one of these days. It was Stefanowicz who persuaded the codefendant Lenczewski, who is nearly 2 years younger and was at the time the deed was committed barely 18 years old, to leave his place of work and escape with him to Switzerland in order to live a more comfortable life there. They agreed to escape on 2 August 1942.

On that day they left Berlin and went via Augsburg and Innsbruck to Landeck/Tyrol. From there they went on foot toward the Swiss border, with the intention of crossing the border secretly. In the mountains, however, they suffered from bad weather, and on 6 August 1942 they were arrested by a customs patrol in See (Tyrol), very close to the Reich border.

The prosecution assumes that the defendants had the intention of joining the Polish Legion. Both defendants, however, have denied this from the beginning and maintain that they merely wanted to get better working conditions in Switzerland. The assumption of the prosecution is doubtless supported by the fact that members of the former Polish State who wanted to join the legion have frequently been arrested at the border under similar circumstances. On the other hand, no evidence has been presented that the defendants were in contact with such circles. As for their personality, neither of them gives an impression of a fighter but rather an effeminate one, and the fact that they merely wanted to go to Switzerland in order to live a better life there, could not be disproved.

Nevertheless, as Poles, both of them have harmed the interests of the German Reich by their conduct. For they were assigned to work in the Reich, and in total warfare any loss in this regard harms the interests of the Reich. They were aware of this fact, especially since they intended to remain in Switzerland permanently and thus to deprive the Reich of their work for the entire duration of the war (crime under art. 1, par. 3 of the Regulation on Administration of the Penal Law against Poles and Jews in the Incorporated Eastern Territories of 4 December 1941 (Reichsgesetzblatt 1, p. 759)).

The law provides the death penalty for this offense, as a rule. Only in less severe cases can a prison sentence be imposed. The case of the defendant Stefanowicz is not a less severe case. As already emphasized, he belongs to the Polish intelligentsia, which is the stronghold of the spirit of resistance. From the very beginning he failed to adapt himself to the order prevailing in the Reich and once before made an unsuccessful attempt to escape to Denmark. He is also responsible for the fate of his codefendant Lenczewski, to whom he is mentally far superior. He was therefore given the death sentence. On the other hand, in the case of the defendant Lenczewski, who did not make a very independent impression during the trial, who was very young at the time the deed was committed, and who succumbed to the influence of his mentally superior friend, a sentence of 8 years in a penal camp was considered sufficient. The period of custody for investigation was included in this term.

Under the law, the defendants have to bear the costs of the trial, since they have been convicted.

[Signed] LAEMMLE [Signed] DR. SCHLEMANN

25 May 1943

Carbon copy

The Reich Minister of Justice — Berlin, 7 August 1943
IV g 10a 4910 c/43 g

Urgent—Secret

The Chief Reich Prosecutor with the People's Court,
Berlin

personally or to his deputy in office

Reference GJ 190/42g 30 July 1943

Enclosures:

1 volume
1 folder
1 decree of 5 August 1943 (fair copy)
1 certified copy of the decree

Referring to the proceedings against Paul Stefanowicz who was sentenced to death on 21 May 1943 by the People's Court, I send you a fair copy and certified copy of the decree of 5 August 1943[1] with the request to take the necessary steps with the greatest possible speed. The executioner Reichhart is to be entrusted with the carrying out of the execution. As to the delivery of the body to an institute according to article 39 of the Reich Ordinance of 19 February 1939, the Anatomical Institute of Munich University is to be taken into consideration.

Please refrain from publicity, either through the press or through posters.

BY ORDER

[Typed] DR. VOLLMER[2]

PARTIAL TRANSLATION OF DOCUMENT NG–457 PROSECUTION EXHIBIT 201

OPINION AND SENTENCE OF THE NUERNBERG SPECIAL COURT, WITH DEFENDANT OESCHEY AS PRESIDING JUDGE, 29 OCTOBER 1943, BY WHICH TWO FOREIGN WORKERS WERE CONDEMNED TO DEATH[3]

Beg. f. H.V. Sg No. 256/1943

[1] The decree of 5 August 1943 was not with the copy of the document introduced in evidence.

[2] Dr. Vollmer was a Ministerialdirektor in the Reich Ministry of Justice and chief of division IV—penal jurisdiction and penal legislation.

[3] For an opinion and judgment of the Nuernberg Special Court, with defendant Rothaug presiding, see Document NG–154, Prosecution Exhibit 152, reproduced earlier in this section.

[Stamp]
The sentence is effective and must be executed.
Nuernberg, 3 November 1943
The Chief Registrar
of the Office of the District Court
Criminal Division

[Signed] RAMSENTHALER
Chief Court Clerk

Sentence

In the Name of the German People

The Special Court

for the area of the Nuernberg District Court of Appeal at the Nuernberg-Fuerth District Court in the criminal case against Kaminska, Sofie, farm laborer in Uffenheim and 1 other person charged with a crime under part I, section 4 No. 1 of the Penal Ordinance for Poles and Jews, at a public session on 29 October 1943 attended by—

Presiding judge—District Court President Oeschey;
Associate judges—Local Court Judge Dr. Pfaff and
District Court Judge Dr. Gros;
Public Prosecutor for the Special Court;
Public Prosecutor Markl, and as registrar of the office.

Court Clerk Kastner rules as follows:

Kaminska, Sofie; nee Uba, born on 1 September 1907 at Czenstocice, widow, Polish farm laborer,

Wdowen Wasyl, born on 20 February 1923 at Zatwanica, single, Ukrainian farm laborer,

both last residing in Uffenheim, both under arrest pending trial are guilty: Kaminska slapped a German soldier, threatened him with a hoe, and threw a stone after him; furthermore offered resistance to a policeman when she was being arrested. Wdowen tried by force to prevent Kaminska's arrest.

They are therefore sentenced to death; Kaminska under articles II, III, and XIV of the Penal Ordinance for Poles; Wdowen is sentenced as a public enemy.

Findings

The defendant Kaminska, who belongs to the Polish ethnic group and who on 1 September 1939 was residing in the territory of the former Polish State, attended elementary school and after having finished school worked as a laborer on several farms in Poland. She was married in 1929 and since then had three chil-

dren. Her husband was killed in action during the Polish campaign in October 1939. At the middle of December 1939 she came to Germany being committed to work there. She was first employed for over a year by a farmer in Weidenheim, then for a year by the farmer Landshuter at Unternzenn, and since 15 March 1942 she has been employed by the farmer Gundel at Uffenheim. Leo Gundel is 60 years old and fragile; his daughter manages the farm. At Weidenheim the defendant Kaminska met the codefendant Wdowen who belongs to the Ukrainian ethnic group. Wdowen never attended school, he can neither read nor write, nor had he learned a trade. Until he came to Germany in March 1940 for labor commitment he worked as a farm laborer for his parents and for other farmers in the territory of the former Polish state. In Germany he was first employed by a farmer in Weidenheim, and in March 1942 he was transferred to Gundel together with Kaminska. Wdowen started a love affair with the defendant Kaminska in Weidenheim. The child born in June 1942 is a result of that relationship. The defendant took the child to her mother in Wussiowa in March 1943.

On 1 July 1942 the two defendants entered Gundel's home and demanded money from the daughter, Marie, for the journey which the defendant Kaminska had made to Poland to take her child to her mother. When the daughter refused the request, they turned to old Gundel who was also present in the room. When he, too, refused to pay any money to Kaminska both defendants became more and more insistent; the defendant Wdowen even gave the farmer a push. In his distress, Gundel called for the help of the army private Anton Wanner, who used to work on the farm as a laborer and who happened to be spending his leave there. Wanner was in uniform. He came into the living room and told the defendants to leave immediately. The defendant Kaminska at once attacked the soldier, slapping his face once. Thereupon, Wanner slapped her face. Now a fight resulted during which his infantry assault badge fell to the ground. Wanner, feeling himself threatened, drew his bayonet and yelled at Wdowen, "Get out, you bully." The defendant Kaminska by this time ran out of the room and took a hoe which was leaning near the staircase. She did not get a chance of attacking him as the soldier quickly closed the door.

Shortly afterward Wanner was riding on his bicycle along the road to Uffenheim to go to the police station. When he was passing the two defendants who were walking in the same direction, the defendant Kaminska threw a stone weighing half a pound after the soldier without, however, hitting him.

The next day police sergeant Dirmann went to Gundel's farm, but the defendant Kaminska was working in the fields. There, the police official told her to follow him. The defendant Kaminska followed him unwillingly and hesitatingly. The codefendant Wdowen ran after the police official, although the latter had forbidden him to follow them. On the way Dirmann twice slapped Wdowen's face to force him to turn back. Despite this he followed the two to the prison cell. When Dirmann wanted to put Kaminska in the cell she began screaming. Wdowen rushed up to them and embraced Kaminska with both hands so that the police official was prevented from arresting Kaminska. Only after several other people who were called in by the police official came to his aid, he succeeded in overpowering the two defendants and putting Kaminska in the cell.

The defendant Kaminska states that she learned before 1 July 1942 at the employment office that the farmer Gundel had to pay her travel expenses both ways. On 1 July 1942, she made only these demands. Besides, she only slapped the soldier after he had slapped her face. She had not purposely torn off his infantry assault medal. It was true she had fetched the hoe but she had not raised it to assault the soldier but only to intimidate him.

The defendant further admits having picked up a stone on the way to Uffenheim and having thrown it after the soldier; she merely mentioned as an excuse that she had been so angry that she had picked up a stone and thrown it at Wanner.

Regarding her arrest by police sergeant Dirmann, the defendant says she had offered resistance because she had been afraid that the police official would throw her into a cellar; she had not known before what the official really wanted from her.

The defendant Wdowen denies having struck or attacked the old man Gundel and the soldier in the living room. He had only received a blow on the nose from Wanner when Wanner had said something to him and to Kaminska which he could not understand. He had not seized or held him.

Concerning the arrest of Kaminska, Wdowen states that he had "already thought" that Kaminska was to be arrested by the police official; he had also kept "running after them," although he had been forbidden to do so, and he did not let himself be intimidated by the slappings. Outside the cell he had intended to tear Kaminska away from the police official because he had felt sorry for her. The excuses which the defendants have put forward are irrelevant; for the rest, the afore-mentioned facts have been confirmed by the witnesses Gundel and Wurm. The soldier Wanner has been reported missing since the fighting in Tunisia. The witness, police sergeant Wurm testified, however, that Wanner had made definite

and clear statements. The court is therefore convinced that the defendant Kaminska hit the soldier first; she was not authorized to do so in any way. When the witness Miss Gundel had told her that she would first make inquiries at the employment office as to whether the demands for payment of travel expenses were justified, the defendant Kaminska should have been satisfied. If despite that she continued to insist on her imagined demand and together with Wdowen behaved insolently towards Miss Gundel and her father, it was absolutely understandable that old Gundel called the soldier Wanner for help. The defendant Kaminska should have complied immediately with Wanner's demand to leave the room. She cannot claim that she did not understand his demand. If instead of immediately leaving the farmer's living room, she slapped the soldier's face then this constituted a bodily maltreatment and thereby an assault and battery.

As the codefendant Wdowen, too, according to the credible statements which the soldier Wanner had made to the police sergeant Wurm, either gripped the soldier or at any rate took sides with Kaminska, so that Wanner had to fear a joint attack, it was understandable that he drew his bayonet in his defense. If the defendant Kaminska had to run out of the house to get a hoe and with it had walked towards the front door where the soldier was standing, Wanner had to fear the possibility of an attack on his life, although it was not established at the trial whether the defendant had already lifted the hoe to hit him. This behavior must be regarded as a threat within the meaning of article 241 of the Criminal (Penal) Code.

The defendant admits that after the incident in Gundel's room, "some time later" on the way to Uffenheim she, in her anger, picked up a stone weighing a half pound and threw it after the soldier Wanner who was sitting on a bicycle, however, without hitting him.

The facts thus established prove that the defendant has committed a crime within the meaning of article 1, paragraph 1 of the Law against Violent Criminals of 5 December 1939. For this the death sentence is imposed on a person who, among other things, when committing a serious act of violence uses cutting or thrusting weapons or with such a weapon threatens the body or life of another person.

An act of violence within the meaning of that provision is constituted by a violent attack on a person which, according to design or execution or in view of the consequences for the person who is being attacked, endangers the security afforded by law to a high degree, and which therefore is particularly rejected and detested by the national community which is engaged in a fight for its

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right of existence, according to the verdict of the Reich Supreme Court of 26 January 1942, Second Criminal Senate, January 1942.

In the present case, the basic punishable deed is a threat within the meaning of article 241 of the Criminal (Penal) Code.

The defendant by throwing, in her anger, such a heavy stone after the soldier did not merely make a purposeless gesture. The court is convinced that it is evident from the over-all attitude of the defendant Kaminska, which she had previously displayed toward the soldier, that she meant to hit Wanner. A stone weighing half a pound when being thrown by someone in a condition which the defendant herself described as anger may kill a human being. Thus, a stone of that weight must be considered equal to a cutting or thrusting weapon; it must be considered as an object equal to a weapon within the meaning of the law against violent criminals. The defendant dared attack a German soldier, she took up an offensive position which would have caused grave injury if the soldier had not evaded the stone which was thrown at him. The defendant was about to endanger gravely the life and health of a German national. The German nation which is engaged in a grim defensive struggle rightly expects the most severe methods to be taken against such alien elements. The crime of the defendant, by design, and execution, as well as a considerable violation of the security afforded by law, constitutes a serious crime of violence within the meaning of the law against violent criminals. The fact that the criminal is a Pole is of particular significance.

From the name of the law it is concluded that it can only be applied against persons who are to be regarded as violent criminals. The defendant had not been provoked to the violent action. After she had failed to hit him with the hoe, she tried to hit the soldier on the road. The over-all behavior of the Polish woman, also toward the farmer, proves that the crime is not alien to her nature. She thereby characterizes herself as a Polish violent criminal. The defendant cannot dispute that she resisted with all her strength when a police official wanted to put her in a cell. Her excuse that she had not known what the official wanted from her cannot be believed. She knew in what manner she had acted toward the Germans on the previous day. She therefore had to expect the police official who moreover was in uniform to try and arrest her. The court has no doubt that she, as well as Wdowen who admitted having assumed that Kaminska was to be "picked up" because of her behavior on the day before, knew that she would now be arrested. By her violent resistance outside the cell, she therefore violated article 113 of the Criminal (Penal) Code.

According to the opinion of the medical expert, which the Court

shares, the defendant shows no symptoms which could justify doubts as to her responsibility for the crime.

As the defendant on 1 September 1939 was a resident in the territory of the former Polish State, she had to be found guilty in application of articles II, III, and XIV of the Penal Ordinance for Poles, of a crime of assault and battery in conjunction with a crime of threat, a crime under article 1, paragraph 1 of the Law against Violent Criminals, and of a crime of offering resistance to the police.

The defendant was further charged with intentionally having torn off the infantry assault badge of the soldier Wanner. That could not be proved during the trial. The witness, Miss Gundel, testifies that after the defendant Kaminska had slapped the soldier's face, a fight ensued and that afterward the soldier's infantry assault medal was missing. In view of this evidence there is, at any rate, a possibility that the badge might have loosened in the course of the fight. A particular acquittal was not necessary, however, as the attitude of the defendants must be regarded as one action.

Although the old feeble farmer Gundel was not physically injured by the thrust of the defendant Wdowen, he did rightly feel the action of the Ukrainian to be an offense to his honor as a German. The defendant Wdowen, by holding Kaminska with both hands when the Polish woman was about to be put into a cell so that the police official was unable to do so for the moment, and by allowing himself to be removed only after the intervention of other persons, offered forceful resistance to an official who was lawfully doing his duty.

By his action, he also tried to free the co-defendant Kaminska from the hold of the official in whose custody she was.

His act, therefore, constitutes an attempt to free a prisoner in conjunction with resistance to the police under articles 120, 43, 113, 73 of the Penal Code.

That, however, does not exhaust the entire unlawful character of his deed.

The defendant Wdowen knows very well that the German economy, on account of wartime conditions, is dependent on foreign labor, in particular on labor from the eastern territories. He speculated that his offenses would be overlooked in order not to lose him as a worker. The defendant also knew that because of the drafts into the armed forces the security organs in the Reich have been reduced and that Germany is deprived of the population fit for military service so that the rural population is largely helpless against the insolent and obstinate behavior and against attacks, which occur more and more on the part of such elements

from the East. The defendant Wdowen, therefore, committed the offense taking advantage of the extraordinary wartime conditions. His action is therefore particularly despicable and demands that the ordinary limit of punishment be exceeded.

The defendant therefore had to be sentenced for a crime under article 4 of the Decree against Public Enemies in conjunction with resistance toward the police and an attempt to free a prisoner.

Under article III, paragraph 2 of the Penal Ordinance for Poles, the death sentence must be passed if the law provides for it. The defendant Kaminska, therefore, under the law against violent criminals is deserving of the death penalty.

The death penalty has to be pronounced as the only just atonement because the security afforded by law within the German living space must be protected against Polish criminality with the utmost severity. The defendant Wdowen, if only by his behavior toward the feeble old farmer Gundel proved that he is an insolent aggressive fellow inasmuch as he kept following the police official, although he had been chastized twice. It is to be concluded that he was waiting for a favorable moment to free the codefendant Kaminska by force, and finally by attempting to prevent by force the police official from the execution of his official duties and the latter having to call for assistance, he topped his provocative, dangerous behavior. Every security organ enjoys the special protection of the Reich. He who impedes in such a provocative manner the security organs, which are stationed at home, and which on account of their numerical minority are particularly overburdened during the war, must expect the Reich to react with utmost severity. That applies, in particular, to the foreign workers from the East who work in the Reich. In view of that, the court has assumed a particularly grave case within the meaning of paragraph 4 of the Decree against Public Enemies, and has not attached any decisive importance to the circumstances alone that the defendant Wdowen has had no previous convictions and has hitherto not attracted any unfavorable attention during his stay in Germany. Therefore, the defendant Wdowen had to be sentenced to death under the penal law of article 4 of the Decree against Public Enemies.

Costs: Paragraph 465, Code of Criminal Procedure.

[Signed] OESCHEY[1]
DR. GROS[2]
PFAFF[3]

[1] The testimony of defendant Oeschey concerning this case is reproduced subsequently in this section.

[2] Dr. Franz Gros was called as a prosecution witness concerning this case. His testimony, none of which is reproduced herein, is recorded in the mimeographed transcript (30 April 1947), pages 2826–2882.

[3] Dr. Theodor Pfaff was called as a prosecution witness concerning this case. His testimony, none of which is reproduced herein, is recorded in the mimeographed transcript (27 May 1947), pages 3642–3650.

TRANSLATION OF DOCUMENT 664–PS
PROSECUTION EXHIBIT 348

CIRCULAR LETTER OF HIMMLER TO THE SUPREME REICH AUTHORITIES, 10 MARCH 1944, NOTING THAT "THE ACCOMPLISHED EVACUATION AND ISOLATION" OF JEWS AND GYPSIES HAD MADE MEANINGLESS THE PREVIOUS MANNER OF PUBLISHING SPECIAL DIRECTIVES CONCERNING THEM

Berlin, 10 March 1944

The Reich Leader SS
Minister of Interior Affairs
S. Pol. IV D 2 c—927/44 g–24

[Initial] TH [Thierack]
[Stamp] Reich Ministry of Justice
17 March 1944
Dept. VII

SECRET

To the Supreme Reich Authorities

Subject: Posted prohibitions concerning Poles, Jews, and gypsies

The separately published decrees and rules governing the livelihood of Poles, Jews, and gypsies within the jurisdiction of the Reich, have frequently led to a summary equalization of these groups in the public eye as far as sale-and-utilization prohibitions, public announcements in the press, etc., are concerned. This attitude does not correspond with the differentiated political position to be granted to these groups now, and in the future.

As far as Jews and gypsies are concerned the accomplished evacuation and isolation of these groups by the Chief of the Security Police and the SD has made the publication of special directives (concerning the all inclusive prohibition of participation in many livelihoods) in the previous manner meaningless. Therefore, corresponding public directives may be eliminated.

The decrees and regulations which have been decided upon to govern the livelihood of the Poles will remain as before. For political practical reasons it is hereby recommended to maintain a certain amount of restraint in the public directives of these regulations, be it in posters, signboards, on press releases, etc.

I wish that the subordinate officers be informed of the necessary directives.

[Typed] Signed: H. HIMMLER

Certified: [Illegible signature]

SS Sturmbannführer

TRANSLATION OF DOCUMENT NG–900
PROSECUTION EXHIBIT 453

LETTER FROM THE CHIEF OF SECURITY POLICE AND SD TO MINISTRY OF JUSTICE, 3 MAY 1944, ENTITLED "REQUESTS MADE BY THE COURTS FOR INFORMATION ON JEWS," AND INTEROFFICE MEMORANDUMS LEADING TO DISPATCHING OF A LETTER DRAFTED BY DEFENDANT ALTSTOETTER

The Chief of the Security Police
and the Security Service

IVA b (I)a 4647/43

Please state this business number,
the date and the subject in
correspondence

Berlin SW–11, 3 May 1944
Prinz Albrechtstr. 8
Local Phone: 120040
Long distance: 126421

[Stamp] Reich Ministry of Justice

5 May 1944
Dept. VII–VI

[Initial] TH [Thierack]

[Initials] KLE [Klemm]

To the Reich Minister of Justice
Berlin

Subject: Requests made by the courts for information on Jews

Reference: None

In a number of proceedings for the checking of descent, the District Court Vienna requested information about the whereabouts of Jews, in some cases it requested this information from the central office for the regulation of the Jewish problem in Bohemia and Moravia at Prague, and in some cases directly from here. These Jews were at some time either evacuated to the East or were sent to Theresienstadt. Although my local office drew the attention of the District Court Vienna several times to the fact that such requests, as well as applications for the admission of such Jews as witnesses before courts or for hereditary biological examinations cannot be granted on account of reasons stated by the Security Police, the District Court Vienna renews its applications continuously.

Besides the fact that the Jews for years had time and opportunity to clarify their position with regard to descent, the proceedings for the checking of the descent demanded by the Jews or their families are according to experience in general made only in order to conceal their descent so that they would not be subject to the measures of the Security Police intended for them, or to those which have already been carried out. For this reason and in the interest of urgent dispatch of work important to the war effort the granting of applications of this kind has to be refused for the time being.

Therefore, I request to direct the District Court Vienna not to submit any such applications in future. I would be grateful to be informed about the steps taken from there.

As deputy:
[illegible signature]

The Reich Minister of Justice — Berlin, 3 June 1944

VIb 2 1124/44

Dispatched 14 June 1944, [initial] B

[Stamp] Office
8 June 1944
H/Frl. [illegible]

1. To the President of the Court of Appeal, *Vienna*

Subject: Handling of cases concerning descent of Jews or Jewish persons of mixed race

No previous correspondence.

The Chief of the Security Police and the Security Service pointed out that in cases concerning descent of Jews and Jewish persons of mixed race the office of the police are frequently asked for information on the place of abode of deported Jews by the courts especially by the District Court Vienna, or that their admission, as witnesses or for the purpose of examination for hereditary biological expert opinions is requested. These requests cannot be granted for reasons of the Security Police.

Even if the hearing (*and examination*)* of the Jews (*be an important piece of evidence for the clarifying of the question of descent*) in many cases help to frustrate the intentions (*of the Jews*) to conceal their descent, reasons of the security police demand to desist therefrom (*from this piece of evidence*).

In the near future I intend to issue in a decree detailed regulations for the handling of cases concerning the descent of Jews

* The words which appear italicized and in parentheses were crossed out in the original.

and Jewish persons of mixed race. Already now I request to inform the District Court Vienna (*and other courts, in your district, which according to your judgment, Mr. President of the Appellate Court, should be informed*) of the following:

(insert)*

As deputy:

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2. To the Chief of the Security Police and the Security Service

Subject: Requests for information on Jews made by the courts.

Reply to the letter of 3 May 1944—IV A–4–b (I) a–4647/43

1 enclosure (copy of 1)

[Stamp] Dispatched: 14 June 1944
3475/2 [Initial] B

In the enclosure I submit a copy of my letter to the president of the Appellate Court Vienna for your information.

BY ORDER

[Initial] AL [Altstoetter]

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3. Ministerial Counsellor Rexroth

With the request to settle the arrangement of the report with the Minister

The settlement of the arrangement of the report was not possible on 3 June 1944

Before dispatch

Mr. Minister is informed
[Illegible initials]

[To the] Minister [of Justice] with request to permit the dispatch of the above letter signed by me. The arrangement of the report could be settled in connection with the report on the decree concerning a general order on the handling of cases concerning the descent of Jews and Jewish persons of mixed race. It is intended to put into the draft of this official decree, the directives in the above letter sent to the president of the Appellate Court Vienna for information to all presidents of the appellate courts and general public prosecutors.

[Signed] ALTSTOETTER, 3 June
[Initial] R [Rexroth] 3 June

* The proposed insert appears at the end of the document.

[Insert]

(In cases of Jews who were deported to Theresienstadt or to other places, a hearing as witnesses or a hereditary biological examination is impossible for reasons of the Security Police, because persons to accompany them and means of transportation are not available. If the residents registration office or another police office gives the information that a Jew has been deported, all other inquiries as to his place of abode as well as applications for his appearance [before court], questioning and examination are superfluous. On the contrary, it has to be assumed that the Jew is not obtainable for the taking of evidence.

If in an individual case it is in the interest of the public to make an exception and to render possible the taking of evidence by special allocation of persons to accompany and means of transportation for the Jew a report has to be submitted to me in which the importance of the case is explained. In all cases offices must refrain from direct application to the police offices, especially also to the central office for the regulation of the Jewish problem in Bohemia and Moravia at Prague, for information on the place of abode of deported Jews and their admission, hearing or examination.)

[Initial] R [Rexroth] 3 June

EXTRACTS FROM THE TESTIMONY OF DEFENDANT SCHLEGELBERGER*

DIRECT EXAMINATION

* * * * * * *

DR. KUBUSCHOK (counsel for defendant Schlegelberger): Since the Jewish question is of particular importance for several points in the indictment, I would ask you first of all to tell us what your personal attitude to the Jewish question was.

DEFENDANT SCHLEGELBERGER: As far as I am concerned, there is and there was no Jewish question. This is my attitude: all races were created by God. It is arrogant for one race to place itself above another race and try to have that race exterminated. If a state deems it necessary to defend itself against being inundated and does so within the frame of a social problem, then it can and must be done by applying normal, decent means.

* Further extracts from the testimony of the defendant Schlegelberger are reproduced above in sections IV E, V B, and V C 2 a; and below in sections V D 3 and V E.

During the Goebbels campaign in 1938 I was abroad. When I heard about those events I said to my family: "We must be ashamed of being Germans." That was my view at that time and that is my view today. The only person with whom I am united in faithful friendship until today because we went to school together is a full Jew. I succeeded in saving his life all through that era. He again holds his former office as a judge. My physician too is half-Jewish. That attitude of mine naturally meant that on many occasions I was faced with inner conflicts. I ask you to consider that the Jewish problem was regarded as the central problem of the National Socialist State and the entire life in Germany was to be placed in line with that. Concerning that question Hitler and his followers worked in an entirely uncompromising manner; that an expert administrator could not bypass that basic attitude is a matter of fact. I shall have an opportunity to demonstrate what my personal attitude was toward those questions and how it always evidenced itself in an effort to put a check on the wishes of party policy, to make improvements and to exercise as far as possible a moderating influence on the practical application of those matters.

Q. What were the manifestations of your attitude to the Jewish question in your office?

A. The prosecution charges me with having cooperated in taking measures against the Jews. That the ordinance of 4 December 1941* against Jews in the eastern territories must be evaluated under particular points of view, I shall show in connection with the Polish question. For the rest, I ask you to consider that in view of the strength of the powers with which I was engaged in a struggle, a hundred percent victory of the Ministry of Justice was entirely out of the question. In that sphere, too, faithful to my basic attitude, I did work to make justice prevail; but frequently I had to content myself with making a compromise and I had to be pleased when at least I had achieved some amelioration. To use a customary phrase, if I had drawn the consequences from every defeat, I would have deprived myself of all possibility to aid the Jews. Quite apart from the fact that the resignation from office, before the war would have been a factual impossibility, and during the war a legal impossibility until a new minister was appointed.

With the permission of the Tribunal I will prove how difficult it was by citing an example. When the Party started a campaign against Jewish lawyers, I went to see Hitler and told him that it

* The reference is to the "Decree concerning the Administration of Penal Justice against Poles and Jews in the Incorporated Eastern Territories," reproduced on page 632 (NG–715, Pros. Ex. 112).

was untenable to remove from their profession Jewish lawyers among whom research people of repute were included, and with whom I myself had worked. I was pleased when I succeeded in persuading Hitler that that was correct and in achieving his agreement that he would reject the wishes of the Party. To inform the agencies concerned, I called a meeting of Ministers of Justice of the Laender who were still in office in those days and informed them about Hitler's decision. The result was surprising. I encountered bitter resistance, and the meeting bore no result. Hitler asked for Guertner to come to see him and asked him for information as to whether I was not perhaps a Jew myself. Then the Party began to exercise pressure on Hitler. He abandoned his decision, and the Jewish lawyers were removed from office. So as to make it possible at least for the Jews to preserve their rights, I proposed to set up the institute of the so-called Jewish consultants where former lawyers worked as consultants.

As to my own attitude toward these problems, that I could show properly only where I, myself, had to make the decisions. In this connection, I attach importance to the fact in saying here that nothing is more removed from me than here to play the part of the friend of the Jews. I am not a friend of the Jews; I am not a friend of the Aryans as such; but I am a friend of justice. And anybody who saw me at work and wishes to give a just opinion can confirm that with regard to all those who in my opinion were unjustly persecuted; no matter what their race or what their class, I tried to help them with all my strength.

Roosevelt, the former President of the United States of America, in 1944, in an address to the United Nations said, "Hitler asserts that he had committed the crimes against the Jews in the name of the German people. May every German show that his own heart is free of such crimes by protecting the persecuted with all his might." I can claim for myself that I acted accordingly. Concerning the members of the Ministry who were not fully Aryan, I kept them in office; and as has been established at this trial concerning judges who were not fully Aryan, I left large numbers of them in their offices irrespective of the Party purge. I looked after those who had been dismissed from their posts, and who were non-Aryans, and who had Jewish relatives. As far as possible, I protected them against being driven out of their homes and being deported.

Q. Concerning the question of civil servants remaining under Dr. Schlegelberger who were not fully Aryan, persons who were only dismissed on the basis of Thierack's list, I refer to Exhibit 42.* On the legal provisions concerning the fact that since 1933 a

* Document NG–219, Prosecution Exhibit 42, reproduced above in section C 3 a.

minister could not resign on his own, I will submit Schlegelberger Documents 79 and 80.[1]

Witness, you also dealt with a bill concerning people of half Jewish race. The prosecution has included those documents under PS–4055, Prosecution Exhibit 401.[2] Will you tell us something about those documents?

A. That document has been the subject of the discussion before the International Military Tribunal. The document, if my recollection is right, consists of two parts. On 12 March [1942], there was a letter from me to Reich Minister Lammers, and a letter of 5 April, to various agencies.

Q. May I interrupt you for a moment? The first letter is dated 6 March, and is in the English text on page 95.

A. I thought you were talking of the discussion which took place on 6 March.

Q. Yes, on page 95.

A. First of all, I'd like to speak about the letter of 12 March. That was, as I said, a letter from me to Reich Minister Lammers. From that letter I gathered that on 6 March there was a discussion about the treatment of persons of mixed origins, partly Jewish, partly Aryan. In that conference, the SS had demanded that people of mixed origin were to be treated in the same way as full Jews and were to be sent to labor camps in Poland.[3] If that had been done, a demand which for a long time had been voiced by the Party in a categorical manner would have been carried out. If one reflects to what extent the police measures were carried out in those days against Jews, one had to recognize that now the question of the fate of the mixed Jews had entered into an acute phase.

When I heard about the subject of that discussion, the question arose immediately whether one could, and how one could, intervene. My moral obligation was clear to me. There was the difficulty that it was a different department; that in itself was difficult to interfere with a different department in its work; and again and again there would be the additional difficulty that I was no minister. But to put it plainly, it was the case of an under secretary who was only appointed [as acting Reich Minister of Justice]

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[1] Document Schlegelberger 79, Schlegelberger Exhibit 72, was a law of 25 March 1939 amending the German Civil Service Law. Document Schlegelberger 80, Schlegelberger Exhibit 73, was the third law amending the German Civil Service Law of 21 October 1941, neither of which are reproduced.

[2] Reproduced earlier in this subsection.

[3] For contemporaneous documents concerning labor camps in German-occupied Poland, see the Pohl Case, United States *vs.* Oswald Pohl, et al., Volume V, this series.

under a system by which he could be given notice any day. If I had attempted to attack that political solution with legal or ethical weapons, nothing would have been done and there would have been nothing but mockery about me. Thus, I had to find a different way.

I had to try to approach somebody who perhaps might have the possibility to talk some sense into Hitler, and that person was Reich Minister Lammers, a man from the group of old civil servants, a man who had a feeling for right and justice, and whom I had frequently assisted in difficult situations. I could be quite open and frank with him; and, therefore, the quite open way in which I talked in my letter was without any pretense. I described the suggestions as entirely impossible. I did so knowing that thereby I was interfering with affairs which had nothing to do with me as far as my department was concerned, for the judiciary only had an outside interest in those affairs. There was a question of compulsory divorce, a question which naturally I answered in the negative; a question which was naturally very important for those whom it concerned, but the importance of which was not comparable to the great problem which was now my concern. Lammers said I could talk to him, but that conversation never came off, and probably it did not come off because Lammers was away at the [Fuehrer] Headquarters. Thus, I had to act on my own initiative, and, as I have said, I could not act in basing myself on legal and ethical considerations because that would have amounted to doing nothing. I had to limit myself concerning the agencies in question to acquaint them with the fact that the solution which they intended to apply was not possible. The entire idea and the entire way of thinking concerning that question altogether was based upon the desire to see to it that a further increase of persons of mixed origin, Aryan and Jewish descent, was to be avoided. I used that as my basis, and this is what my proposal amounted to. Certain groups were to be exempted from the solution altogether from the very outset. First, persons of mixed descent of the second degree, that is to say those persons who had only one Jewish grandparent; second, a person of mixed descent of the first degree, that is to say a person who had two Jewish grandparents; of those the people who were not able to propagate; and three, those persons of mixed descent, first degree, whose offspring under the law were not considered half-Jews. By that proposal, therefore, all persons of mixed descent, second degree a very large number, and a considerable number of people of mixed descent first degree, would have been excluded from this measure. The remaining persons were of mixed descent, first degree. For them I suggested that if they were to prefer it, they

were to be sterilized rather than deported to Poland. May I draw the attention to this point. The idea of escaping deportation by voluntary sterilization did not originate within myself. That idea originated from the persons of mixed descent themselves. I knew that persons of mixed descent had asked physicians to exempt them from the application of the Nuernberg laws and had themselves suggested to afford them the possibility of sterilization. In view of that situation in which they found themselves, I thought it justified to revert to the suggestion which these people themselves had made originally, and to afford them an opportunity in that manner to escape deportation to Poland. The prosecution employed that suggestion of mine to raise charges against me. I believe that if one thinks things out until the last, it is not so difficult to recognize that these charges are unfounded. My suggestion, altogether my work in that respect as I have said before, was not one of the tasks of the judiciary. If I went beyond the limits of my department, one must bear in mind that the charge would only be justified if one took it for granted that I was a model of active National Socialists, an active National Socialist who overcomes every obstacle even the limitations of his department, and I would assume that everything that has been discussed here so far will show that to assume such an active National Socialist ardor would be complete nonsense. I acted in accordance with my ethical feelings; the only motive for me was the intention to check a development which was fatal for a large number of persons. There are, after all, situations where one can only escape a larger evil by applying a smaller evil. But that somebody who all his life has thought along the lines of law, found it extremely difficult to make a decision of that kind, that the Tribunal will understand.

Q. Under Document NG–151,* the prosecution has submitted documents concerning limitations of the legal means for Jews in penal cases. Please give us an explanation concerning those documents.

A. Those documents begin with a letter by Freisler dated, I believe, 3 August 1942. In that letter Freisler tells the agencies in question about a bill concerning the problem we have just mentioned. The reason for his suggestion, he referred to as the exigencies of the war, he says that the state of affairs is untenable, and that it weakens the defensive will of the German people. Freisler wrote that letter without my knowing anything about it beforehand, but afterward he told me about it and gave me his explanation. This is what he told me: Himmler and his agencies had

* Document NG–151, Prosecution Exhibit 204 is reproduced previously in this section.

pointed out again and again that the present state of affairs was an impossibility; only a radical separation of the entire Jewish problem from the judiciary and transfer to police was conceivable. Again here we find—I shall have to revert to that later—Himmler had also said that the administrative measures against the Jews had advanced so far that it would be nonsense, in particular concerning criminal Jews, to be more lenient; therefore, one had to guard against allowing these criminal Jews, who were already under the supervision of the judiciary, such benefits as legal protection.

Himmler's desire to transfer Jewish affairs to the police was too much even for Freisler. Perhaps he was also particularly proud of his paternity of the penal ordinance concerning Poles and Jews which he considered his own sphere. Therefore, so he told me—and I believed him—in all circumstances he wanted to adhere to the competence of the courts; but he then convinced himself that somehow or other he had to make a concession because otherwise events would move without us.

Furthermore, we of the administration of justice, particularly in the Incorporated Eastern Territories, suffered from a severe lack of judges, and we could only master that difficulty if we exempted a number of judges from service in the armed forces. If Freisler and we had refused consistently to comply with Himmler's wishes, it would have been easy for Himmler to get Hitler to agree to cancel such exemptions from service with the armed forces, and thus the administration of justice in the eastern territories would have come to an end altogether. In order to avoid this danger, Freisler believed that he had found a way out in limiting legal remedies and thereby to start out on a way which we later on, inside Germany, in cases against Germans, had to take on account of the lack of judges. That is why he made the suggestion. I could not altogether agree with Freisler's arguments, but I attached importance to the fact that this new regulation was to be final and was to appear as such to the outside world, too. That might strengthen our position toward the opposing forces and, therefore, in the letter I wrote afterward,* I discussed the question of whether Jews are able to take an oath, and I included that question in my draft so as to make that draft more well rounded and complete. In itself this question of the oath was important, for under German law it is the duty of the judge to attach equal weight to statements made under oath, and statements made while the person was not under oath.

* Schlegelberger refers to his letter of 13 August 1942 to the Reich Minister of Public Enlightenment and Propaganda, Dr. Goebbels, making specific proposals for the wording of the decree. This letter is reproduced earlier in this section as part of a lengthy correspondence on the matter (Doc. NG–151, Pros. Ex. 204).

There again we were faced with a case in which a concession which in itself was immaterial but which to the outside world, nevertheless, seemed important, had to be made in order to pacify Party circles. If one wants to evaluate such a procedure, one must bear in mind that 1 month later Thierack did find a final and comprehensive solution. He dropped my suggestion and transferred the Jews to the police.[1]

Q. The prosecution also submitted Document NG–589, Prosecution Exhibit 372,[2] a document which concerns a curtailment of the poor law privileges of the Jews. Was that ruling made at your suggestion?

A. No. I only heard about that ruling here when the document book was submitted. At every ministry certain matters which are not of much importance are dealt with quite independently by departments which are below the under secretary or the minister. It is altogether out of the question that an under secretary or minister deals with everything personally. He would even misunderstand his function if he were to do so. Those matters, for example, the question of the poor law, fell within the competence of the then Assistant Under Secretary Hueber, who signed the ordinance.

As I said, I only heard about it here, but I should like to add that the institution of the poor law was created so as to enable poor persons to conduct civil litigations. The granting of poor law privileges does not mean that the person to whom it is granted can conduct proceedings free of costs, but it only exempts him from payment in advance. He is still under an obligation to pay.[3]

The poor law institution, therefore, so to speak is an institution of government welfare. For a long time before Hueber ordered it, government financial support of Jews had been stopped, and they had been referred to their own Jewish welfare organizations. The uncurtailed provisions governing the poor law, therefore, were not in accordance with the line otherwise observed, and Hueber refers to that when he considers the old ordinance as outmoded.

Q. I do not know whether the witness' statements were clear enough to elucidate the concept of the poor law. I hear that the expression in English has been translated by "poor law." That

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[1] Schlegelberger refers to decisions taken by Thierack after consultations with Reich Leader SS Himmler on 18 September 1942. See Thierack's own memorandum of this conference (654–PS, Pros. Ex. 39) reproduced in section C 3 a, and Thierack's letter to Bormann of 13 October 1942 (NG–558, Pros. Ex. 143) reproduced earlier in this section.

[2] Reproduced earlier in this section.

[3] The reference is to a provision in German law whereby a person who has been granted the benefits of the *forma pauperis* but who, later on, ceases to be poor, must pay the court and lawyer's fees from which he had been exempted.

translation might perhaps lead to confusion. We are concerned here merely with the question of costs and merely with the exemption of paying costs in advance, and that is the cost of civil litigation.

* * * * * * *

Q. I come now to the introduction of the German criminal law in the Incorporated Eastern Territories. Will you please give a short review of the general development of that question?

A. These matters, as far as the time was concerned, are connected with what I said before. Among the drafts sent out in February 1940, there was also one about the introduction of criminal law.

Q. May I interrupt you? That, again, is Exhibit 459.[1]

A. That draft comes from Freisler's sphere, and in the absence of the Reich Minister of Justice Guertner, as well as Freisler, I signed that draft upon the request of the Minister. That draft provided absolutely equal treatment of Germans and Poles. Later on, 6 June 1940, a decree was issued about the introduction of penal law in the Incorporated Eastern Territories and that decree was only designed for Poles and Jews; that shows that before my time, and without any assistance on my part a special law was created for Poles and Jews. Apparently Freisler afterward gave in to the efforts of the Party and had managed after hard struggles to obtain the approval of Guertner, who, as I know, was against such a thing on principle. But the decree of 6 June 1940 bears the signatures of Frick and Guertner.

Q. That decree will be contained in my document, Schlegelberger 60.[2] Then, it came to the penal ordinance concerning Jews and Poles, 7 December 1941, that is Exhibit 343.[3] Will you please discuss that decree in detail?

A. That decree of 7 December 1941 which has been the subject of a detailed discussion in this trial is based on the following: The decree of June 1940, in the view of the department of criminal legislation in the Ministry, was not satisfactory. And that was

[1] Document NG–880, Prosecution Exhibit 459, is reproduced earlier in this section.

[2] Document Schlegelberger 60, later received in evidence as Schlegelberger Defense Exhibit 26, is reproduced earlier in this section.

[3] Here defense counsel makes two erroneous references, as both the contemporaneous documents and Schlegelberger's ensuing testimony show. The pertinent penal ordinance concerning Poles and Jews was promulgated on 4 December 1941, and it was introduced in evidence as part of Document NG–715, Prosecution Exhibit 112, reproduced on page 632. On the other hand, Prosecution Exhibit 343, which defense counsel mentions, is a draft for a penal ordinance on Poles and Jews by defendant Schlegelberger. He transmitted this draft to the Reich Chancellery on 17 April 1941 with a long letter of explanation (NG–144, Pros. Ex. 199). Both the transmittal letter by Schlegelberger and the proposed draft are reproduced earlier in this section, and both are discussed in the following testimony by the defendant.

907802—51——48

because the extent of punishment was not sufficient, neither the maximum nor the minimum of punishment was sufficient. There was also a lack of specific provisions. In addition to that, the Reich Chancellery had informed the Ministry, that the deputy of the Fuehrer and the Party, demanded a discriminatory law concerning Poles and Jews.

Q. I refer to Exhibit 341.[1]

A. Therefore, the Department for Penal Legislation—that was before my period in office as Acting Reich Minister of Justice—had started to work out a new draft which should take care of these deficiencies. When I took over after Guertner's death, Freisler reported to me about that matter and told me the following: It was Himmler's intention to obtain sole competency for all cases against Poles and Jews, and that Gauleiter Greiser of Warthegau province was of the same opinion, and he if necessary wanted to eliminate the administration of justice with the aid of civilian courts martial. Bormann was of the same opinion and demanded, first of all, the introduction of corporal punishment. According to this information I had to expect a fight with the Party. This fight which was fought to maintain legal procedures for Poles and Jews in all events, could only be successful if I could point out that the courts had at their disposal an appropriate procedure and appropriate provisions which were sufficient for all, even the most serious cases. The new draft,[2] in my opinion, was designed to rebut the assertion by the Party that the courts could not master the situation. Therefore, in April 1941, I submitted that draft to the Ministerial Council for Reich Defense to the attention of Reich Minister Lammers, in order to achieve a decision. I also announced to Lammers that I had to see him in advance to inform him about the situation, and about the conditions which lead to the draft in that form. The prosecution has repeatedly referred to that covering letter which accompanied the draft.[3] Therefore, I should like to explain the reason for this letter, and the manner in which it was written. According to the legal provisions, to those provisions which I have already discussed, I had to have the approval of the Party Chancellery, but

[1] Document NG–227, Prosecution Exhibit 341, is not reproduced herein. It contains, among other items, a note prepared in the Reich Ministry of Justice, dated 26 November 1940, stating that "the Deputy of the Fuehrer [Rudolf Hess] thinks it best to rescind the application of the German Penal Code in the new eastern provinces and to create a penal code a special dominating principle of which must be to deter by fear and there must be a possibility of pronouncing a sentence of corporal punishment. The law of criminal procedure must not allow for obstruction; here the deputy of the Fuehrer is in favor of police courts martial rather than law courts."

[2] This draft (NG–331, Pros. Ex. 343) is reproduced earlier in this section just following Schlegelberger's letter of 17 April 1941 (NG–144, Pros. Ex. 199) transmitting the draft to Lammers, Chief of the Reich Chancellery.

[3] Document NG–144, Prosecution Exhibit 199, dated 17 April 1941, reproduced earlier in this section.

only then did I have any chance to obtain that approval, if that draft was implemented with those main points which I considered necessary.

If I had described in my letter the contents and consequences of the draft without exaggeration, I could never have expected the approval of the Party Chancellery. Therefore, I had no alternative but to emphasize the increases in the severity of treatment with exaggerated expressions, to pass over less severe provisions, and to leave out references to decrees which would make this decree more lenient. Whether it came to any conference with Lammers, I could no longer tell. I remember quite clearly the event which proved to me that my assumption was correct, that we would have to expect a most energetic attack on the part of Himmler.

In the summer of 1941, Himmler asked me to come to a conference. That was the only one I ever had with Himmler. There was a great pressure with regard to time connected with that request. Himmler told me that he was on his way to see Hitler and that he had to have my approval. Penal cases against Poles and Jews should be turned over to him, that is to say, to the police. That was regardless of where the acts had been committed.

I rejected that categorically and told him that for that kind of change of competence, there was no reason whatsoever, particularly since in a very short time a new regulation could be expected about that question by the Ministerial Council for Reich Defense. That, of course, made Himmler suspicious. At that time, it did not seem to him to be the right thing to fight against the Ministerial Council for Reich Defense which was under the presidency of Goering, at that time a strong opponent. Himmler seemed to depart for a short time from his original plan.

The Ministerial Council for Reich Defense passed that draft in December of the same year and that determined and assured the competence of the courts for penal cases against Poles and Jews*. When I left office that was immediately changed as could be seen from these proceedings. That decree dates back to December 1941, as I have already pointed out the period when my task as Acting Minister of Justice came to an end. It is not surprising that I could not gain a clear picture, as to how that decree was applied and what the consequences were.

I do recognize that one could criticize individual sentences at least as far as the limited amount of material is concerned which is available to us now. However, considering that there were about half a million penal cases during 1 year—as regrettable as it may be in the individual case—it is not very decisive for an over-all

* Decree concerning the administration of penal justice against Poles and Jews, 4 December 1941 (NG–715, Pros. Ex. 112) reproduced on page 632.

judgment of conditions. I owe it to the German judges to state here frankly and publicly that as long as I could observe their activity, they have discharged their duties with a definite desire for justice in general.

Concerning the criticism which was voiced against this decree, I should like to say the following in detail. The most essential feature of that decree was its practical application. I took every opportunity when a judge from the eastern territories came to see me to point out that that decree gave a great deal of latitude to the judges; that therefore, the judges for the procedure as well as for the sentencing had to keep in mind that they were servants of justice. Beyond that I caused Freisler to discuss the point of view of just application in an article in a magazine, *Deutsche Justiz* (German Justice).* *Deutsche Justiz,* an official publication, was read by all judges and prosecutors, and that made absolutely certain that they knew how Freisler thought about it, and that he did not want any arbitrary application. That achieved that Freisler himself was prevented from giving individual directives or expressing opinions which would go contrary to the meaning of that decree. In view of his unstable nature, this was particularly important.

This article by Freisler took into account my demands by stating that it was a serious duty of judges and prosecutors in cases of Poles and Jews to apply the same maximum care as they would in the case of Germans. The prosecutors are instructed in preliminary investigations to examine also points in favor of the defendant very carefully so that the defendant can recognize the charges made against him and is put in a position to prepare his defense. The courts are admonished to keep in mind that it was not within the meaning of the decree that facts which were of little or no importance should be artificially exaggerated. What harms an individual does not harm the Reich. Sufficient opportunity should be given to the defendant to use legal remedies, to explain things, and to state his views to the evidence submitted. Everything should be avoided which in the least would make the sentence look like a sentence based on suspicion. Under all circumstances, the extent of the punishment should be within sound measure. The legal remedy of appeal should be applied by the prosecutor, also in favor of the defendant and for that express purpose, the time limit was extended to twice its normal length.

PRESIDING JUDGE BRAND: Mr. Schlegelberger, you are referring to an article by Freisler, are you not?

DEFENDANT SCHLEGELBERGER: Yes.

* Extracts from this article were offered in evidence as Document Schlegelberger 61, Schlegelberger Exhibit 27, reproduced earlier in this section.

PRESIDING JUDGE BRAND: Does that have an exhibit number, or will it have?

DR. KUBUSCHOK: I will submit that article as Document Schlegelberger 61; 61 will be the number of that article. It is in my document book.

PRESIDING JUDGE BRAND: 161?

DR. KUBUSCHOK: No, only 61 in document book 3, Schlegelberger document book 3.

PRESIDING JUDGE BRAND: Thank you very much.

DEFENDANT SCHLEGELBERGER: The right for civil suits for Poles and Jews had already been rescinded by the old decree. A new decree brought modification by which also Germans should not have that right any longer as Freisler explained. And now the most important element— the latitude and extent of punishment was increased not only toward heavier punishment, but also by decreasing the minimum. The death penalty was mandatory only where an act of violence was committed against a German on account of his being a German. That was already contained in the old decree. In all other cases, apart from the death sentence, there was an opportunity for a prison term.

In the old decree, in the case of anyone owning or carrying weapons a death penalty was mandatory. The new decree provides for the possibility of a prison term which goes all the way down to 3 months in prison. That modification applied to a large number of offenses. Also, the mandatory death sentence for arson was abolished. Apart from that, I am of the opinion—and it has been mentioned here frequently—that whether the death penalty is mandatory or optional, a judge who does not want the sentence of death in taking into account the facts in a case, can almost always avoid that possibility.

The prosecution asserts that the new decree excludes the clemency plea for Poles and Jews. That is not correct. If it is stated that the sentence was final and had to be executed immediately that only means that with the exception of that right the sentence is final. I will not discuss the question as to whether a sovereign can forego the use of the clemency plea from the outset, but it is beyond doubt that the Ministerial Council for Reich Defense could not have excluded the right of pardon on the part of Hitler. Besides, for the Incorporated Eastern Territories, the pardon regulations of 1935 applied. Article 453 of the Code of Criminal Procedure, according to which execution of the death sentence is only possible after it has been ascertained that the authority in charge of the clemency prerogative has refused to make use of this prerogative was especially emphasized upon my

demands in Freisler's article. In fact, Poles were pardoned. That was mentioned in these proceedings. I would like to refer to two cases which I remember: the case Pitra and the case Woziniak.

DR. KUBUSCHOK: Those cases are contained in Document NG–398, Prosecution Exhibit 253.[1]

DEFENDANT SCHLEGELBERGER: The right to have defense counsel is not taken from the defendant by that decree. On the basis of the regulations concerning Special Courts of that time, a defense counsel had to be appointed for the defendant. And I may say in conclusion that the penal ordinance concerning Poles and Jews guaranteed the Poles and Jews a court procedure and a sentence by the court. Also, it prevented these defendants from being dealt with without the protection of the court and being turned over to the police.

Q. I am just informed that the translation on one point was in error. The witness stated that he would not discuss the question as to whether the right for pardon on the part of the sovereign, or the supreme authority of the state, could be omitted, and instead of the word "sovereign," the word "defendant" came over the channel.

According to Exhibit 346, retroactivity of the penal ordinance for Poles and Jews was ordered.[2] What can you say in that connection?

MR. LAFOLLETTE: I did not get the Exhibit number.

DR. KUBUSCHOK: Exhibit 346.

DEFENDANT SCHLEGELBERGER: I have described how great the pressure on the part of Himmler and Bormann had been. We had just succeeded in calming these parties down. They had had quite different ideas of the practical application, but now Freisler again piped up. He complained that in past cases the old decree was still applicable. In order to prevent a renewed debate about the competency of the police, that request for retroactivity was granted. Besides, that decree concerning retroactivity had a consequence which the Party officials had not taken into account, most probably, because now, on these many pending cases against people who had been found to have arms, not the old decree but

[1] This is an undated table entitled "Death Sentences." It lists 115 persons delivered to jail between 24 April 1942 and 1 September 1944, all having been sentenced by the Special Court in Stuttgart. However, in a column headed "Execution," the table shows that five of the cases were either sentences for a term of years or possibly cases where death sentences were changed to imprisonment for a term of years. The entry under the heading "Execution" for the two cases mentioned by Schlegelberger are for Pitra, "8 years' prison camp" and Wozniak, "5 years' prison camp, beginning September 1942."

[2] Reference is made to article I of the Supplementary Decree concerning the Administration of Penal Justice against Poles and Jews in the Incorporated Eastern Territories, a decree signed by the defendant Schlegelberger and Dr. Pfundner. This decree (NG–665, Pros. Ex. 346) is reproduced earlier in this section.

the new decree had to be applied which also gave the possibility of a penalty of 3 months' prison term instead of the death sentence, which was mandatory under the old decree.

Q. The prosecution charges you with having introduced or contributed toward introducing the Standgerichte—the civilian courts martial—in the Incorporated Eastern Territories. Document NG–136, Prosecution Exhibit 345[1] is in point. What can you say in that connection?

A. Apart from the general desire to turn over cases of Poles and Jews to the police, Himmler and Bormann, as it was said once, had a special preference and desire for the establishment of civilian courts martial. One could not quite bypass that desire in the decree concerning Poles and Jews, but it was possible to establish an obstacle. I did so, including the provision that civilian courts martial could only be established with the approval of the Minister of Justice and the Minister of the Interior. Greiser, with the support of Himmler, had recognized that that clause or that provision would make it impossible for them to have their wishes fulfilled.

Therefore, bypassing the Minister of Justice, they went directly to Hitler. Lammers, by order of Hitler, informed me that Hitler had decided that the demand for the establishment of civilian courts martial and the transfer of rightful pardon should be granted.

What I had always tried to achieve by various means had not been achieved; on the contrary, that which I had tried to avoid had come true. By the decision on the part of the Fuehrer, my hands were tied.

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CROSS-EXAMINATION

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MR. LAFOLLETTE: Now I believe you testified on direct examination that you yourself had no anti-Semitic feelings as such against the Jews as a race; that also you sought justice rather than to classify people as groups. That, as I gather, was right?

DEFENDANT SCHLEGELBERGER: Yes, that is correct.

Q. If then you extended the Nuernberg laws[2] by decree into the eastern territories, that would be a little inconsistent with your own feeling about the matter, would it not?

[1] Reproduced earlier in this section.

[2] The two original Nuernberg laws, the Reich Citizenship Law and the Law for the Protection of German Blood and Honor, were both announced at Nuernberg on 15 September 1935. The second law is reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 180.

A. Certainly not.

Q. May I hand you a copy of an order of the 31 May 1941 which as I read it has the effect of extending those laws into the eastern territories. This order was signed by you. That is the prosecution's document NG–1615, which we asked to have marked for identification as Prosecution Exhibit 521,* Your Honor.

If Your Honors please, if the Tribunal will permit me, I have had English copies of this and I thought they were here. I am advised that they are not in here now. I will furnish them. May I proceed and then furnish them to the Tribunal?

Have you examined that exhibit, Doctor?

A. Yes.

Q. It is signed by you as Acting Reich Minister of Justice, Martin Bormann, and Dr. Stuckart. Is that correct?

A. Yes. There are two decrees on the same day.

Q. Yes. Article 3 provides the Act for the Protection of German Blood and Honor of 15 September 1935 shall be applicable in the annexed eastern territories. That is what is known as the Nuernberg law, is it not?

A. Yes.

Q. That was applied to the eastern territories?

A. In regard to this decree, I would like to say something, if I may.

Q. Surely.

A. These two decrees of 31 May 1941; the first one is an order introducing it; and the second one is the executive order of the Law for the Protection of German Blood and Honor. They have to be looked at together. As far as the basic question of the introduction of that law is concerned, the prosecutor has already spoken about my personal feelings. I shall leave them out of consideration for the moment. In regard to the question as to whether the Nuernberg laws were supposed to be introduced, the following were the decisive legal sources:

First, here too the directives of policy which Hitler had issued; secondly, the political responsibility of the Ministry of the Interior, as the central office for questions regarding the eastern territories, and the leader of the Party Chancellery.

The Ministry of Justice in regard to these laws participated only because the so-called law for the Protection of German Blood and Honor, by which Minister Guertner was completely surprised

* This document is reproduced earlier in this section.

at the time, contained a penal regulation. If now, in accordance with the political directives, one had to introduce this decree, the penal regulation, of course, had to be introduced too, and from that resulted, of necessity, the signature. Moreover, from the connection of these two decrees, it is apparent without any doubt that the decrees do not apply to Poles, either Jews or non-Jews, but only to German citizens, and that they had to comply is obvious.

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EXTRACTS FROM THE TESTIMONY OF DEFENDANT KLEMM[1]

DIRECT EXAMINATION

* * * * * * *

DR. SCHILF (counsel for defendant Klemm): We come now to the third phase of your activity, namely, your activity in the Party Chancellery in Munich.[2] I ask you, first of all, how did it happen that you came into the Party Chancellery at all? Please also tell the exact dates to the Tribunal first.

DEFENDANT KLEMM: I began my activities in Munich on 17 March 1941. At that time the Party Chancellery did not exist at all. At that time there was only the staff of the Deputy of the Fuehrer, and that was Reich Minister Hess. Reichsleiter Bormann who had the position of chief of staff was not in Munich at all, but since the beginning of the war, in the Fuehrer Headquarters in the immediate proximity of the Fuehrer. That remained the same way during the entire course of the war. From the Party Chancellery I knew the chief of Department III, that is Under Secretary Klopfer. I have known him since 1924 or 1925; that is, from my student days. We had not seen each other at all for 1 or 2 years and had not written to each other. We met by chance in Berlin in January 1941 in front of the Reich Chancellery, on the occasion of the funeral of the Reich Minister of Justice Guertner. I had come for this funeral from The Hague and Klopfer happened to be in Berlin. At that time Klopfer had just been given Department III in the staff of the Deputy of the Fuehrer, and he asked me whether I would like to work in his department, and to take over the group in charge of the administration of justice. That group consisted at that time of two or three people, and

[1] Other extracts from the testimony of the defendant Klemm are reproduced above in sections V C 1 a, V C 3 b, V C 3 d, and below in section V F.

[2] Concerning the earlier phases of Klemm's activities, see the footnote appearing at the beginning of the extracts from Klemm's testimony which are reproduced above in section V C 3 b. There was still a fourth phase to Klemm's activities, for in January 1944 he was appointed Under Secretary in the Reich Ministry of Justice.

there was no group leader because he was employed in other matters.

Q. I believe that is sufficient to describe the cause—

A. I said at the time to Klopfer that I liked it very much at The Hague; that I had an independent position there. I was able to work independently, but during the war things were not done in accordance with the personal wishes of a person; that I would work wherever I was assigned to work. I never heard anything about it again until one day Seyss-Inquart called me to him and told me that he had had a lengthy correspondence with the Party Chancellery, that the Chancellery had asked for me, that he had fought against this, but in the end had to give in after all. And he had agreed to the chief of staff of the Deputy of the Fuehrer to put me at his disposal, and therefore, he instructed me to start my service in Munich 4 days or a week later. That is how I entered the staff of the Deputy of the Fuehrer at the time.

Q. Before we now turn to your activities in detail in the Party Chancellery, it seems to be necessary to tell the Tribunal the most important facts about the organizational structure of the Party Chancellery or the staff of the Deputy of the Fuehrer. You know that the Party Chancellery has a bad reputation. We want to tell the Tribunal first the outside organizational structure.

A. The staff of the Deputy of the Fuehrer had that name until the middle of May 1941, until the time when Reich Minister Hess —that is the Deputy of the Fuehrer—secretly flew to England.* At that time the staff was transformed into the Party Chancellery, and for the sake of simplicity I shall only use the name "Party Chancellery" from now on.

The Party Chancellery was an organization with, in my estimation, from 750 to 1,000 persons. There was one office in Munich and one in Berlin. The Party Chancellery was divided into three divisions, and these divisions were again subdivided into groups:

Division I, which is of no interest here, was in charge of management, building, and maintenance; and in that division the personnel of the Party Chancellery itself was administered. Furthermore, the registry was there and the telegraph and teletype system.

The nucleus of the Party Chancellery as a Party office was Division II, the Party political division. Here was the actual leadership of the Party, that is, the NSDAP, and here was the direct channel to the Gaue, the Kreise, and the local groups. A certain Friedrichs was in charge of this division.

* Hess landed in Scotland on 10 May 1941.

Division III was the State or constitutional division as it was called. Under Secretary Dr. Klopfer was in charge of it. Here everything was dealt with which had to do with the State and the State functions of the Party Chancellery, while, as I have already stated, purely Party matters were dealt with in Division II.

Q. Would you please explain to the Tribunal the contrast between this office, the Party Chancellery, and the purely Party offices of the NSDAP?

A. In addition to the Party Chancellery, the Party had different offices on the level of the Reich leadership, for instance, to cite examples, the Reich Legal Office, the Office for Agricultural Policy, and the Office for Public Welfare. Thus, there were a number of different agencies. Party jurisdiction went through up to the supreme Party court. It also was divided into Gau and Kreis courts. In addition to that there were also, of course, some other Reich offices, such as the office for Reich propaganda matters and Reich organizational direction, and so on.

Within the Party Chancellery, in addition to these three divisions, there was also the so-called Reichsleiter Bureau, Reich Leader Office. That was, so to speak, the staff formerly closest around Reich Minister Hess and later on around Reichsleiter Bormann. This Reich Leader Office Bureau, which at times had up to three jurists on its staff, met partly in Munich and partly in Berlin, in the office there, and partly at the Fuehrer Headquarters immediately with Bormann.

Q. You spoke of Division III as the State or constitutional division. I ask you whether it was anchored on a legal basis.

A. If I speak of a state or constitutional division, I give it this designation because of the nature of the work of that division. Division III was, so to speak, the counterpart of the State organization in the Party sector. Division III was divided into seven groups. I shall describe this organization somewhat later.

By virtue of the "law to secure the unity of Party and State," * the Deputy of the Fuehrer had been made a Reich Minister. Supplementary decrees, and orders laid down that the Deputy of the Fuehrer, had to participate in the making of national laws and ordinances, by having to approve the drafts of such decrees. This right was then transferred to the leader of the Party Chancellery, and in a more stringent form—as the witness Schlegelberger has already testified—quite clearly in a circular, or perhaps in an ordinance it was repeatedly stated that the leader of the Party Chancellery always had the position of a participating minister.

* 1933 Reichsgesetzblatt, 1 December 1933, part I, page 1016.

In the same way as in the purely legislative field, the Deputy of the Fuehrer entered into personnel matters of the government. No higher official could be employed or promoted if this measure in the State sector was not approved by the Deputy of the Fuehrer and later by the leader of the Party Chancellery.

In order to fulfill these State and constitutional functions, Division III had been formed in the Party Chancellery, or rather earlier, in the staff of the Deputy of the Fuehrer. As I have already stated, it consisted of seven groups:

Group III–A, above all, dealt with the sphere of the Reich Ministry of the Interior and questions of nationality [Volkstum]. During the last period of my time in Munich, the witness Anker, who was examined here as a witness for the prosecution, was in charge of Group III.

In Group III–B, all economic matters were dealt with: economics, food, traffic, mails, and armaments.

Group III–C, the group of which I was in charge, dealt with laws and orders as far as they had been issued by the Ministry of Justice, and with questions of Party law.

Group III–D worked on educational and ecclesiastical questions, as well as matters of the Foreign Office.

Group III–E dealt with financial questions, and Group III–P (Paula) dealt with personnel matters; that is, all State personnel matters, without consideration of the fact as to whether they originated from the judiciary, the administration, finance, or anywhere else.

Then there was a group, III–S, which had special tasks in the cultural field.

* * * * * * *

Q. Witness, you have now listed the individual groups, seven, as you stated. I now ask you to make a statement as to how the individual groups of the Party Chancellery were in contact with each other or how they worked together.

A. In my description I omit Division I, because it only dealt with technical matters of the management of the office, administrative details within the Party Chancellery. I can limit myself to the relationship of Division II, that is the purely Party political division, and Division III. These two divisions worked not with each other but against each other. Already this structure was quite arbitrary and unorganized. For example there were fields of work which had the same name in both divisions. In the course of time Division II arrogated this to itself. This battle between

the two divisions was not based only on purely factual reasons in the fields of work but also had other deeper reasons. In Division III officials were working who had almost exclusively been detailed by their ministries for such work. In Division II only political leaders were working whole time who, for the most part, looked down upon the jurists with contempt. The word "jurist" was a kind of epithet, and they saw in the people of Division III only civil servants and deputies of the ministries. They did not concede that we did any political work at all, and especially not work of a party political nature. They did not acknowledge us as political leaders at all. We in Division III were only a necessary evil in the Party Chancellery; that is how they saw things, because without the experts they could not get along. This disrespect—I cannot call it anything else—this disrespect on the part of Division II was especially strengthened by the attitude of Bormann toward Division III. He had approximately the same attitude. The result was that between Divisions II and III there was a constant malicious fight for competency. Division II constantly tried to arrogate to itself matters which could have something remotely to do with Party matters. These attempts took place also when State matters were predominantly or exclusively concerned; that is, if the effects would take place in the State sector. This situation was favored by the unbelievable conditions that existed in the registry. This registry had been built up by laymen. In 1933 Germany had several million unemployed, and an effort was made to find a place for these people and again give them an opportunity to make a living. The result was that people were put in such positions only to find a place for them, people who had no idea about an organizational structure. In this registry, former streetcar conductors and violinists were employed, people who knew nothing about it. Therefore, the entries were constantly directed to wrong places and then the other division did not let them go out. Whether a letter went to Division II, or Division III, or directly to Bormann was in many cases just a question of luck.

Q. I wanted to ask you also, in Division III was there also a financially worse position compared with the people in Division II?

A. We were paid the same way as we were paid when we were in the employ of the State, while the political leaders, the Main Office political leaders, had their own salary scale; and I do not want to repeat here; I can refer to what the witness Anker stated who explained that a political leader of Division II in the same position as Anker got about double the amount of salary than an official.

Q. I want to demonstrate to the Tribunal the borderline of competency between Divisions II and III. I have here a document

which the prosecution believed they could bring into some kind of connection with your case. It is Document NG–364, Prosecution Exhibit 108.[1] This is the infamous letter about the lynching of Allied airmen who had bailed out. The letterhead is the NSDAP, Party Chancellery. Further, the leader of the Party Chancellery and the place from which it was sent is the Fuehrer Headquarters. The date is 30 May 1944.

A. Even though this is a circular from the Party Chancellery at a time at which I had been out of the Party Chancellery already for 5 months, I do know that such circular letters in principle were not submitted by Division II to Division III when they were in a draft form or for cooperation, even if the police, the Wehrmacht, and the administration of justice and their spheres of work were discussed in it.

Q. The letter is signed by Bormann. In the same document, that is Exhibit 108, there is contained another letter which also has the date 30 May 1944. It is addressed to all Gau leaders and Kreis leaders, and refers to Bormann's circular letter. It is signed by Friedrichs. Is Friedrichs the chief?

A. Friedrichs is the chief of Department II.

Q. Before, when you were speaking about the registry and the delivery of letters, you mentioned that many letters went directly to Bormann, to the Fuehrer headquarters. Thus, these letters did not go to Munich to the divisions that had been established there. Was there any standard in regard to the distribution of these letters, to whom they were to be sent?

A. If personal letters to Bormann in his position as Reichsleiter or as secretary of the Fuehrer were received by a minister or a Reichsleiter or a Gauleiter or any other prominent person in the service of the State or the Party, these letters always went first to Bormann in the Fuehrer Headquarters. Other letters went quite frequently first to Bormann. It depended entirely on who of the people I described before, who did not have the requisite training at the registry, and the mail got such a letter into his hands and how he forwarded it. Of course, efforts were made to make as few mistakes as possible which would arouse Bormann. The result was that as much as possible was sent to Bormann so that the reproach could not be made that he had been skipped.

Q. Perhaps we can clarify this by means of an example. The prosecution introduced Document NG–558, Prosecution Exhibit 143.[2] This is a personal letter which Thierack wrote to Bormann,

[1] Reproduced above in section C 3 d.
[2] Reproduced above in this section.

dated 13 October 1942. In this letter the information is passed on that in the extermination of Jews and Poles the administration of justice wanted to give a helping hand. In the form in which it is submitted, this letter is addressed personally by Thierack to Bormann. I am asking you whether this letter went via your Group III–C, that is the legal division, or whether Bormann later sent it to your legal division and thus informed you about it?

A. Whether this letter was sent to Bormann too, by Thierack, I don't know. It did not come to Munich to Group III–C. I personally saw this letter for the first time here when the document was submitted.

Q. We have another document here, that is NG–280, Prosecution Exhibit 70.* It is a letter which Lammers, who was then Chief of the Reich Chancellery, sent to Bormann. It is a complaint about an inadequate sentence regarding a Pole. This document contains several letters. We are here concerned with the third letter with the address: "To Reichsleiter Bormann." I ask you to also make a statement in regard to this whether the legal group or you personally had this letter, as shown to you, put at your disposal.

A. This letter came to Bormann personally, and in the same way as the preceding letter from Lammers to Bormann which was written by him personally. Group III–C, Bormann–Lammers, was not informed about this correspondence. I have to add something here. Bormann had, after all, two functions. He was leader of the Party Chancellery and he was secretary to the Fuehrer. He stayed almost exclusively in the Fuehrer Headquarters. It was often difficult to find out whether Bormann acted as leader of the Party Chancellery or as secretary of the Fuehrer. In a case like the one here, Exhibit 70, certainly the Fuehrer exercised criticism and to that extent Bormann then acted as the Fuehrer's secretary. He then referred the matter to the State sector via Lammers. In addition, an exterior circumstance must be considered between the Fuehrer Headquarters and the Party Chancellery in Munich; there were thousands of kilometers. For some time the Fuehrer headquarters was in Vinnitsa in the Ukraine. In the immediate proximity of the Fuehrer Headquarters were the field headquarters of Lammers, that is, of the Reich Chancellery. For purely technical reasons the mail went immediately back and forth between the Fuehrer Headquarters and Lammers' field headquarters.

Q. Another interim question, Mr. Klemm. You characterized Bormann in two capacities; one, as leader of the Party Chancellery, and secondly, as secretary of the Fuehrer. This letter

* Reproduced above in section C 2 a.

which I am just showing to you, however, contains the designation Reichsleiter Bormann. Was that a third capacity in which Bormann worked?

A. In contrast to other Reichsleiters, as far as I know, Bormann became Reichsleiter, more or less, in title only. Goebbels, for example, was a Reichsleiter too, because he was in charge of the Reich Propaganda Office. On top of that, he was also Reichsleiter Goebbels, the Gau Leader of Berlin. At the very moment in which Bormann became leader of the Party Chancellery and in addition secretary of the Fuehrer, the concept Reichsleiter did not signify a special office or a special function any more.

Q. That is enough. Since you have described the geographical and technical conditions in which the correspondence went as a rule, I now want to ask you in principle, did you at all receive information about that correspondence which went to Bormann to the Fuehrer Headquarters or which went from Bormann from the Fuehrer Headquarters or which went from Bormann from the Fuehrer Headquarters to other State offices or Party functionaries?

A. That depended. There were several possibilities. Either Bormann answered such letters immediately himself, or those parts of the Reich leader's office which were also in the Fuehrer Headquarters dealt with them. I have already mentioned that sometimes up to three jurists belonged to the Reich leader office who advised Bormann.

A certain proof of the fact that Bormann dealt with a matter himself is the initials "Bo." Very frequently we were not informed about such matters, because often they were put in the files of the secretary of the Fuehrer which did not concern us in the Party Chancellery after all.

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Q. Mr. Klemm, you spoke about several possibilities concerning Bormann receiving letters or sending letters. You said it all depended on the circumstances. I now ask you to explain to the Tribunal further what additional possibilities existed in order to clarify whether you were informed about any measures taken by Bormann or not.

A. The second possibility was that Bormann wrote his decision or his opinion on the margin of the letter and then gave it to the Referent in the Party Chancellery and left it up to him to draft the answer in accordance with the decision he had written in the margin. Whether the answer to the letter then formulated was

signed by Bormann himself, or whether the Referent, his group leader, or the division chief signed it, depended in each case on who signed the first letter.

Q. The documents which I just mentioned were all brought into close connection with your person by the prosecution, apparently solely because the Party Chancellery is mentioned on these documents. I now come to Document NG–412, Prosecution Exhibit 77.* On this, there is your name. The connection with your person is very clear here. It concerns an approval that you gave to a draft of a law which the Reich Ministry of Justice had drafted on order of the Party Chancellery. The contents were retroactive application of regulations concerning treason. I would like to ask you on the basis of what you explained, was this approval given on your own decision or on Bormann's instructions?

A. I did not give this approval by my own decision. In the case of drafts of laws in particular, Bormann always reserved the right to make the decision for himself. In this case the letter concerned, which the Ministry of Justice had, among others, probably also addressed to the leader of the Party Chancellery, was returned from the Fuehrer Headquarters. Probably on the margin it said "approved," or "yes," or "in accordance," those were the words which Bormann used; and since in this letter of the Ministry of Justice a wish of the Fuehrer was referred to which he had expressed already before in discussions, it was quite clear for Bormann that he would agree, and in such a case I could then sign.

Q. This letter of the Party Chancellery is dated 18 June 1942 and also has the file number III–C; that evidently was issued by the legal group. I would like to ask you now to describe somewhat more in detail the sphere of the task of the legal group.

[*Recess*]

Q. We discussed Exhibit 77, that was the approval of the Party Chancellery to a draft or law which was prepared by the Ministry of Justice. I had asked you what matters in the legal group of the Party Chancellery were dealt with by you in addition?

A. I want to summarize the tasks of the legal group briefly. First it had to deal with laws and drafts and decrees of the Reich Ministry of Justice, unless for reasons of their subject, they were dealt with by another group, because that group appeared to be competent. Secondly, penal matters based on the law on insidious acts, as far as on the basis of legal provisions the approval of the chief of the Party Chancellery was required for the prosecution.

* Reproduced below in subsection E.

Thirdly, complaints from Party offices or individuals against decisions by the courts. Fourth, complaints from the administration of justice against interference by Party offices into pending trials. Fifth, to observe especially civil and penal cases which concerned the Party. Sixth, matters of legal reform, and seventh, expert opinions in the field of the Party law.

Q. As for the first group, approval of laws and drafts, was that approval of the Party Chancellery for drafts of law based on a legal foundation?

A. I have already made statements concerning that question when I explained why there was a Department III, the so-called state law and constitutional law department in the Party Chancellery. The chief of the Party Chancellery, on the basis of certain legal provisions in the case of any law or draft or any decree was a minister who had to participate in its drafting, that is to say, he had the same position as a minister participating in legislation.

Q. In discussing the first part of your activities you made the reservation that the legal group in the Party Chancellery dealt only with those drafts which for reasons of their subject did not belong within the competency of another group. Would you please elucidate to the Tribunal what you mean by that?

A. First I have to make a more general reservation. It was not the task of individual groups of Department III or of Department III itself to display any political activity. The Party political elements connected with a problem were to be dealt with by the political offices of the Party. I had listed before the Reich Legal Office, the Office for Agrarian Policy, the Office for Public Health and others. These offices within the Party developed their policies through the Reichsleiters who were in charge of these offices, and did that directly with the Fuehrer. The groups of Department III, and above all not the Legal Group, could not deal with the individually specialized matters to the extent that it would have been necessary. I have already explained that Group III–C comprised four to six officers. That group was balanced in the Ministry of Justice by well over 200 experts. Our tasks—and above all because each individual in that group considered himself a representative of the thought of the Ministry of Justice,—were to prevent difficulties which might arise by some legal arrangement between the Party and the offices of the administration of justice. For instance, in Group III–C, we always were very skeptical to any general clauses which were contained in a draft and laws because such general clauses are the pets of the layman, and he sticks to them because that affords him the opportunity to criticize. That arrangement which was as such provided by law that the chief of

the Party Secretariat always had the capacity of a participating minister, was not agreed to by various sectors of the administration of the State, and thus, for instance, Goering in his various positions which he held at the same time, as Minister for Aviation, as Plenipotentiary of the Four Year Plan, and as chairman of the Ministerial Council for the Defense of the Reich, never stuck to it, and never submitted any drafts. Likewise, the High Command of the Armed Forces never submitted the drafts of laws as far as they concerned the administration of justice, penal regulations, et cetera, to the Party Chancellery. The individual group, however, the legal group could not independently deal with a draft, if problems were dealt with in that draft which did not immediately concern the legal group but in their essence concerned other ministries, for instance, all questions of nationality, were dealt within Group III–A. For instance questions of Poles and Jews, Group III–C, to cite another example, in the field of law concerning hereditary estates, could not decide independently. That was claimed by Group III–B, which was in charge of questions of food, the Food Ministry, to which the hereditary estate court belonged also. I believe these examples should be sufficient.

Q. You had set forth that the various subgroups of III were offices corresponding to the institutions of the State, that you would consider the Ministry of the Interior as analogous to Group III–A. I ask you now since you mention Poles and Jews, the problems of which were to be dealt with by III–A, whether the purpose for that was that as far as the organization of the State was concerned, the Ministry of the Interior took a leading part in dealing with these questions?

A. Group III–A had dealt with these problems because it was the equivalent of the Ministry of the Interior. It was dealt with there only and if on the one side the Ministry of the Interior took the leading part, then Group III–C had nothing to do with those matters at all.

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Q. Then, since you worked in the Party Chancellery, Document NG–151, Prosecution Exhibit 204* was submitted in connection with you. It is a proposal on the part of the Reich Minister of Justice of 3 August 1942, with the designation "Limitation of Legal Remedies in Penal Matters for Jews." On page 108 of the German text, a letter is submitted which has the signature of Bormann. Next to Bormann's signature there is also the file note

* Reproduced above in this section.

"III–C," that is to say, the symbol of the Legal Group [in the Party Chancellery].

I ask you to comment on that and to tell us whether you or your Legal Group had anything to do with that matter.

A. To answer this intelligently, I have to refer to the entire document submitted by the prosecution. The document comprises 25 pages, and that letter from Bormann is put at the end. The entire procedure, however, can be understood only if one puts these various documents in the correct chronological order, for only then can one see how this entire development can be subdivided into three phases.

On 3 August 1942, the Ministry of Justice distributes its first draft, which is draft number 1. The letter of 13 August 1942 shows the approval of the Reich Ministry of the Interior, with supplementary suggestions. In the meantime, however, the Ministry for Propaganda quite apparently, although there is nothing contained in this file about that, has made counterproposals and distributed those to all offices concerned. That can be concluded from the fact that on 13 August—that is to say, on the same day when the Ministry of the Interior first approved proposal number 1 with certain supplementary requests—on the very same day, the Ministry of Justice distributed suggestions for draft number 2, at the same time referring to suggestions made by the Ministry of Propaganda. That draft number 2 was approved on 20 August 1942 by the Food Ministry, which also stated requests for supplementation in its field, that is, in the field of civil administrative law. Then, on 9 September 1942, the chief of the Party Chancellery states his approval, and in that letter also the request is expressed that the suggested draft concerning a restriction of legal remedies for Jews should be supplemented.

As for the second phase, dealing with draft number 2, there are two events to be noted—one, a certain activity of the Reich Chancellery, that is to say Lammers, who suggests to the General Plenipotentiary for the Administration of the Reich, that is, the Reich Minister of the Interior, that he should see to it that these suggestions are adjusted to meet the requirements and then submitted.

And the second is a letter from the Reich Leader SS of 25 August 1942, who suggests a conference regarding draft number 2. On 10 September 1942, the High Command of the Wehrmacht also states its approval, and that second phase of developments ends with the result that the leading part is transferred from the Ministry of Justice to the Ministry of the Interior. The final conclusion of that phase is the letter from the Plenipotentiary for the Administration of the Reich, that is to say, the Ministry of the

Interior to the participating supreme offices of the Reich containing draft number 3. Now the third and last phase of this development starts, and the procedure as submitted in documentary form by the prosecution for more than half a year does not produce any results as far as matters developed. In the documents submitted by the prosecution the only further development is that on 3 April 1943 the Minister of the Interior writes to the Reich Chancellery, that is to say, to Lammers and encloses a letter by Kaltenbrunner from the police of 8 March 1943 where the demand is made that the Jews should be completely removed from the administration of justice. These documents then contain only two further notations of the Reich Chancellery of 6 April 1943 and of 21 April 1943. The first notation deals with a conference between the Under Secretary Kritzinger on the part of Lammers, Reich Chancellery, Stuckart on the part of the Ministry of the Interior, and Klopfer for the Party Chancellery, the Party Secretariat. And the last notice of 21 April refers to a conference of various under secretaries from the Reich Chancellery, Party Secretariat, Ministry of the Interior, Ministry of Justice, and Kaltenbrunner on the part of the police. The result of that conference is what we designate as the 13th decree amending the Reich Citizen Law. The Party Chancellery letter from 9 September 1942 does only refer to draft number 2 of the Ministry of Justice, that is the draft of 13 August 1942. The problem of removing the Jews entirely from the administration of justice and to declare them incapable of inheriting property, that problem was not all under discussion at the time when that letter was written, and the suggestions made in that letter do not represent any change against the fundamental character of that draft. They supplement the draft only to the legal systematic side. In as far as the Party Chancellery suggests that legal remedies should be included, they are suggestions of a minor weight compared to those that are already planned in the draft. According to the draft, limitations were provided to appeals and revision, that is, matters which are directed to the next higher resort. Whereas in the suggestion for supplementation made by the Party Chancellery legal remedies are referred to which are normally directed to the same court in the form of a reminder or a complaint. The next suggestion to limit the right of challenging a judge is the same provision which is also part of the IMT charter. This letter of 9 September 1942 I did not draft. Besides since it was issued more than 1 month after the letter of 13 August, other offices must have participated. Who it was in Group III–C who drafted that letter and who was the referent dealing with the matter I can no longer tell. I cannot even recall ever having seen that letter such as Bor-

mann signed it. It is quite possible that I was away on a duty trip and that my deputy signed it for me.

Q. I believe, Mr. Klemm, that that is sufficient.

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Q. Then, concerning Poles, Jews, and members of the Protectorate, Document 664–PS, Prosecution Exhibit 348,[1] was submitted, that is a circular letter from Himmler with the classification of secret, and was sent to all Reich authorities. Your initial is on that letter because it was received in the Ministry and apparently came to your attention. In this letter it is stated that posters such as "no Jews permitted to enter public places and stores" should disappear. It was no longer necessary to show such practice to the public because the people concerned by evacuating and isolating them were no longer there. I ask you, did that lead you to the conclusion that the Jews were to be exterminated or already, at the time of this circular, had been exterminated?

A. I would never have gotten a thought of that kind. I know nothing about the places in the East. I knew that Jews lived in a city for themselves in Theresienstadt near Leitmeritz. On the contrary, I remember having seen series of pictures in magazines, I believe pictures from Theresienstadt were shown of the Jewish mayor, of the Jewish police, also of the baths and restaurants, and similar things. Also, I believe from Warsaw, such pictures were shown in German illustrated magazines. One could not gather any more from that circular letter than that or conceive the thought that it had anything to do with the extermination or anything similar to it.

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Q. In addition, Document NG–900, Prosecution Exhibit 453,[2] was submitted against you. This concerns a document which treated so-called complaints of descent of Jews. The decisive question in this document is whether you, from the letter which is contained in this document, which was written by the chief of the SD and the Security Police, could gain the conviction that Jews should be exterminated. If you have the document in front of you —it consists of several letters—the first is of 3 May 1944, there the chief of the SD writes to the Reich Minister of Justice in this letter, and the subject is a request for information about reports regarding Jews. Please comment on this.

[1] Circular letter of 10 March 1944, reproduced above in this section.

[2] Reproduced above in this section.

A. In regard to the first question I can only repeat what I have already stated in regard to Prosecution Exhibit 348. No such thought ever occurred to me. Moreover, I only saw the introductory letter of this document on which the Minister had written "V"—which meant "Vortragsanordnung," schedule of report. With that, the matter was taken out of my sphere of activity.

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHAUG[1]

DIRECT EXAMINATION

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DR. KOESSL (counsel for defendant Rothaug): It has been asserted that you had coupled together the Katzenberger and Seiler proceedings in order to exclude the Seiler woman as a witness.[2] What was the situation there?

DEFENDANT ROTHAUG: Under the German Code of Procedure, there are always as many penal proceedings pending as there are defendants. Under certain conditions, such penal proceedings can be tried together for the purpose of uniform trial and decision. That is what we call joinder of penal cases. That joinder may be decided by the court, concerning cases which are pending with it separately. But such joinder may be established by the prosecution itself by one combined indictment. That was what was done in the Katzenberger-Seiler case. The prosecution, by filing one indictment for both defendants, had already established the joinder prior to the files reaching the court. The joinder of the two cases was therefore neither due to a file prepared by me, nor to a file prepared by the court.

Q. Would it have been possible for the prosecutor to proceed differently?

A. Naturally. He could have filed separate indictments. The question was merely whether that would have been correct from the technical point of procedure.

Q. What are the legal provisions on which a joinder of penal cases is based at the Special Court?

A. A joinder is based on article XV, section 2 of the competency order.

Q. When do the conditions exist for a joinder, such as demanded by the law?

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[1] Further extracts from Rothaug's testimony are reproduced in sections V C 1 a, V C 1 b, V E, and V F.

[2] See the opinion and judgment in the Katzenberger case (NG–154, Pros. Ex. 152), reproduced earlier in this section. Rothaug was presiding judge in the Katzenberger case.

A. Such conditions can arise from all sorts of situations. They exist in particular if one offense developed from another offense, and if the judgment has to be based on the same facts. That was the case in the Katzenberger-Seiler affair, which we have been discussing.

Q. What was the reason for the prosecutor to connect the two cases?

A. Both cases, as is proved clearly by the opinion of the court, had to be decided on the basis of the same facts. Therefore, a joinder was altogether natural and corresponded to the customary treatment such as was applied in other cases as well.

Q. What was the legal nature of such joinder?

A. It was purely a measure of expediency.

Q. Is a defendant entitled to ask for not combining his case with that of another defendant because in the case of a joinder he loses evidence?

A. The defendant does not have such a claim. According to the general legal doctrine, which existed prior to 1933, a joinder is admissible even if, as a result of a joinder, one codefendant can no longer appear as a witness. But if it is decisive that the codefendant should appear as the witness, the two cases can be separated after all so as to have an opportunity to examine the codefendant as a witness. But that is left entirely to the discretion of the court, and the defendant has no claim to have that question decided in one definite way.

Q. When several penal cases are combined, does that mean that all possibility is excluded to examine one of the codefendants in the same proceedings as a witness? I would like you to supplement your previous answer and to tell us whether it is possible temporarily to separate proceedings.

A. Such temporary separation is allowed expressly by jurisdiction. Therefore, during one proceeding, temporarily a separation can be ordered. One codefendant can be examined as a witness, and after he has been examined the case can be recombined.

Q. Did anybody at any time—be it the prosecutor, the defense counsel, or the defendant—during the trial make a motion to separate proceedings?

A. Such a motion was not made either at the trial or outside of it by anybody. Not even the mere idea of doing that was ever mentioned, and the reason was that at that time nobody regarded the joinder of the two cases as a defect.

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Q. In the case under discussion, was it likely that the chances of the two defendants might be affected by joining their cases?

A. As I have stated before, the legal position of the defendants could not be affected, and their chances were not affected either. If one had thought that their chances might be affected, I think in that case the two defense counsel would have made a motion to have the two proceedings separated. If one wishes to judge the situation properly, one has to bear in mind the following: that is to say, one has to think of the situation such as it would have been if the Seiler woman had not been a codefendant but a witness. In that case, she would have made no different statements at the trial than she had made at her interrogation under oath before the investigating judge, for she made the same statements as a codefendant, and we had to discuss her statements under oath before the investigating judge from every point of view for the purpose of the verdict. What difference would there have been, as far as our judgment was concerned, if she had repeated the same statements at the trial in her capacity as a witness? The real problems of the proceedings would and could not have been affected in any way by that.

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PRESIDING JUDGE BRAND: Were tickets issued for admission to the trial?

DEFENDANT ROTHAUG: Yes, Your Honor.

DR. KOESSL: I shall come back to those tickets later. What importance had to be attributed to the fact that a trial was held in front of such a large public?

DEFENDANT ROTHAUG: Under the German Code of Penal Procedure, the fact that the public is admitted to a trial constitutes one guaranty that the proceedings will be conducted in an orderly manner.

Q. Did Katzenberger have a defense counsel?

A. Yes, he had.

Q. Was that defense counsel a Jew?

A. Yes, he was.

Q. Did the Seiler woman have a defense counsel, too?

A. Yes, she had.

Q. What sort of a man was the defense counsel for Seiler? Was he a National Socialist, or what was he?

A. I knew him. He wasn't a National Socialist for certain. My impression was that he was entirely uninterested in politics and devoted to his profession.

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Q. Now, we're going to examine the statements by the witness Seiler. The statements by the witnesses Ferber, Seiler, and Dr. Baur* are criticizing your method of conducting the Katzenberger case.

According to the testimony of the witness Seiler, you addressed the audience and said—"The Jews are our misfortune. It is the fault of the Jews that this war happened. Those who have contact with the Jews will perish through them. Racial defilement is worse than murder, and poisons the blood for generations. It can only be atoned by exterminating the offender." (*Tr. p. 1053*).

Did you make remarks of that kind, or of a similar nature, or what exactly did happen?

A. That expression—"The Jews are our misfortune" or "It is the fault of the Jews that the war happened," or "Those who have contact with the Jew will perish through them"—those expressions are well known slogans from the Stuermer, which I think appeared in large letters in every issue of the Stuermer.

PRESIDING JUDGE BRAND: Mr. Witness, the only question before you is whether you used, in substance, the language which was attributed to you. You may answer that question. We are not concerned with who else used the same language.

DEFENDANT ROTHAUG: Neither on duty nor in my private life did I use such generalizations, but the facts which have been discussed here, and which were mentioned in that issue of the Stuermer, concerning all that I would like to give my view on one point. That is the question as to war guilt. I can remember more or less exactly—and that idea is also mentioned in the opinion of the judgment in the same way in which I expressed it at the trial. Naturally, it was not the purpose of the trial to prove that it was the fault of the Jews that war had broken out. The point was, however, this. As is known, both defendants tried to make the situations which incriminated them appear more harmless, as if their relations had been everyday matters. And in that connection, I remember that I put it to Katzenberger that, particularly here in Nuernberg, he must have known that such relations were particularly dangerous even if the relations had been harm-

* These were all prosecution witnesses and none of their testimony is reproduced herein. Their testimony is recorded in the mimeographed transcript as follows: Dr. Karl Ferber, (31 Mar, 1, 3, 8 Apr 47), pages 1312–1315, 1319–1466, 1576–1630, 1665–1746; Irene Seiler, (26 Mar 1947), pages 1025–1057; and Armin Baur, (23 May 1947), pages 3598–3606.

less, because, ever since 1933, he had observed the developments, and then, finally, war had broken out and the Jews were held responsible for the war, and all these events should have caused him to be wise and to abandon relations which were bound to endanger him, even if those relations had been only harmless—and if they had been harmless it would, after all, have been easy to abandon them. That thought of which I made use by way of arguments, both at the trial and in my oral opinion, that thought appeared in the Stuermer. It said, if I remember correctly: "He also mentioned the fact that it was the fault of world Jewry that war had come." *

DR. KOESSL: Now, it has been alleged that in other cases too, you addressed the audience. What were the speeches about? What was the purpose of those speeches?

DEFENDANT ROTHAUG: I am charged with having addressed the audience, particularly in connection with the Katzenberger case. In addition to the generally acknowledged fact that, under the German Code of Penal Procedure, trials have to be held in public, there is also a fact that by the trial this general law consciousness should be deepened—

PRESIDING JUDGE BRAND: We have extended beyond our time for the recess. We'll take 15 minutes' recess now.

[Recess]

DR. KOESSL: Witness, you came to the explanation of the connections where you have made the so-called speeches to the audience. Will you explain the purpose and the connections for making these so-called speeches?

DEFENDANT ROTHAUG: I base myself on the fact that the reason for the trials being public according to the German rules of procedure was that the conscience of law should be strengthened and that the population should be educated in the meaning of the laws. Our sphere dealt with entirely new legislation, new in consideration of the basis on which it was founded and of its purposes; for that reason—and of course one has to consider that this new legislation provided severe and most severe consequences, and that makes it understandable why I—and that was with approval of all interested offices of the administration of justice—was of the position that it was necessary to bring as quickly and as effectively as possible this legislation before the population in order to warn them because that warning in a certain sense is a justification of the severe sentence, particularly the extent of the sentence; and that explains why I had the intention to conduct my trials before the public and as many people as possible and as

* Extracts from the pertinent article in "Der Stuermer" concerning the Katzenberger case are reproduced above in this section (NG–270, Pros. Ex. 155).

broadly as possible. That also explains why it was not only my intention to describe the bare legal facts but the offenses regardless in what field they were committed and to explain them from the point of view of the doctrine of the State and from the points of view of the legal system and the political point of view. The guiding thought for me was that it was our duty, and at the same time, our justification before the public, to explain that the sentence pronounced in any individual case was the direct consequence of the legislation provided therefore. It has to be added that fundamentally according to German rules of procedure, the sentence can only be based on the entirety of the trial; that is to say, that all points of view which are concerned with the penalty or the extent of penalty have to be discussed in all details during the trial because that alone puts the defendant in a position to recognize the main points which may be directed against him; and I also want to emphasize that at no time were lectures made for their own purpose, but that such statements were made in connection with the testimony of the defendant or the witnesses at the time and at the place where it seemed proper.

Q. Ferber charges you generally, and particularly, in the case Katzenberger.

A. I intended to add, that it is therefore quite certain that at that session I also stated my opinion concerning the problem of race defilement on the basis of the doctrine of the State and on the basis of the legal system, and on the basis of our political and legal foundations. That I also discussed the danger in the manner that these things were regarded at that time according to the legal situation, the danger arising from the mixture of races to coming generations, that I consider to be a fact. What words I used and what thoughts I may have expressed in detail in discussing these matters, that, of course, I could no longer tell today. But what I object to is the assertion that these may have been statements of the level of the "Stuermer;" and with absolute certainty I should like to exclude the possibility that in that connection I demanded any physical destruction. That, according to the law, would not have been possible. That, of course, based on the fact of the war which went far beyond any racial point of view.

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Q. The witness Seiler in her direct examination testified that she and the defendant Katzenberger had denied under oath at various times those relations. Was Katzenberger heard under oath?

A. No, he was not heard under oath. That was not admissible under German law because German law holds that the defendant had to be entirely free to use all possibilities for his defense. That is considered a certain guarantee to aid in finding the truth.

Q. The witness Seiler also stated in her direct examination that the judge, Rothaug, used the assumption of her guilt as the basis for the entire conduct of the trial. The reason for that discrimination in her opinion had been that Rothaug did not want to hear any answer. Did you examine the witness Seiler thoroughly?

A. Of course, she was examined thoroughly, and I may point out—and that can be found also from reading the opinion—that this was a so-called case of circumstantial evidence, that a large number of individual situations of more or less importance were compiled in order to make it possible to reconstruct the circumstances which were of importance for the evaluation; and it was always like that, and it was no different in this Katzenberger-Seiler case, that I discussed with the defendants every phase and every little detail; not only in order to completely clarify any particular action, that of course, was the main purpose; but beyond that it was of importance to establish what the point of view of the defendants was, and how they described matters; that is the reason why that matter took a day and a half, and in addition to that, after the examination of every witness who offered something new, again the two defendants were heard thoroughly concerning the new situation. At any rate the evidence which was taken as the basis for the judgment, was discussed in all possible detail.

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Q. Among the judges concerned during the deliberations, was there any doubt about the guilt of Katzenberger?

A. I remember the deliberations very well. That conference was as peaceful as could be; for in the course of the trial, which lasted a day and a half, the entire occurrence, as far as the facts were concerned based upon the statements of the defendants and on what the witnesses testified to, had developed into such a clear picture that there could not have been any differences of opinion; and, after a very short time—and I remember that very well also —we arrived at a decision and actually started to write the judgment down, but considering the importance of the case, we extended the time for deliberations so that the impression should not be given that we wanted to pronounce a hasty decision. There were no difficulties at all, the reason being that the facts themselves were of compelling logic, and that anything else which

was the consequence of the facts just arose from them logically and in the way one had to evaluate those things at that time, and of course, we could not evaluate it based upon any different philosophy.

Q. Which motions were made by the defense counsel?

A. I would like to say with certainty that one of the defense counsel, without being able to tell who it was, made an attempt in the direction of a lenient sentence, and he was trying to combat its evaluation as a serious case, but there was no doubt left about the basic facts in the case. That is the way I remember the case, and it must have been like that; and that was also manifest by the calm deliberations where no points of argument came in existence.

Q. Was any one of the associate judges of a different opinion concerning the extent of punishment? Did any one of them vote against the death penalty, for instance?

A. The core of the question from the very beginning was the following.

PRESIDING JUDGE BRAND: Let me ask you a question. Did all of the judges vote for the death penalty? Answer yes or no.

DEFENDANT ROTHAUG: Yes, absolutely.

PRESIDING JUDGE BRAND: Next question.

DR. KOESSL: At that time, among the jurists around you—but those who were not in direct contact with the case—were there any discussions about that sentence?

DEFENDANT ROTHAUG: In no way at all. That sentence was never criticized in any way or considered doubtful by jurists who were not connected with the case which would normally be possible.

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHENBERGER*

DIRECT EXAMINATION

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DR. WANDSCHNEIDER (counsel for defendant Rothenberger): We come now to a new subject which plays an important part within the scope of national socialism; that is, the Jewish question. Will you please tell the Tribunal quite generally what your point of view is concerning the Jewish question.

* Further extracts from the testimony of defendant Rothenberger appear in sections V C 1 a, V C 2 b, and V C 3 a.

DEFENDANT ROTHENBERGER: Concerning the Jewish question, there were in the NSDAP already before 1933 two factions which opposed each other. One was the so-called Streicher wing which put the racial problem in the foreground. The other wing was the so-called social wing, led originally by Gregor Strasser. Gregor Strasser, already as early as the end of 1932, went into open opposition, and in 1934 was killed together with Roehm. Among the men who emphasized the beliefs of that social group was Kaufmann. That was conditioned by the fact that in Hamburg, of course, social problems played an important role. The Jewish question did not play the same part in Hamburg as in many other parts of the Reich. One reason for that was that on account of a large Portuguese immigration in Hamburg, the connection to western Jewry had been very strong for centuries; particularly the so-called good old Hamburg families are greatly mixed by intermarriage. Furthermore, it was due to the fact that the people of Hamburg are generally more tolerant in their basic temperament.

Another indication of the attitude of the people of Hamburg to the Jews was, for instance, that the display of the so-called Stuermer boxes in Hamburg was prohibited by Reichstatthalter Kaufmann. I, of course, officially and also privately was in close contact with Jews. I knew the advantages and disadvantages of Jewry.

Q. Now, of course, it is known to you, Dr. Rothenberger, that the Party program ambiguously states its position to the Jewish question. I assume you knew the Party program at that time. Could you comment on that as to what thoughts you had concerning the attitude the Party would take to the Jewish question?

A. In the beginning of 1933, I believed that just as in many of the Party platforms many points are made which later do not play an important role. Gradually, however, I realized that the general line became more severe. It is beyond doubt that any German under the influence of propaganda considered a limitation of the Jews in cultural and spiritual life absolutely required, and so did I. But what was generally rejected in Hamburg was any method of violence, any economic exploitation and any kind of hatred. As for the general line, such as it developed gradually in Germany, I could not change anything anymore. In each individual case of my personal and official sphere of influence, individually and from the human point of view, I helped.

Q. In connection with this question, the pogroms against Jews of November 1938 play a part. Will you please state to us what experiences you have made of these pogroms and what your attitude was.

A. On the day before the pogroms—that is the night before—by way of rumor I heard of the intention that Jewish shops were to be looted. There again to obtain information I got in touch with the Reichstatthalter Kaufmann who told me that he had asked for information in Berlin because he had also heard about it, and he had already alerted the Hamburg police too. He had posted them before the Jewish shops so that nothing should happen, and in fact, in Hamburg nothing did happen with the exception of a few individual cases. About that, in the document submitted, NG–629—

Q. I refer to Document NG–629, Prosecution Exhibit 28* which has already been mentioned.

A. It also mentions that due to the attitude of Reichstatthalter Kaufmann, nothing happened.

Q. Will you please discuss now the question of the legal position of Jews, as far as you had to do with it.

A. As for the legal point of view, of course in the course of years many instances of conflict occurred to everyone; also to me. In a meeting in Berlin about various legal questions negotiations were made, and the result of these negotiations as far as it concerns questions of civil law was passed on by me to the subordinate courts. As far as matters of penal law were concerned, it was passed on by the General Prosecutor at Hamburg. The opinion which the Ministry stated at that time in matters of civil law was just about in accordance with my own opinion.

Q. Here again we are concerned with Exhibit 28, which has already repeatedly been mentioned; specifically the point of view of the Ministry which Dr. Rothenberger mentioned and which he shared and passed on to the subordinate officials can be found on the last page of Exhibit 28.

A. If I may be permitted, I would like to point out that during the same press conference I mentioned two further points; one the question of sensational reports in the press about trials, where I promised to get in touch with the competent agencies to see that such sensational reports would have to cease; and the other concerning the speed of signing the sentences. I pointed out that no pressure should be permitted to be exerted on judges so that they should be given an opportunity to work on their opinions in all peace and quiet.

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* Reproduced in part in section V B. This document was also introduced as Document, Rothenberger 3, Rothenberger Exhibit 3.

Q. Dr. Rothenberger, we will now go over to another subject. Now we are going to deal with the beginning of the war. I want to ask you about the Jewish problem which we have already discussed. In what way did the Jewish problem develop after the outbreak of the war, as far as your opinion goes.

A. The outbreak of the war increased the difficulties of the Jewish problem in Germany considerably. The situation became considerably more acute, and in particular under the influence of propaganda. Under that influence, naturally difficult legal conflicts arose as far as the situation of a Jew in court proceedings was concerned. Previously, as Dr. Schlegelberger emphasized, already there had existed separate welfare institutions for Aryans and non-Aryans. There was the NSV for the Aryans, and there were separate welfare institutions for the non-Aryans. For the jurisdiction, that resulted in complete uncertainty on the part of the judges as to the question whether a Jew can be allowed to conduct proceedings without paying costs. There were courts which granted that privilege; there were other courts that did not. I considered that a uniform jurisdiction on these matters was necessary. Naturally I was not uninfluenced by the situation then prevailing; and, therefore, I supported a proposal to the Reich Ministry of Justice that a uniform jurisdiction should be developed to the effect that such privileges were not to be granted to the Jews. The importance of those privileges concerning costs and nonpayment of costs has been characterized by Dr. Schlegelberger who said that the State makes an advance which the person concerned has to pay back, that is to say he is not exempted from paying costs caused by court proceedings. The prosecution in submitting evidence read out a sentence which is supposed to have originated with me. I only want to correct the matter to say that Document NG–589, Prosecution Exhibit 372,[1] shows that that sentence is not mine, but was phrased by the Gau economic adviser. The other exhibits which refer to that question are NG–392—

Q. Dr. Rothenberger, may I interrupt you for a moment so that we can quote the correct exhibit numbers to the Court? They are Exhibit 373,[2] Exhibit 462,[3] and Exhibit 372. Would you please continue?

[1] Reproduced above in this section.

[2] Document NG–392, Prosecution Exhibit 373, is not reproduced herein. It is a situation report of 5 January 1942 from defendant Rothenberger to defendant Schlegelberger. The item of this report concerning privileges of Jews in court proceedings is the following: "VII. The lower courts do not grant to Jews the right to participate in court proceedings in *forma pauperis*. The district court suspended such a decision in one case. The refusal to grant this right of participation in court proceedings in *forma pauperis* is in accordance with today's legal thinking. But since a direct legal basis is missing, the refusal is unsuitable. We therefore think it urgently necessary that a legal regulation or order is given, on the basis of which the rights of a pauper can be denied to a Jew."

[3] Document NG–1106, Prosecution Exhibit 462, reproduced in part above in this section.

A. The only thing I can add is that it happened fairly frequently, and that it appears altogether understandable that the Jews in order to avoid having their property confiscated upon their emigration, transferred their property to somebody else in a fake transaction. Thus, the whole problem became more complicated and more difficult for the courts.

Q. In what way were you concerned with curtailment of Jewish legal rights which emerged in the subsequent period?

A. I had to deal with that question once again in the spring of 1943. At the end of April, Thierack one day asked me to go see him and told me that on the same day a discussion would take place, a so-called conference of under secretaries. That conference was to be held at the Reich Ministry of the Interior. I believe I had no knowledge of those developments until then.

Q. May I interrupt you, Dr. Rothenberger? At the moment we are concerned with Document NG–151, Prosecution Exhibit 204,* which Dr. Rothenberger wants to discuss. This Exhibit 204 is composed of a number of letters in which a draft on curtailment of legal means and legal recourse for Jews is discussed and in which various ministries give their views. Will you tell us, please, whether you had anything to do with that matter?

A. Until that conference I had nothing to do with the previous history. That is due to the fact that the first draft originates from a time before I had assumed office. It is dated 3 August 1942, and it is signed by Dr. Freisler. The second draft is dated 13 August, and that also was before I assumed office. As this was a matter concerning penal law I was not informed about the developments during the subsequent period. As I can see from the documents now, in September 1942 the so-called GBV, the Plenipotentiary General for the Reich Administration—that was the Reich Minister of the Interior—was in charge of the drafting and conference which I have mentioned took place at the Reich Ministry of the Interior.

Q. Would you tell us something about the course of the conference of April 1943?

A. Thierack, before I went to the conference, handed me a draft. That was the draft by the GBV of 25 September 1942. That was already 6 months old by that time because the conference took place in April 1943. I was annoyed anyhow that I was now to deal with a matter the previous history of which I did not know. I had a look at the draft in Thierack's office and when I had

* Reproduced above in this section.

read it, I said to him that I was against such far-reaching restrictions.

What seemed embarrassing to me, in particular, was the provision that if the Jew was not to swear an oath, he was yet to be punished for perjury. Thierack said to me that doesn't matter. In his somewhat brusque and curt manner he said, "You will have to go there, for I am the minister and I cannot attend a conference of under secretaries." That, as a matter of fact, was not the custom. I went to the Reich Ministry of Interior. To begin with, I maintained reserve, because I had not dealt with the matter beforehand. Then I heard from the others who were present there that they too were against such an ordinance. Thereupon, I said that that was my personal opinion, too. Of course, I could not say as to the minister's decision. He was in favor of it, as he had told me beforehand.

Then the provisions of that draft were dropped. Only one person who was present objected; that was Kaltenbrunner. Kaltenbrunner said he had to attach a decisive importance to at least two provisions becoming law. He was referring to 2 provisions which, in effect for some time, had already been applied, which however, required subsequent legalization. One provision was that the property of a Jew who dies goes over to the Reich. He said—as is evident in detail from the exhibit—that until now Jewish property in the case of death had been regarded as so-called property of an enemy of the State and had, therefore, been confiscated all along. But he would like to have a legal provision, because that would constitute a technical administrative simplification.

That provision, as I see from the file, had not been incorporated into the draft before by the Reich Ministry of Justice, but by the Reich Ministry of Interior. It appears for the first time in the draft of 25 September 1942. The Ministry of Justice, thus, did not deal with it. The second provision—

PRESIDING JUDGE BRAND: Would you mind telling us what happened to that provision?

DEFENDANT ROTHENBERGER: Yes. That provision did become law afterward. Yes, I meant to say that.

The second provision which Kaltenbrunner wanted to become law and considered necessary was a provision, which has already been discussed here, and it concerned handing over the penal jurisdiction over Jews from the administration of justice to the police. As far as I was concerned that resulted in an entirely new situation, for that provision was not contained in the previous draft. I felt I could not assume any responsibility for such a provision, all the more so as I had no formal competence for penal matters.

I would have to report to the minister as I had been requested by him to do.

DR. WANDSCHNEIDER: Did you make a report to Dr. Thierack?

DEFENDANT ROTHENBERGER: I went to see Thierack on the same day, and I told him that he had now for the second time confronted me with a very embarrassing situation, by bypassing me in a fundamental question of the administration of justice which did not concern me formally, but which concerned me as a jurist and as a human being. I could not assume the responsibility and I offered him my resignation.

Thierack was very angry and said, "I shall decide the day when you will leave the office." In saying that, he referred to the compulsion to which all of us were subject in time of war, that is to say, the compulsion of not being able to leave our service voluntarily.

He then added ironically, "For the rest—in the future you will have nothing to do with penal matters even when I am away for I have already asked Lammers to appoint a second under secretary,[1] and I shall get some help that way." I mentioned these facts briefly in another connection this morning.

Subsequently I had nothing to do with the ordinance. I merely read that later, on the first of July 1943 with both provisions; it took effect. I felt unfree, and from that time on I stuck all the more to the one task, which still remained to me, that is, the task of the administration of justice proper; the strengthening of the judiciary.

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CROSS-EXAMINATION

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MR. KING: Dr. Rothenberger, the document which has been placed before you is NG–1656 [Pros. Ex. 535].[2] It is an information for the Fuehrer report. I would like to, with your concurrence, read it. You say—"After the birth of her child a full-blooded Jewess sold her mother milk to a pediatrician and concealed the fact that she was a Jewess. With this milk babies of German blood were fed in a nursing home for children. The accused will be charged with deception. The buyers of the milk have suffered damage for mother's milk from a Jewess cannot be regarded as food for German children. The impudent behavior of the accused is an insult as well. Relevant charges, however, have

[1] In January 1944, at Thierack's request, defendant Klemm was made Under Secretary.
[2] Document NG–1656, Prosecution Exhibit 535, above, earlier in this section.

not been applied for, so that the parents who were unaware of the true facts need not subsequently be worried."

Do you recall the origin of this particular document?

DEFENDANT ROTHENBERGER: I do not remember the facts. It is quite impossible that I wrote this, because I never drafted the Fuehrer Information. I do not even remember whether it ever came to my attention later. I ask to be shown the original of that Fuehrer Information.

Q. I will be very happy to do that, Dr. Rothenberger. Is that your initial?

A. That shows that I have seen it later, but not at all that I was the author. It can be seen from the original, naturally, that the Fuehrer Information had neither a date nor a signature and the Fuehrer Information also shows that there is a notation on it "to the Under Secretary"—for information, that means. As I can see from the initial, it apparently came to my attention without, however, identifying myself in any manner with the contents of that Fuehrer Information.

Q. Have you finished, Dr. Rothenberger?

A. Yes.

Q. Your feeling, of the moment, is that you had nothing to do with the authorship of this document?

A. I consider it quite impossible that I would have identified myself even at that time with such an opinion.

PRESIDING JUDGE BRAND: I have a question of information. Would your initials have been placed on it before or after the distribution of the document?

DEFENDANT ROTHENBERGER: Whenever such Fuehrer Informations were sent out—and I cannot see that that was the case—then they were afterward brought to my attention.[1]

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EXTRACT FROM THE TESTIMONY OF DEFENDANT OESCHEY[2]

DIRECT EXAMINATION

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DR. SCHUBERT (counsel for defendant Oeschey): I am now coming to the subject of violent criminals and the first case I want

[1] Further testimony of defendant Rothenberger denying knowledge of "final liquidation" measures of Poles and Jews is reproduced in section V C 3 a.

[2] Complete testimony is recorded in the mimeographed transcript, (9, 10, 11, 12, and 15 Sep 1947), pages 8510–8548, 8559–8805.

to refer to is the case of Kaminska and Wdowen. The prosecution introduced Exhibit 201, which included extracts from the official files.[1] The prosecution also introduced affidavits, Prosecution Exhibits 229, 235, and 635.[2] Finally there is the witness Gros[3] who was heard on those cases (*Tr. p. 2828*). Please comment on it.

DEFENDANT OESCHEY: The account given of that case by the witnesses who were heard on it gives the impression as if Kaminska had been convicted merely for having thrown that stone, but that was not the case.

What was of great significance were the events which had preceded that attack which are not mentioned by the witnesses, but which were the factors which made that case so grave that led to its being evaluated as the crime of a violent criminal.

The witness, in giving an account of that case, omitted to mention that the offense began with an act of blackmail committed by the two defendants for they approached their employer, whose name was Gundel. He was an old weak man. They asked Gundel for money to which they were either not entitled at all or to which their title was extremely doubtful. And when Gundel asked that they should give him some more time, they tried to force him to give them the money by attacking Gundel, that is to say, the defendant Wdowen attacked Gundel and slapped his face. That explains why Private Wanner appeared on the spot and intervened. That factor, too, was omitted by the witnesses and that is why it was not made clear that Wanner came to the aid of Gundel and in doing so Wanner limited himself to asking the two defendants to leave Gundel's room. But the witnesses omitted to mention that the two defendants now assaulted Wanner who after all had behaved absolutely correctly, and Kaminska when Wanner had been able to ward off the first attack took up a hoe and tried to attack Wanner with that hoe, and Wanner was only able to evade that blow by showing presence of mind and closing the door which happened to be between him and Kaminska. Shortly after Kaminska threw a stone—

PRESIDING JUDGE BRAND: Wait a minute. If I remember correctly, you are merely reviewing now the findings which are con-

[1] From these official files only the opinion and sentence of the Nuernberg Special Court has been reproduced herein. See Document NG–457, Prosecution Exhibit 201, reproduced in part above in this section.

[2] Actually only the first two of these three exhibits are affidavits. Document NG–650, Prosecution Exhibit 229, is an affidavit of Associate Judge Dr. Franz Gros. Document NG–635, Prosecution Exhibit 235, is an affidavit of Associate Judge Dr. Theodor Pfaff. Gros and Pfaff were the two associate judges sitting in the Kaminska-Wdowen case with defendant Oeschey. Both were called as witnesses before the Tribunal. (Gros, 30 Apr 1947, tr. pp. 2826–2882) (Pfaff, 27 May 1947, tr. pp. 3642–3650). The third mentioned exhibit, Document NG–2245, Prosecution Exhibit 635, is a newspaper clipping of 25 August 1942. None of these three exhibits and none of the testimony of Gros and Pfaff is reproduced herein.

[3] Associate Judge Dr. Franz Gros. In addition, the second associate judge was also heard. See footnote 2.

tained in the transcript of the case and which is in evidence. We have examined that.

DEFENDANT OESCHEY: I merely wanted to explain that the whole of that action did not consist of isolated facts but that it is necessary to evaluate all those facts together in order to comprehend the legal evaluation of the offense as a whole.

DR. SCHUBERT: Witness, I now ask you to tell us what was the nationality of those two defendants.

DEFENDANT OESCHEY: Wdowen's nationality I am afraid I can't remember. The Kaminska woman was a Pole. Anyway, I don't think Wdowen was a Pole.

Q. Well, what was he?

A. He was a Ukrainian.

Q. On the basis of what provision did the prosecution file its indictment?

A. The prosecution filed an indictment on the basis of part I, section 4, Number 1 of the law against Poles.[1]

Q. Against whom?

A. Against both defendants. If I am right—well, I am not quite sure whether my memory serves me well—(document handed to witness). Against Kaminska the indictment was based on part I, article 4 of the law against Poles and with Wdowen it was based on a crime of having aided in somebody else's crime, articles 4 to 7 of the law against Poles. Also she was convicted on the basis of having offended against article 4 of the public enemies law.

Q. You saw that in the official court files?

A. Yes, I saw that from the original files of the Nuernberg Special Court, SG 256/43.[2]

Q. Both the witnesses Pfaff and Gros today draw back from this judgment.[3] Gros said that he voted against it. Pfaff wasn't clear in what he said about it. My first question to you is this. Did you in any other case announce a judgment without having had at least one associate agree with your view, as provided by law?

A. No, I never did that.

[1] Decree concerning the Administration of Penal Justice against Poles and Jews in the Incorporated Eastern Territories, 4 December 1941, reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 632.

[2] SG 256/1943 is the file number of the Kaminska-Wdowen case. See Document NG–457, Prosecution Exhibit 201, reproduced in part above in this section.

[3] Counsel refers to the two associate judges in the case, both of whom testified in the justice trial.

Q. Did you force Gros and Pfaff to agree with you in passing the death sentence on these defendants?

A. In this case they were as free in their decision and in their opinion as I left them in every other case.

Q. What did the court say of the offense against the woman, Kaminska? Was the decision in accordance with the indictment?

A. No. The court did not convict Kaminska under article 1, section 4, No. 1 of the law against Poles and among us judges there was a fairly long discussion on that point. That is to say, we debated the question as to whether the offense of Kaminska could be sentenced under the provision of the law against Poles which I have just mentioned. As far as I remember the associate judge, Pfaff, was inclined to answer that question in the affirmative. Gros, as well as myself, however, had doubts about that. That legal provision assumes that the violent crime was directed against a member of the armed forces in which case the death sentence becomes mandatory. But in view of the entire facts of the case it appeared doubtful whether Kaminska, in committing her offense, had realized at all that the person she was attacking was a member of the armed forces. According to the facts, that element did not play a part. In the view of Gros and myself, therefore, the elements needed for convicting a defendant under part I, section 4 of the law against Poles were lacking. The further examination had to discover whether the offense was to be sentenced under article I of the decree against violent criminals of 5 December 1939.* That question, too, we debated at great length and that is a point which I remember. We scrutinized quite a number of decisions made by the Reich Supreme Court and studied a number of commentaries. As far as I recollect, neither of the associate judges had any doubts about that view.

With these Reich Supreme Court decisions the legal questions had been clarified beyond all doubt.

Q. Witness, is it correct that Kaminska was not convicted under the law against Poles?

A. Kaminska, as the law against Poles prescribes in paragraphs II and III, was convicted under the decree of 1939, the decree against violent criminals, which applied to all violent criminals in Germany, and she was convicted under that law as concerns the question of her guilt as such and as concerns the sentence.

Q. The witness Gros testified that she had been convicted for racial and political reasons. What do you have to say to that?

* Reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 193.

A. That is altogether untrue. The decision was based solely on the logical application and interpretation of the law in accordance with the decisions of the Reich Supreme Court while taking into consideration the particularly difficult and dangerous conditions prevailing in the rural districts in wartime. Such points of view as those of race and biology and whatever else you may call them, as I pointed out yesterday, played no part whatsoever in any of my decisions and judgments.

Q. And you will now tell us something about the Wdowen case. The witnesses Gros and Pfaff evidently tried to minimize that offense. What do you have to say to that?

A. The facts of the case can be seen from the judgment which is available to the Tribunal, and I therefore need not to go into any detail. Apart from the fighting and the aid given by Kaminska, this was a very violent and altogether unusual attack against the policemen; it was a kind of attack on the policeman who had arrested the Kaminska woman, and Wdowen was trying to get the policeman to release his grip on Kaminska. Gros and Pfaff as witnesses disputed that fact; one can only refer to the fact that Wdowen himself never disputed his own intentions and his motives.

Q. What was the legal evaluation of the Wdowen offense?

A. That offense by Wdowen was considered by the court as a crime under article IV of the decree against public enemies* and the indictment had given the same evaluation. I should like to point out that assaults of that nature against police officials ever since the beginning of the war, and that is by all courts who tried such crimes, had been sentenced under the same provisions, that is to say under article IV of the decree against public enemies. As a rule, the Wdowen case is by no means an exception. The need to protect particularly rural districts and the need which became greatly increased due to the wartime conditions, and such need for protection was due to the fact that the police was very short of staff, and, because of all that, an attack of that kind on the police—who worked under very difficult conditions—always resulted in a very severe penalty.

Q. Was the law against Poles applied in the Wdowen case?

A. No, it wasn't. Only article IV of the law against public enemies.

Q. Was the Wdowen case the subject of differences of opinion at the consultations?

* Decree of 5 September 1939, reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 188.

A. As far as I remember, it wasn't.

Q. Did the prosecution consider both defendants as meriting the death sentence?

A. The prosecution from the very beginning considered that the death sentence should be asked for both defendants, and accordingly, it informed the Reich Ministry of Justice before the indictment was filed. The Reich Ministry of Justice concurred with the view of the prosecution and approved it.

DR. SCHUBERT: I am now passing on to the next case of violent criminals.

* * * * * * *

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ALTSTOETTER[1]

DIRECT EXAMINATION

* * * * * * *

DR. ORTH (counsel for defendant Altstoetter): Do you remember Prosecution Exhibit 204, Document NG–151?[2] That document is concerned with the events which lead up to the 13th decree concerning the Reich Citizenship Law.[3]

DEFENDANT ALTSTOETTER: Yes.

Q. In article II of the draft, it was provided that when a Jew died his property was forfeited to the Reich and that for non-Jewish heirs and persons who were entitled to alimony, a hardship clause should be added, is that correct?

A. Yes.

Q. The treatment of hereditary provisions according to the plan for the distribution of work was to be dealt with by Department VI of the Ministry of Justice.[4] In connection with the intended contents of the provisions in article II of the draft, could that not justify a conclusion that you and your department had something to do with that decree?

A. No, the order that Jewish property was to be forfeited to the Reich in case of death of a Jew was not a hereditary ruling. It was a matter of police confiscation and that concerned only the

[1] Complete testimony is recorded in mimeographed transcript, 15 and 16 September 1947, pp. 8841–8962.

[2] Reproduced above in this section.

[3] Decree of 1 July 1943, reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 685.

[4] The defendant Altstoetter, as this time a Ministerial Director, was Chief of Department VI of the Reich Ministry of Justice. Department VI was concerned with civil law; commercial and economic law; racial legislation; public administrative law and international law; international law and international treaties; constitution of the courts; and administration of civil law.

Ministry of the Interior and only that Ministry was responsible. That is evident too from the document itself and that from the final draft, no, not the final draft, the draft before the final draft, which shows that the provision of article II, section I, originated with the Ministry of the Interior.

Q. I am now going to show you the text of the 13th amendment of the Reich Citizenship Law. Please have a look at article II of the decree. On the basis of this provision, do you have further indication that Department VI did not have anything to do with the promulgation of this decree?

A. Yes, the wording of these provisions, already in article I, because if Department VI, I mean the section that dealt with hereditary law, had had anything to do with this decree, they would have chosen the version which existed in the civil code for hereditary rights of the State [Fiskus]* which is provided there for special cases. I am referring to article 1936 in the civil code, which has always existed. Furthermore, the provisions under article II shows that hereditary rights of Jews and non-Jews, [benefiting from the will] of a deceased Jew as such were not affected. Otherwise, one could no longer have spoken of persons entitled to inherit. According to that provision, or rather in spite of that provision, for example in the case of a mixed marriage, the Jewish partner of the marriage could be or become heir to the non-Jewish partner. In the case of hereditary settlements, provisions would have had to be made concerning the rights of third persons, that is to say, non-Jewish subsequent heirs. Furthermore, we would have had regulations concerning the legal validity of transactions among living people, concerning the part of the estate not comprised by inheritance regulations. Section II also mentioned non-Jewish persons entitled to receive support from the deceased, although generally in the case of death any obligation to look after the maintenance of third persons comes to an end.

Q. If Department VI had had anything to do with the 13th decree, what Referent of the Department would have dealt with it?

A. Ministerialdirigent Dr. Hesse, Ministerial Counsellor Rexroth, or Ministerialdirigent Dr. Stagel would have dealt with it in that case.

Q. Did Department VI have anything to do with the handling or carrying out the 13th decree?

A. No.

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* The State in its capacity as carrier of rights and duties of a financial-legal nature.

Q. Did you or Department VI at a later time have anything to do with the handling of Jewish hereditary law?

A. Yes, in 1944 the Minister of the Interior approached the Reich Ministry of Justice with a request concerning an executory order of the 13th decree, to incorporate in it provisions, which were to change or amend article II of the Reich Citizenship Law. the ministry of the Interior had recognized that article II had certain defects, and therefore asked us to find a solution concerning the hereditary law. I objected to this request from the Reich Ministry of the Interior, although the Minister of Justice was of different opinion.

Q. Do you know how that matter developed further?

A. As for the details of the subsequent development I do not remember them, but one thing I remember for certain, Hesse, with my consent, when Thierack the Minister of Justice had declared himself ready to collaborate in the preparation of this executory order, contacted the competent Referent of the Ministry of the Interior, and convinced them that the provision, purely technically, for the Reich Ministry of Interior, amounted to a basic change of the previous decree, that is to say the 13th decree. He also told them that we didn't want to have anything to do with this matter. The Ministry of the Interior then withdrew its request, and I was told by Hesse that the matter of a Jewish hereditary law would now be dropped. In effect, an executory order in connection with the 13th decree concerning the Reich Citizenship Law was promulgated on 1 September 1944, and that by the Ministry of the Interior alone without any participation of the Reich Ministry of Justice and without incorporating the provisions concerning article II of the 13th decree, which had originally been requested.

Q. In summing up, Witness, I should like to ask you, is it correct that Department VI, during your term of office, did not participate in the making and carrying out of laws concerning confiscation of Jewish property and that during that time legal provisions about the exclusion of Jewish hereditary rights were not issued?

A. Yes, that is true.

PRESIDING JUDGE BRAND: May I ask you concerning that. I am wondering if I have the correct understanding of your testimony. Do you intend to say that this 13th decree did not change the previous law of inheritance, the rights of inheritance, but that the only effect was to provide for police confiscation, is that right?

DEFENDANT ALTSTOETTER: Yes, yes, quite. That is my opinion.

Q. Well, was it your opinion that the provision for police confiscation was invalid?

A. Invalid? Invalid, no, not invalid.

Q. The courts which had to do with matters of inheritance in general were courts with which your department had dealt, were they not?

A. Yes, Your Honor.

Q. Well, when a question of inheritance under the general law came up in the courts in which they were confronted with this 13th decree concerning police confiscation, what did the courts do?

A. I got to know of only one single case which may be connected with this problem, and I am thinking of a case of recognition of the right of subsequent inheritance. The district court of appeals and the seventh civil senate of the Reich Supreme Court at the time decided that the right of subsequent inheritance remained legal and that regardless of the provisions which had been issued in connection with the Jewish problem, the estate, if a case of subsequent inheritance occurred, would have to be passed on to the subsequent heir. Other cases, I do not remember.

Q. Was that the equivalent or did it amount to holding that the decree for police confiscation was invalid?

A. I am sorry. I did not understand.

Q. The Supreme Court apparently refused to apply the provisions of the decree for police confiscation, did it not?

A. I can't say for certain. If I remember rightly the Reich Supreme Court, concerning the question of the validity of that decree did not express its opinion at all.

Q. Well, it didn't enforce the decree, did it?

A. No, the Reich Supreme Court said, the subsequent heir who comes after the immediate heir is not affected by that decree, and therefore, his rights remain his rights.

Q. And who was the subsequent heir? Was he a Jew?

A. All I remember is his name. Whether he was a Jew I don't know, but I don't think he was. Probably he was non-Jewish.

Q. Well, what was your opinion as to what a court could do when the law of inheritance provided that one person should receive the Jewish estate and that the decree for police confiscation provided that the property should be confiscated?

A. In practice it was like this. The law of inheritance remained as it was from the point of view of legal theory; but the property

left by a Jew which was forfeited to the Reich when the Jew died, however, no longer existed.

Q. It existed. You don't mean it vanished in the air? You mean it was—

A. No, that is to say, it had now gone to the police or to the finance office, they had now taken into their hands the property left by the Jew.

Q. Then I take it in practice the courts did not enforce what you have stated would be the valid law of inheritance?

A. I assume that such cases did not come before the courts.

Q. Well, didn't matters of inheritance in general as to the Germans come before the courts?

A. Yes, yes they did.

DR. ORTH: I think that is all.

* * * * * * *

DR. ORTH: Please explain briefly to the Tribunal what one understands under German law by "matters of descent."

DEFENDANT ALTSTOETTER: The fact that from the biological point of view a certain man has fathered a certain child is under the German civil code, the decisive criterion for the status and the legal position of the child, and therefore, also for the rights and claims of such a child. However, as we know, it is frequently difficult to establish the true biological descent of a child, and it was particularly difficult at the time of the promulgation of the civil code. Pursuant to the achievements of biological science, the German legislator had established certain legal suppositions concerning the legal descent. On the basis of those provisions the biological descent and the legal descent not infrequently appeared to be different. As science progressed, in particular in the field of biochemistry, hereditary biology, and anthropology, after the civil code had come into force, more and more reliable methods of science were discovered in order to prove or at least exclude biological descent of a child from a certain father. As a result, litigations between father and child became more and more frequent concerning the true biological descent, that is to say, concerning the question as to whether the legal father was also, biologically speaking, the child's father.

Under German law, all those cases of litigation are described as matters of descent. A partial complex is formed by those cases where Jews and persons of mixed descent, in the majority already adults, wanted the matter clarified in a court for themselves or their progeny, that contrary to the legal supposition, biologically

and consequently also legally, they were not—or, at any rate, not to the extent that had been assumed—the children of a Jew or a person of mixed descent.

* * * * * * *

PRESIDING JUDGE BRAND: Could you tell us in a few words what, if anything, your Department VI had to do with matters pertaining to descent cases such as you have described them?

DEFENDANT ALTSTOETTER: Those descent cases played a great part from the point of view of my department exercising supervision. I shall revert to that matter quite briefly.

Q. Over whom or over what did you exercise supervision?

A. The Ministry of Justice, because of the treatment to be accorded to such descent cases constantly received complaints, in particular, complaints stating that these proceedings never made any progress. Furthermore, and I shall revert to this, too, we received complaints—

Q. That doesn't answer my question. I am sorry to interrupt you. Your department exercised supervision in matters pertaining to descent. Over whom did you exercise supervision?

A. We had that supervision over the courts and over the public prosecutors.

* * * * * * *

DR. ORTH: Witness, will you please comment again on Exhibit 453?*

DEFENDANT ALTSTOETTER: Here I have to say first, briefly, that the descent cases which I have just mentioned, especially the right of the prosecution to raise charges in descent cases, since the so-called laws concerning Jews were issued, were used as a means for Aryanization as we called it. In cases, that is to say, where a man who according to the law was considered to be a Jew was of the opinion that he was not to be considered a Jew, he himself filed a claim for the establishment of the fact that he was not a Jew, that is, that he was not a descendant of a Jew. Or if his right to file that claim or the right of his father to do so no longer existed because the term to do so had expired, he went to the public prosecutor to make the public prosecutor file this claim. The latter was the case when a suit was filed in order to challenge the legality of a marriage. Now in cases where these claims were filed in the course of the war, particularly during the last years of the war, considerable difficulties arose. I only want to mention two, but

* Document NG-900, reproduced above in this section.

there were more of those. One was the lack of experts in the field of genetics which was caused by the war. The other reason was the thing that had occurred with the courts in Vienna. In other courts it did not occur, as far as I know. There in Vienna a particular difficulty arose owing to the fact that the police, as far as Jewish witnesses for these descent trials were concerned—in most cases it was a question of so-called witnesses for the investigation or witnesses for the purpose of comparison—that the police, as I said, for reasons of security had removed these witnesses and now refused to produce them or to release them. That can be seen from the letter of the police of 3 May 1944, which is in this exhibit. Objections against the attitude of the police which were raised by the subdepartment chief, Ministerialrat Rexroth, in the course of a conference with a Referent, were only successful to the extent that the police consented in exceptional cases to produce witnesses if the Reich Minister of Justice expressly demanded that. Moreover, the police referred to the lack of means of transportation and escort personnel caused by the war. With matters as they stood, the Reich Ministry of Justice could do nothing else but to bring them to the attention of the courts in Vienna through the president of the district court of appeals. For the people concerned who desired to carry out by that suit, as I have called it, an Aryanization, the fact that these witnesses were not produced as a rule did not amount to any disadvantage. The persons concerned on their part, either if they had instituted the proceedings themselves in their own interest or if they had requested of the public prosecutor to institute proceedings, had themselves presented to the public prosecutor evidence for their assertion that they were not descendants of a Jew or a person of mixed Jewish descent. And if the court could not produce the expert opinions of geneticists which officially had to be produced and for which these witnesses for the purpose of comparison were needed, then the court could do nothing else but on the basis of the evidence which the Jews concerned had submitted, to decide, and that this evidence was in favor of the person filing the claim is obvious. And to that the remarks in Exhibit 453 refer, that one had to put up with it if in this manner the intentions to cover up for the true descent could not be prevented.

Q. Witness—

PRESIDING JUDGE BRAND: Let me ask you this. Concerning these claimants suspected of being Jews but claiming to be Aryans, how far back did they have to trace their ancestry to prove that they were Aryans?

DEFENDANT ALTSTOETTER: They were not compelled to go far back. It sufficed to prove that either one of the parents was not

Jewish, and if that could not be proved, they also could refer to the fact that other ancestors of theirs were not Jewish. The question as to whether a person was a Jew or was not a Jew was laid down in the meaning of the Nuernberg laws, these laws and the decrees to carry out these laws. But the suits themselves were not concerned with that, but subsequently the main thing was whether—

Q. Did they have to prove that their grandparents were not Jewish?

A. Mr. President, we have to distinguish here—

Q. Just tell me yes or no first, and then you may distinguish. Here is a man who claims he is an Aryan. He wants to prove it. What of his ancestors must he prove were not Jews? Can you answer?

A. Framed in this way, as far as these suits were concerned, I cannot answer the question because as far as these suits were concerned that question was of no importance.

Q. Was he an Aryan if his grandfather was a Jew?

A. He had two grandfathers and two grandmothers.

Q. Yes.

A. And there the distinction was made, but according to the Nuernberg laws, which were only of interest before the administrative authorities and not for these trials, the distinction was made whether he was one-eighth, one-fourth, or one-half Jew, that is to say, a person of mixed descent of that degree, or whether he was a full Aryan. But I say that that is a question which for carrying out these descent cases was of no importance.

Q. Will you tell me then, and do it briefly, because I know you can, what did the person have to prove in order to establish in a descent case that he was an Aryan?

A. It was established, Mr. President, that contrary to the legal assumptions, he was not the descendant of that and that father. Nothing else.

Q. That is, that he was not the descendant of his purported father.

A. Of the purported father according to the legal assumption.

Q. That is, if the father was a Jew.

A. If the father was a Jew.

Q. Then he had to prove he was a bastard. Is that what you mean?

907802—51——51

A. Yes. If it was at all a question of legitimacy. There were such cases of descent also outside of marriage, illegitimate. These descent cases were not restricted to Jews. There were not at all any special regulations for Jews.

* * * * * * *

3. NATIONALS OF THE WESTERN OCCUPIED COUNTRIES—THE NIGHT AND FOG DECREE

TRANSLATION OF DOCUMENT 671-PS
PROSECUTION EXHIBIT 304

LETTER FROM KEITEL, CHIEF OF ARMED FORCES HIGH COMMAND, TO MINISTRY OF JUSTICE, 12 DECEMBER 1941, TRANSMITTING HITLER'S NIGHT AND FOG DECREE AND ITS FIRST IMPLEMENTATION ORDER; INTEROFFICE MEMORANDUM REQUESTING TRANSMITTAL OF THE LETTER TO DEFENDANT SCHLEGELBERGER

Chief of the Supreme Command of the Armed Forces
14 n 16 WR (I 3/4)
No. 165/41 g

(When answering, please refer to above file number, date and subject.)

Berlin W 35
12 December 1941
Tirpitzufer 72–76
Telephone: Local: 218191
Long distance: 218091
12/Hz

[Stamp] Secret

To the Reich Minister of Justice

Attention: Under Secretary Dr. Freisler

Subject: Prosecution of criminal offenses against the Reich or the occupying power in the occupied zones

3 enclosures

With regard to the oral conversation between Under Secretary Dr. Freisler and the chief of my legal section,* I enclose herewith a decree of the Fuehrer and Supreme Commander of the Wehr-

* Lieutenant General Rudolf Lehmann was head of the armed forces legal section. Lehmann also had the title of judge advocate general (Generaloberstabsrichter) and Ministerialdirektor. Lehmann, whose name comes up in ensuing documents, was sentenced to 7 years' imprisonment by Tribunal V in the High Command Case. Extracts from Lehmann's testimony concerning the Night and Fog decree appear near the end of this section and more lengthy testimony by Lehmann on the same and related subjects appears in the materials on the High Command Case, United States *vs.* Wilhelm von Leeb, et al., Volumes X–XI, this series.

macht of 7 December 1941[1] and an order for its execution of the same day.[2] I agree with the opinion of the State Secretary that the execution of the Fuehrer decree necessitates a close cooperation between the Reich Ministry of Justice and the Supreme Command of the Wehrmacht.

I instructed my officials to assist your agencies in every respect. I ask you to settle the question regarding the manner of imprisonment in your provision for the execution of decree.

[Signed] KEITEL

Action taken by II a 118 and 119/42 g

II a 116/42 g
3 enclosures

12

received 26/1
SCH [Schlegelberger]

Ministerialrat Dr. Gramm, State Secretary Dr. Freisler asks to transmit the enclosed letter to State Secretary Dr. Schlegelberger for his information

[Signed] VON HACKWITZ
19 January 1942

PARTIAL TRANSLATION OF DOCUMENT 1733-PS PROSECUTION EXHIBIT 303

SECRET NIGHT AND FOG DECREE OF HITLER, SIGNED BY KEITEL, 7 DECEMBER 1941, CONCERNING MEASURES TO BE TAKEN AGAINST PERSONS OFFERING RESISTANCE TO GERMAN OCCUPATION

Secret

The Fuehrer and Supreme Commander of the Armed Forces

Directives for the Prosecution of Criminal Acts against the Reich or the Occupying Power in the Occupied Territories of 7 December 1941

Since the beginning of the Russian campaign, Communist elements and other anti-German circles have increased their assaults against the Reich and the occupation force in the occupied territories. The extent and the danger of these activities necessitate the most severe measures against the malefactors in order to

[1] This decree was the Night and Fog decree (1733-PS, Pros. Ex. 303) reproduced immediately below.

[2] This implementation decree is contained as the enclosure to Document 669-PS, Prosecution Exhibit 305 reproduced below after the Night and Fog decree.

intimidate them. To begin with, the following directives should be observed:

I

In case of criminal acts committed by non-German civilians and which are directed against the Reich or the occupation force, endangering their safety or striking force, the death penalty is indicated in principle.

II

Criminal acts contained in paragraph I, will on principle, be tried in the occupied territories only when it appears probable that death sentences are going to be passed on the offenders, or, at least, the main offenders, and if the trial and the execution of the death sentence can be carried out without delay. In other cases the offenders, or, at least, the main offenders, are to be taken to Germany.

III

Offenders who are being taken to Germany are subject to court martial procedure there only if particular military interests should require this. German and foreign agencies will be told upon inquiries on such offenders that they were arrested and that the state of the proceeding does not allow further information.

IV

The commanders in the occupied territories and the judicial authorities, within their jurisdiction, will be personally held responsible for the execution of this decree.

V

The Chief of the High Command of the Armed Forces will decide in which of the occupied territories this decree shall be applied. He is authorized to furnish explanations, to issue supplements, and implementation directives. The Reich Minister of Justice will issue implementation directives within his jurisdiction.

BY ORDER:
The Chief of the High Command of the Armed Forces

[Signed] KEITEL

Distribution:
Foreign Office
Reich Minister and Chief of the Reich Chancellery

Reich Leader SS and Chief of the German Police in the Reich Ministry of the Interior

Army High Command (Chief, Army Armament and Commander of the Replacement Army, Army Legal Department) with 7 numbered copies

Navy High Command, (Navy Legal Department) with 1 numbered copy

Reich Air Minister and Commander in Chief of the Air Force with 1 numbered copy

President of the Reich Military Court

Commander Armed Forces Southeast with 4 numbered copies

Norway
Netherlands
Ostland
Ukraine

Plenipotentiary for the Armed Forces with the Reich Protector for Bohemia and Moravia

Armistice Commission Wiesbaden

OKW:

Chief of the Armed Forces Operational Staff with 8 numbered copies
Division L
Armed Forces Propaganda
Division Foreign Affairs, Foreign Counter Intelligence
Division Foreign Affairs
Counterintelligence III
General Armed Forces Office

TRANSLATION OF DOCUMENT 669-PS
PROSECUTION EXHIBIT 305

KEITEL LETTER OF 12 DECEMBER 1941, TRANSMITTING THE FIRST IMPLEMENTATION DECREE TO THE NIGHT AND FOG DECREE

[Stamp] SECRET

The Commander in Chief of the Armed Forces

14 n 16 WR (I 3/4)
No. 165/41 g

[Stamp] L. 15 Dec. 1941
Az. 14g po 10
No. 37787 41

12 December 1941

Subject: Prosecution of criminal acts against the Reich or against the occupying power in occupied territories

1 enclosure

It is the long considered will of the Fuehrer that in case of attacks against the Reich or the occupation force in the occupied territories, other measures than those in present use should be taken. The Fuehrer is of the following opinion: in connection with such activities imprisonment, even life imprisonment, is considered as a sign of weakness. An effective and lasting deterrent can only be achieved by death sentences or by measures which will keep the relatives of the perpetrator and the population in suspense concerning the fate of the perpetrator. This purpose is served by deportation to Germany.

The attached directives for the prosecution of crimes correspond to this conception of the Fuehrer. They were examined and approved by him.

[Signed] KEITEL

Distribution*

[Handwritten notes] Clarify as soon as possible.

1. Are the provisions concerning shooting of hostages, etc., annulled by that order?

2. Is it clear to the Army High Command, especially to the Quartermaster General, who has been omitted in the distribution?

[Initial] W [Warlimont] 17 December

Secret

First Decree for the carrying out of the Fuehrer's and Supreme Commander's directives concerning the Prosecution of Criminal Acts against the Reich or the Occupying Power in the Occupied Territories

By virtue of chapter V of the directives of 7 December 1941 of the Fuehrer and Supreme Commander concerning the prosecution of criminal acts against the Reich or the occupying power in the occupied territories, I order the following:

I

The conditions of chapter I of the directives will as a rule be applicable in cases of—

1. Assault with intent to kill.

2. Espionage.

3. Sabotage.

* Distribution appears at end of document.

4. Communist activity.

5. Crimes liable to create disorder.

6. Favoring of the enemy the following means:

a. Smuggling people into a country.

b. The attempt to enlist in an enemy army.

c. Support of members of an enemy army (parachutist, etc).

7. Illegal possession of arms.

II

(1) The criminal acts described in section I of the directives are to be tried in the occupied territories only under the following conditions:

1. It must be probable that a death sentence will be pronounced against the perpetrators or at least against the principal perpetrator.

2. It must be possible to carry out the trial and the execution of the death sentence at once (on principle a week after the capture of the perpetrator).

3. Special political misgivings against the immediate execution of the death sentence should not exist.

4. Apart from the death sentence for murder or partisan activities no death sentence against a woman is to be expected.

(2) If a sentence which has been pronounced according to section I is annulled, the trial can continue in the occupied territory, if the conditions of section I, No. 1, 3, and 4 still exist.

III

(1) In case of criminal acts mentioned in section I of the directives, the highest judicial authority in agreement with the counter intelligence officer examines whether the conditions for a trial in the occupied territories exist. If he agrees that they are, he orders the session of the court martial. If he denies it, he submits the documents to his superior commanding officer (sec. 89, par. 1 of the decree on criminal procedure during wartime). The latter may reserve the decision to himself.

(2) The superior commanding officer renders the final decision as to whether the conditions for a trial in the occupied territories exist. If he agrees that they do, he orders the highest judicial authority within his command to deal with it. If he denies it, he gives the order to the secret field police to take the perpetrator to Germany.

IV

(1) Perpetrators taken to Germany *will be subjected there to court martial proceedings* only, if the High Command of the Armed Forces or the superior commanding officer declare in their decision according to chapter III that special military reasons require court martial proceedings. If such a declaration is not made, the order that the perpetrators be taken to Germany means a transfer according to section 3, paragraph 2, sentence 2 of the decree on criminal procedure during wartime.

(2) If the superior commanding officer uses his authority according to paragraph 1, he submits the documents to the High Command of the Armed Forces through official channels. The perpetrators are to be designated "prisoners of the armed forces" when being transferred to the secret field police.

(3) The High Command of the Armed Forces determines the tribunal for those perpetrators who are subjected to court martial proceedings according to paragraph 1. *It may waive the competence of the armed forces tribunals.* Moreover, it can suspend the proceedings for any time it chooses.

V

The trial in Germany will be held under strictest exclusion of the public because of the danger for national security. Foreign witnesses may be questioned during the trial only with the permission of the High Command of the Armed Forces.

VI

The regulations on the procedure before tribunals of the armed forces included in the decree of the High Command of 13 September 1941 concerning the situation in Norway (Armed Forces Operational Staff/Department L. (IV/Qu) No. 002034/41 top secret) and of 16 September 1941 concerning the Communist revolutionary movements in the occupied territories (Armed Forces Operational Staff/Abt. L (IV/Qu) No. 002060/41 top secret) are superseded by the directives and this executive order.

VII

(1) These directives will become effective 3 weeks after they are signed. *They are to be applied in all occupied territories with the exception of Denmark* until further notice.

(2) The orders issued for the newly Occupied Eastern Territories are not affected by these directives.

(3) Chapter I of the directives is applicable for pending trials. The highest judicial authority and the superior commanding officer can accordingly apply chapter III of this executive order in case of such trials. If the superior commanding officer orders that a perpetrator be taken to Germany, chapter IV will be applicable. In case of perpetrators who were taken to Germany before these directives became effective, the High Command of the Armed Forces can proceed according to chapter IV, paragraph 3.

The Commander in Chief of the Armed Forces

[Signed] KEITEL

Distribution:

Foreign Office

Reich Minister and Chief of the Reich Chancellery

Reich Leader SS and Chief of the German Police in the Reich Ministry of the Interior

High Command Army (Chief Army Armament and Commander of the Replacement Army, Army Legal Department) with 7 numbered copies

High Command Navy (Navy Legal Department) with 1 numbered copy Reich Minister for Air and Commander in Chief of the Air Force with 1 numbered copy

President of the Reich Military Court

Armed Forces Commander Southeast with 1 numbered copy
Norway
Netherlands
Ostland
Ukraine

Plenipotentiary for the Armed Forces with the Reich Protector in Bohemia and Moravia

Armistice Commission Wiesbaden

High Command Armed Forces:

Chief Armed Forces Operations Staff with 8 numbered copies
Department L

Armed Forces Propaganda

Office Foreign Counterintelligence

Department Foreign Countries

Branch III

General Armed Forces Office

PARTIAL TRANSLATION OF DOCUMENT NG–077[1]
PROSECUTION EXHIBIT 306

LETTER FROM UNDER SECRETARY FREISLER TO GENERAL LEHMANN, 16 DECEMBER 1941, TRANSMITTING A DRAFT OF A PROPOSED IMPLEMENTATION ORDER TO THE NIGHT AND FOG DECREE, TOGETHER WITH AN INTEROFFICE NOTE OF 25 DECEMBER 1941

Priv. II
v. Ha/La

16 December 1941

[Handwritten] Officially dispatched, 16 December

Secret [Handwritten] IIa 117/42 g
Sheet 13
Secret!

To Ministerialdirektor Dr. Lehmann
Chief of the Armed Forces Legal Division with the High Command of the Armed Forces

Berlin W
Bendlerstr. 14

Dear Ministerialdirektor,

Dear Party Member Lehmann,

Being in the possession of your letter of the 12th of this month, I send you attached hereto the draft of an executive order. Taking your consent for granted, the Reich Minister of Justice intends to publish it.[2] I should be obliged to you, if we could discuss our views in the beginning of next week. (Prior to that time I shall be on an official trip.) In the meantime, Ministerialdirektor Schaefer is also ready to discuss this matter with you. Ministerialdirektor Schaefer will prepare the necessary administrative regulations on the basis of the provisions issued or proposed.

Heil Hitler!
[Initial] FR [Freisler]

[Illegible stamp]
[Italicized text crossed out in original document]
Before dispatch
submitted to State
Secretary Dr. Schlegelberger
with the request to take note.
Berlin, 16 December

[1] Sometimes referred to as Document 665–PS. See transcript, 21 April 1947, page 2440.

[2] Defendant Schlegelberger testified that he signed the proposed executive order and that it was the same as the draft submitted in the document book, i.e., the draft enclosed hereto. See extracts from the testimony of defendant Schlegelberger reproduced later in this section.

[Signed] FREISLER

22. 12. to II a 116/42 g

[Enclosure]

[Executory decree to Hitler's Night and Fog order of 7 December 1941]

Regarding the execution of the afore-mentioned decree, I decree:

1. I reserve to myself the decision as to which court is materially and locally competent to deal with a case.

2. The public prosecutor shall prefer charges after earnest reflection according to his duty.

3. The order, application, and termination of the arrest pending trial are at the discretion of the public prosecutor.

4. The trial will be conducted behind closed doors.

5. The admittance of evidence of foreign origin depends on the preceding consent of the public prosecutor.

6. Prior to the verdict the public prosecutor may revoke the indictment or move for a suspension of the proceedings.

The motion of the public prosecutor to suspend proceedings must be granted by the court.

The public prosecutor must be given an opportunity to state his opinion, should the court decide on making an exception to his motion in re.

[Initial] FR [Freisler] 16 December
[Initial] SCH [Schaefer] 16 December

[Entire document handwritten]

Secret

1. Note. I had an oral discussion in this matter on 19 December, and on 24 December I had a discussion by telephone with Ministerialdirektor Lehmann. He told me, that the High Command of the Armed Forces had, in principle, agreed to the draft submitted to it with regard to the executive order but that, nevertheless, it would give a reply in writing. The question has not been decided whether the High Command of the Armed Forces within its jurisdiction, will give the right to handle the case to the higher military court or the military courts. There is also the necessity of settling some other questions which presumably will be at-

tempted in a conference of delegates in the beginning of January. It would be advisable for the Reich Ministry of Justice to await further information from the High Command of the Armed Forces. Transfers of the cases to courts should not be expected before the second half of January.

Experts in charge of this matter with the High Command of the Armed Forces are—

Senior Military Court Counsellor Huelle,
Military Court Counsellor Schoelz,
Ministerialrat Sack.

Furthermore with the counterintelligence office of Colonel Bentivegni, Chief of Counterintelligence III.

Ministerialrat Herzlieb,
Senior Military Court Counsellor von Gramatzki.

2. To Ministerialrat Grau, with the request to take note.

[Initial] GR [Grau]
25 December

I beg you to take care of the file and handle it in the future.

[Signed] SCHAEFER
24 December

TRANSLATION OF DOCUMENT NG-232
PROSECUTION EXHIBIT 308

CIRCULAR DECREE OF THE REICH MINISTRY OF JUSTICE, SIGNED BY UNDER SECRETARY FREISLER, 6 FEBRUARY 1942, ASSIGNING PARTICULAR SPECIAL COURTS TO HANDLE NIGHT AND FOG CASES

The Reich Minister of Justice
II a 119/42 secret

Berlin W 8, 6 February 1942
Wilhelmstrasse 65
Phone: 110044
Long distance: 11 65 16

[Stamp] Secret

Circular decree on the implementation of the executive decree of 6 February 1942, concerning the directives issued by the Fuehrer and Supreme Commander of the Armed Forces for the prosecution of criminal acts against the Reich or the occupying power in the occupied territories.

For the further execution of the directives mentioned before, I decree:

1

Competent for the handling of the cases transferred to ordinary courts, including their eventual retrial, are, as far as they originate from the occupied French territories, the Special Court and the chief public prosecutor in Cologne; as far as they originate from the occupied Belgian and Dutch territories, the Special Court and the chief public prosecutor in Dortmund; as far as they originate from the occupied Norwegian territories, the Special Court and the chief prosecutor in Kiel; for the rest, the Special Court and the attorney general at the Berlin district court. In special cases I reserve to myself the decision of competence for each individual case.

2

The Chief Public Prosecutor will inform me of the indictment, the intended plea and the sentence as well as of his intention to refrain from any accusation in a specific case.

3

The choice of a defense counsel will require the agreement of the presiding judge who makes his decision only with the consent of the prosecutor. The agreement may be withdrawn.

4

Warrants of arrest will be withdrawn only with my consent. If such is intended, the chief public prosecutor will report to me beforehand. He will furthermore ask for my decision before using foreign evidence or before agreeing to its being used by the Tribunal.

5

Inquiries concerning the accused person or the pending trial from other sources than those armed forces and police agencies dealing with the case will be answered by merely stating that * * * is arrested, and the state of the trial does not allow further information.

Acting:
[Typed] Signed: DR. FREISLER

Certified: [Signed] KERSTEN
Chief Secretary of the Ministerial Chancellery

Circular stamp of the Reich Ministry of Justice

TRANSLATION OF DOCUMENT 2521-PS
PROSECUTION EXHIBIT 310

LETTER FROM THE SS ECONOMIC AND ADMINISTRATIVE MAIN OFFICE TO CONCENTRATION CAMP COMMANDERS, 18 AUGUST 1942, TRANSMITTING INSTRUCTIONS FOR TREATMENT OF NIGHT AND FOG PRISONERS

Copy Oranienburg, 18 August 1942

SS Economic and Administrative Main Office*
Chief of Division D—Concentration Camps
D I/Az.: 14 c 2/Ot./U.
Secret Diary No. 551/42

Subject: Prisoners who come under the Keitel decree

Reference: Reich Security Main Office—IV C 2 Gen. No. 103/42 of 14 August 42 and attached extract of 4 August 1942

Enclosure: 1

To the Camp Commandants of the Concentration Camps Dachau, Sachsenhausen, Buchenwald, Mauthausen, Flossenbuerg, Neuengamme, Auschwitz, Gross-Rosen, Natzweiler, Niederhagen, Stutthof, Arbeitsdorf, Ravensbrueck, and Prisoner of War Camp at Lublin

I am sending you, for information and execution, enclosed extract from the Nacht und Nebel [Night and Fog] Decree for official use in concentration camps, in connection with prisoners who come under the "Keitel Decree."

In the event of the transfer of such prisoners, it is to be pointed out that the prisoners come under the "Keitel Decree" or the Nacht und Nebel Decree.

[Typed] GLUECKS

SS Brigadier General and Brigadier General of the Waffen SS

Certified true copy
Natzweiler, 24 August 1942
[Signed] MELZER
SS-Corporal

Seal

To department III with the request to inform the postal department.

* SS General Pohl, Chief of the SS Economic and Administrative Main Office, and a number of his subordinates, were tried in the Pohl Case (United States *vs.* Oswald Pohl, et al., Vol. V, this series).

Copy

IV D 4—103/42 g Berlin, 4 August 1942

Extract from the Nacht und Nebel Decree for official use in concentration camps

By decree of the Commander in Chief of the Armed Forces dated 12 December 1941 regarding the prosecution of punishable offenses against the Reich or the occupation forces in the occupied areas (called in short Nacht und Nebel Decree), it has been directed by virtue of a Fuehrer order, that persons who, in the occupied territories, take action against the Reich or the occupation forces, shall be removed to the Reich for deterrent purposes. Here they are to be transferred to a Special Court. Should this not be possible for any reason, these persons will be placed in a concentration camp under sentence of protective custody. Protective custody as a rule lasts until the end of the war.

As it is the purpose of this decree to leave the relatives, friends, and acquaintances in uncertainty regarding the fate of the prisoners; they are not allowed to have any means of communication with the outside world. They may therefore neither write, nor receive letters, parcels, or visits. Nor will any kind of information regarding the prisoners be given to any agency outside.

In cases of death, the relatives are not to be informed until further notice. There has not yet been a final ruling on this question.

These regulations apply to all prisoners regarding whom it is stated in the detention particulars or in the detention certificates of the Reich Security Main Office that they come under the Nacht und Nebel Decree. Furthermore, all prisoners come under it who are described as "Porto" or "Continent" prisoners.

If it should occur that prisoners who come under the Nacht und Nebel Decree, have, through an error, had the opportunity of informing their relatives, further exchange of correspondence with their relatives should, for tactical reason, be granted them within the framework of the general regulations regarding correspondence for persons under protective custody.

[Typed] Signed: Dr. Hoffmann

Certified true copy.
Natzweiler, 24 August 1942

[Signed] Melzer

[Seal]

SS Corporal

TRANSLATION OF DOCUMENT NG-228
PROSECUTION EXHIBIT 312

MEMORANDUMS OF DEFENDANT VON AMMON TO DEFENDANT ROTHENBERGER, 9 AND 26 SEPTEMBER 1942, CONCERNING PENDING NIGHT AND FOG CASES AND THE HANDLING OF THESE PRISONERS

1. Note. Criminal proceedings according to the directives of the Fuehrer for the prosecution of criminal acts against the Reich or the occupying power in the occupied territories of 7 December 1941* (so-called Nacht und Nebel cases) pending on 1 September 1943 are—

* Request addition of case, as soon as available settled. [Signed] Ebersberg 12 Sept.

a. With the Chief Public Prosecutor in *Kiel* (from the occupied Norwegian territories) *9* cases with a total of *262* accused.

b. With the Chief Public Prosecutor in *Essen* (from the occupied Belgian and northern French territories) *180* cases with a total of *863* accused.

c. With the Chief Public Prosecutor in *Cologne* (from the occupied French territories—with the exception of northern France) *177* cases with a total of *331* accused.

Since 31 August 1942, trials have been held before the Special Court in Essen. On 31 August 1942 the first death sentence (against Kratz) was passed.

2. To be submitted to:

Ministerial Director Dr. Crohne,
Ministerial Dirigent Dr. Mettgenberg,
Oberregierungsrat Mielke
separately to each one—with the request to take note

[Initial] R. [ROTHENBERGER]

Berlin, 9 September 1942

[Signed] VON AMMON

[Handwritten notes]

To State Secretary Dr. Rothenberger
To the Reich Minister of Justice
With the request to take note.
Has been submitted.

[Signed] DR. CROHNE 10 September

[Signed] EBERSBERG
[Initial] E

Notes for State Secretary Dr. Rothenberger

On 24 September a report was submitted to the Reich minister on the legal basis (Fuehrer decree for the prosecution of criminal acts against the Reich or the occupying power in the occupied

territories of 7 December 1941 and orders for execution) and on the present stage of the so-called Nacht und Nebel proceedings.

On 1 September 1942 pending were—

1. With the Chief Public Prosecutor in Kiel (from the occupied Norwegian territories) 9 cases with a total of 262 accused.

2. With the Chief Public Prosecutor in Essen (from the occupied territories of Belgium and northern France) 180 cases with a total of 863 accused.

3. With the Chief Public Prosecutor in Cologne (from the occupied French territories—with the exception of northern France) 177 cases with a total of 331 accused.

The Reich Minister has ordered the following changes to be made in the present procedure:

1. The Special Courts in Kiel, Essen, Cologne, and Berlin with exclusive competence hitherto, are to some extent to be replaced by the People's Court.

2. The present procedure, according to which the accused are kept in custody indefinitely by the judiciary authorities when an indictment was either impossible or not answering the purpose, is to be abolished.

Furthermore, the Reich Minister wishes the question of the competence for pardons settled in such a way that in cases which have been handed over to the common court authorities, these (not the authorities of the armed forces) shall make the decision for pardon.

To give consideration to these questions, a departmental meeting with the High Command of the Armed Forces Legal Division and Counterintelligence is to be held on 2 October 1942.
Berlin, 26 September 1942

[Typed] signed DR. VON AMMON

[Handwritten] for further action

[Initial] A [Ammon]
2 October

PARTIAL TRANSLATION OF DOCUMENT NG–255 PROSECUTION EXHIBIT 314

LETTER FROM MINISTRY OF JUSTICE, INITIALED BY DEFENDANTS METTGENBERG AND VON AMMON, TO VARIOUS JUDGES AND PUBLIC PROSECUTORS, 21 DECEMBER 1942, CONCERNING OBJECTIONS TO ELECTIVE DEFENSE COUNSEL IN NIGHT AND FOG TRIALS

The Reich Minister of Justice — Berlin, 21 December 1942
IVa 2069.42 g

907802—51——52

[stamp]
mailed 9 January 1943
[Handwritten] Ru.

[Stamp] Secret

To—

a. The President of the People's Court

b. The Chief Public Prosecutor
at the People's Court

c. The President of the Military Court

d. The Presidents of the Courts of Appeal
in Hamm, in Westphalia, Kiel, and Cologne

e. The Attorney General at the Military Court

f. The Attorneys General
in Hamm, in Westphalia, Keil, and Cologne

[Stamp]
To the Chancellery
5 January 1943
made out:
Reply: 6 January 1943
Le/Ru.

Subject: Prosecution of criminal acts against the Reich or the occupying power in the occupied territories

[Stamp]
To the Chancellery
22 December 1942
made out: Reply:
Before mailing

[Stamp]
Armed Forces Legal Department
24 December 1942
1211/42 Secret

To the High Command of the Armed Forces
Armed Forces Legal Department
for information.
Send copy there.

Several attorneys general have raised the question of whether elective defense counsel are to be admitted in the procedures transferred to the general courts according to the directives of the Fuehrer, dated 7 December 1941, dealing with the prosecution of criminal acts against the Reich or the occupying power in the occupied territories. I have contacted the High Command of the Armed Forces in this respect. We are both of the opinion that in view of the regulations in force for keeping secret the procedures in question, there are basic objections to the admission of elective defense counsel. The interests of the defendants can be taken care of by giving them defense counsel according to paragraph 32 of the competence regulation.

By Order

[Department] III	[Department] IV
21 December	[Initial] M [Mettgenberg] 21/12
[Initials illegible]	[Initial] A [von Ammon] 17/12

PARTIAL TRANSLATION OF DOCUMENT NG–253 PROSECUTION EXHIBIT 317

EXTRACTS FROM OFFICIAL CORRESPONDENCE ARISING OUT OF THE QUESTION OF PROVIDING DEFENSE COUNSEL IN NIGHT AND FOG TRIALS, 4 JANUARY—19 FEBRUARY 1943

[Letter from the President of the Essen Special Court to the President of the Essen District Court, 4 January 1943]

The President of the Special Court

Essen, 4 January 1943

Secret

To the President of the District Court in Essen

Concerning—Prosecution of criminal acts against the Reich or the occupying power in the occupied territories.

The German Penal Code applies to the prosecution of criminal acts against the Reich or the occupying power in occupied territories. This does not exclude the application of article IV, paragraph 32 of the competence decree of 21 February 1940 concerning necessary defense, included in the Reich Minister of Justice's executive decree of 6 February 1942.* Foreign defendants must therefore have counsel if there is a possibility of the death sentence (or life imprisonment) being imposed. That is frequently the case in these trials. An increasing number of more copious cases with several defendants are now coming up. Very frequently the only evidence against defendants pleading not guilty consists of statements of codefendants, so that in view of the possibility of conflicting interests, it is only rarely possible to appoint *one counsel* for *a number* of defendants. Recently, seven counsel had to be appointed for one trial lasting several days. At that time it was most difficult to find enough counsel in a position to take over the defense. The course of proceedings was repeatedly interrupted owing to the inability of counsel to appear. In a few days another

* Document NG–232, Prosecution Exhibit 308, reproduced earlier in this section.

case with about 30 defendants will come up, for which a number of counsel will presumably have to be appointed, too. A number of similar trials may be expected shortly.

Such a strain for trials lasting all day for several days upon the few lawyers, who are overworked due to their representing their drafted colleagues, is in my opinion untenable under present circumstances. The resultant drain upon the State treasury is considerable. When the second court for these special cases which will soon be needed is set up, it will be next to impossible to get the requisite number of counsel. The interests of foreign defendants can hardly be considered sufficiently important to justify continuous demands of this kind on staff and public funds.

I therefore suggest that the Reich Minister of Justice should lay down the following by virtue of the powers granted in No. V of the Fuehrer's directives of 7 December 1941:

Article IV, paragraph 32 of the competence decree of 21 February 1940 is not applicable. The president of the court will appoint a counsel for the defendant if the latter is unable to defend himself or if for any other special reasons it seems desirable that the defendant be represented.

[Signed] GOEBEL*
District Court Director [Landgerichtsdirektor]

[Memorandum, 18 January 1943, from Ministerial Director Grau to defendant von Ammon asking for comments on the proposal of the President of the Special Court in Essen.]

Secret

In reference: III a 184/43g
To Oberlandesgerichtsrat Dr. von Ammon

Account of proceedings enclosed with request for comments. In case a regulation of the nature suggested by the Essen Special Court should be considered necessary, a legal decision along the lines of the draft could be made. The formulation of this communication intends to leave untouched in principle the necessity for defense in the cases concerned and only to permit individual exceptions of the compulsory regulation contained in paragraph 32 of the competence decree (ZustVO).

I consider it doubtful whether the principle of the necessity of having a defense should be abandoned also in cases where the death sentence may be expected. Here the existing regulations should be waived only in cases of the utmost urgency.
Berlin, 18 January 1943

[Signed] GRAU

---

* Goebel was president of the Essen Special Court and also held the title of District Court Director.

[Answer, 1 February 1943, from the Reich Ministry of Justice, initialed by defendants Mettgenberg and von Ammon.]
To Ministerialrat Grau

Department IV suggests that section 2 of decree No. 7 of 7 December 1941 be given roughly the following form:

"In trials in which according to the regulations a defense counsel has to be appointed for the defendant, the regulation may be ignored if the president of the court is convinced that the character of the defendant or the nature of the charge make the assistance of a defense counsel superfluous."

However, it might be expedient to obtain the comments of the President of the People's Court, and of the chief Reich prosecutor at the People's Court, the presidents of the courts of appeal at Kiel and Cologne and the attorneys general in Hamm, Cologne, and Kiel.

Berlin, 1 February 1943

[Initials] V [Vollmer]
M [Mettgenberg] 1 February
A [von Ammon] 30 January

[Letter, 9 February 1943, from the Reich Ministry of Justice, initialed by defendants Mettgenberg and von Ammon.]

The Reich Minister of Justice — Berlin, 9 February, 1943
III a 184/43 g

Secret

1. To
   a. The President of the People's Court[1]
   b. The Chief Public Prosecutor at the People's Court[1]
   c. The Oberlandesgerichtspraesidenten in Kiel and Cologne

[Initial] TH [Thierack]

   d. Chief Public Prosecutors in Hamm, Kiel, and Cologne

[Stamp] To files 9 February 1943

Subject: Crimes against the Reich or the occupying forces in occupied territory

The president of the Essen Special Court reports that in trials for the above-mentioned offenses, where a defense is necessary, because of the sentence which may be expected, it is often difficult to obtain counsel for the defense when [defendants who have confessed in cases where there is a collision of interest between the defendants][2] a defense counsel always has to be obtained. The

[1] Items *a* and *b* crossed out in original document.
[2] Bracketed excerpt is part of handwritten note partially illegible on document.

requisite number of lawyers is not always obtainable, the course of the main proceedings is also frequently hampered by the inability of individual lawyers to appear.

I therefore propose to insert in No. 7 of the decree for the carrying out of the directives laid down by the Fuehrer and Supreme Commander of the Armed Forces of 7 December 1941 the following regulation, which is to be paragraph 2:

"In trials before the Sondergericht [Special Court] in which according to the regulations defense counsel has to be provided for the defendant, the regulation may be ignored when the president of the court can conscientiously state that the character of the accused and the nature of the charge make the presence of a defense counsel superfluous."

Please comment as soon as possible.

BY ORDER:

[Department] IV [Department] III
[Initial Illegible]

[Initials] V [Vollmer] 4 February

M [Mettgenberg] 4 February

A [Ammon] 3 February

C [Crohne] 3 February

2. 3 weeks later.
3 March

TRANSLATION OF DOCUMENT NG-269
PROSECUTION EXHIBIT 319

SECRET INSTRUCTIONS OF REICH MINISTRY OF JUSTICE TO PROSECUTORS AND JUDGES, INITIALED BY DEFENDANTS ALTSTOETTER, METTGENBERG, AND VON AMMON, 6 MARCH 1943, CONCERNING MEASURES NECESSARY TO MAINTAIN SECRECY OF NIGHT AND FOG PROCEDURES

Draft

Berlin, 6 March 1943

The Reich Minister of Justice
IV a 398/43 secret

[Stamp] Secret

Secret

1. To:

a. The Chief Reich Prosecutor at the People's Court

b. The Attorneys General in Celle, Duesseldorf, Frankfurt/Main, Hamburg, Hamm, Kiel, and Cologne

c. The Attorney General at the Berlin Court of Appeal

Subject: Criminal procedures on account of criminal acts committed against the Reich or the occupying power in the occupied territories

Enclosures: Extra copies for the Chief Public Prosecutors in Essen, Kiel, and Cologne and for the Attorney General at the Berlin District Court

For the attention of:

a. The President of the People's Court

b. The Presidents of the District Courts of Appeal in Hamm, Kiel, and Cologne

c. The President of the Berlin Court of Appeal

Enclosures: Extra copies for the Presidents of the District Courts in Hamm, Kiel, Cologne, and Berlin

[Stamp] Chancellery of Justice

6 March 1943

With regard to criminal procedures on account of criminal acts against the Reich or against the occupying forces in the occupied territories (so-called Night and Fog cases) I request the observance of the following directives in order not to endanger the necessary top secrecy of the procedure, *particularly, regarding the execution of death sentences and other cases of death among prisoners.* [Italicized text crossed out in the original document.]

1. The cards used for investigations for the Reich crime statistics need not be filled in. Likewise, notification of the penal records office will be discontinued until further notice. However, sentences will have to be registered in lists or on a card index in order to make possible an entry into the penal records in due course.

2. In cases of death, especially in cases of execution of NN prisoners, as well as in cases of female NN prisoners giving birth to a child, the register must be notified as prescribed by law. However, the following remark has to be added: "By order of the Reich Minister of the Interior, the entry into the death (birth) registry must bear an endorsement, saying that examination of the papers, furnishing of information and of certified copies of death (birth) certificates is only admissible with the consent of the Reich Minister of Justice."

3. In case an NN prisoner sentenced to death desires to draw up a public will, proceedings must follow No. 30, paragraph 2 of my circular ordinance of 19 February 1939, article 417–III a, 318.39. The persons who assist the drawing up of the will are, if necessary, to be sworn to secrecy. The will has to be taken into official custody according to article 2 of the Probate Law. The deposition receipt has to be kept by the prosecution until further notice.

4. Farewell letters by NN prisoners as well as other letters must not be mailed. They have to be forwarded to the prosecution who will keep them until further notice.

5. If an NN prisoner who has been sentenced to death and informed of the forthcoming execution of the death sentence desires spiritual assistance by the prison padre, this will be granted. If necessary, the padre must be sworn to secrecy.

6. The relatives will not be informed of the death and especially of the execution of an NN prisoner. The press will not be informed of the execution of a death sentence, nor must the execution of a death sentence be publicly announced by posters.

7. The bodies of executed NN prisoners or prisoners who died from other causes have to be turned over to the State Police for burial. Reference must be made to the existing regulations on secrecy. It must be pointed out especially that the graves of NN prisoners must not be marked with the names of the deceased.

The bodies must not be used for teaching or research purposes.

8. Legacies of NN prisoners who have been executed or died from other causes must be kept at the prison where the sentence was served.

BY ORDER:

[Initials] SCH [Schaefer] 5 March
MX [Marx] 3 March
A [Altstoetter] 3 March
M [Mettgenberg] 25 February
v. A. [von Ammon] 27 February
[Initials] W [Westphal] 27 February
V [Vogel] 26 February
R [Rexroth] 27 February
H [Hecker] 26 February
EI [Eichler] 1 March

2. Copy of (1) to District Court Judge Dr. von Ammon and to Chief Public Prosecutor Dr. Metten, also to Dr. Eichler.

3. To be submitted again after being mailed.

[Stamp] Mailed 8 March 1943

[Handwritten] resubmitted [Initials illegible] March 9
[Handwritten notes illegible]

Distribution

The circular ordinance of 6 March 1943–IV a 398/43—has been mailed today to the following addresses:

786 b 1. Chief Reich Prosecutor at the People's Court, Berlin.
7 2. Attorney General, Celle.
8 3. Attorney General, Duesseldorf.
9 4. Attorney General, Frankfurt (Main).
90 5. Attorney General, Hamburg.
1 6. Attorney General, Hamm.
2 7. Attorney General, Kiel.
3 8. Attorney General, Cologne.
4 9. Attorney General at the Court of Appeal, Berlin.
5 10. President of the People's Court, Berlin.
6 11. President of the Supreme Court of Appeal, Hamm.
7 12. President of the Supreme Court of Appeal, Kiel.
8 13. President of the Supreme Court of Appeal, Cologne.
799 b 14. President of the District Court, Berlin.

[Handwritten] 14 Weber

[Stamp] Berlin, W 8, 8 March 1943, 6–7 afternoon

TRANSLATION OF DOCUMENT NG–281
PROSECUTION EXHIBIT 323

FILE NOTE OF DEFENDANT VON AMMON, 7 OCTOBER 1943, CONCERNING DEFENDANT LAUTZ' QUESTION AS TO GIVING DEFENDANTS TRANSLATIONS OF THE INDICTMENTS AGAINST THEM IN NIGHT AND FOG CASES

1. *Note*—Chief Reich Prosecutor Lautz asked me whether there were any objections to translations of indictments in NN proceedings being handed over to the defendants. It has turned out to be inconvenient that the defendants learned the details of the charges raised against them only during the trial. Also the interpretation by the defense counsel is not always sufficient, since their French mostly is not good enough and since the defendants were brought to the place of the trial only shortly before it was held.

The procedure adopted for Czech defendants, viz, having the indictment translated to them orally by a Czech-speaking sergeant,

is not possible here since French-speaking sergeants are not available.

After having given a report to Ministerialdirektor of Department IV and to the Minister, I informed Chief Reich Prosecutor Lautz on 6 October 1943 that there were no objections whatever to the intended procedure.

2. Ad procedures of office a 3.—"Prosecution of criminal acts against the Reich or the occupying power in the occupied territories."

Berlin, 7 October 1943
IVa 2369/43 g [Initial] A [von Ammon]

PARTIAL TRANSLATION OF DOCUMENT NG–205 PROSECUTION EXHIBIT 328

SECRET DIRECTIVE OF THE REICH MINISTRY OF JUSTICE, 21 JANUARY 1944, ORDERING TRANSFER TO GESTAPO OF NIGHT AND FOG PRISONERS WHO WERE ACQUITTED, AGAINST WHOM PROCEEDINGS WERE QUASHED, OR WHO HAD SERVED THEIR SENTENCES

The Reich Minister of Justice
IV a 2083.43 g Berlin, 21 January 1944

Secret

[Handwritten] Immediately!
[Initial] TH [Thierack]
(Stamp)
dispatched: 25 January 1944

1. To the
   - *a.* President of the People's Court
   - *b.* Chief Reich Prosecutor at the People's Court
   - *c.* Presidents of the Courts of Appeal in Breslau, Hamm, and Kiel
   - *d.* President of the Military Court
   - *e.* Attorneys General in Breslau, Hamm, and Kiel
   - *f.* Attorney General at the Military Court

Subject: Prosecution of criminal acts committed against the Reich or the occupying power in the occupied territories

Enclosures: Extra copies for the Presidents of the District Courts in Breslau, Essen, Kiel, and Berlin; Chief Public Prosecutors in Breslau, Essen, and Kiel; and for the Attorney General at the Berlin District Court

[Stamp] submitted on 25 January 1944

For information:

a. The other Attorneys General

b. Supreme Command of the Armed Forces

Referring to the letter of 10 November 1943
14 n 16.18 WR (I/3)—129/43 g

c. Reich Leader SS and Chief of the German Police at the Reich Ministry of the Interior
—Chief of the Security Police and of the SD—

Referring to the letter of 17 December 1943
IV D 4–103/42 g

As supplement to my circular decree dated 28 October 1942—IV a 1668/42 g—I order the following concerning the treatment of NN prisoners who were acquitted by a general court, against whom such proceedings were quashed, or who served their sentence imposed on them by a general court:

1. If during the trial of an NN proceeding it appears that the defendant is innocent or that his guilt has not been sufficiently established, he will be handed over to the Secret State Police; the public prosecutor will inform the Secret State Police of his opinion whether the defendant can be released and return to the occupied territories, or whether he will continue to remain under detention. The Secret State Police will decide what further actions are to be taken.

2. Defendants who were acquitted, or against whom proceedings were quashed during the trial, or who served a sentence during the war, will be handed over to the Secret State Police for detention for the duration of the war. The Reich Leader SS and Chief of the German Police at the Reich Ministry of the Interior has ordered that these defendants will always be given the mildest grade of protective custody, i.e., grade I.

3. Deviations from the regulations as contained in Nos. 1 and 2, will be made only after my approval has been given.

BY ORDER: As deputy
[Initial] V [Vollmer] Jan. 18

2. Copy of 1 will be sent to the—

a. President of the Senate Hecker

b. Ministerialrat Dr. von Ammon

c. Amtsrat Thienel

d. s 1

3. To be resubmitted after dispatch—
[Initial] A [von Ammon] Jan. 18

Report of 13 December 1943
[Handwritten] submitted with IV a 27/44 g

The decree of 21 January 1944—IV a 2803/43—has been mailed to the following addresses today:

1. President of the People's Court in Berlin.
2. Chief Reich Prosecutor at the People's Court in Berlin.
3. President of the Court of Appeal, Breslau.
4. President of the Court of Appeal, Hamm/Westphalia.
5. President of the Court of Appeal, Kiel.
6. President of the Court of Appeal [Kammergericht], Berlin.
7. Chief Public Prosecutor, Breslau.
8. Chief Public Prosecutor, Hamm/Westphalia.
9. Chief Public Prosecutor, Kiel.
10. Chief Public Prosecutor at the Court of Appeal, Berlin.
11. Chief Public Prosecutor, Bamberg.
12. Chief Public Prosecutor, Braunschweig.
13. Chief Public Prosecutor, Celle.
14. Chief Public Prosecutor, Danzig.
15. Chief Public Prosecutor, Darmstadt.
16. Chief Public Prosecutor, Dresden.
17. Chief Public Prosecutor, Duesseldorf.
18. Chief Public Prosecutor, Frankfurt/Main.
19. Chief Public Prosecutor, Graz.
20. Chief Public Prosecutor, Hamburg.
21. Chief Public Prosecutor, Innsbruck.
22. Chief Public Prosecutor, Jena.
23. Chief Public Prosecutor, Karlsruhe.
24. Chief Public Prosecutor, Kassel.
25. Chief Public Prosecutor, Katowice.
26. Chief Public Prosecutor, Cologne/Rhine.
27. Chief Public Prosecutor, Koenigsberg.
28. Chief Public Prosecutor, Leitmeritz.
29. Chief Public Prosecutor, Linz/Donau.
30. Chief Public Prosecutor, Munich.
31. Chief Public Prosecutor, Naumburg/Saale.
32. Chief Public Prosecutor, Nuremberg.
33. Chief Public Prosecutor, Oldenburg.
34. Chief Public Prosecutor, Poznan.
35. Chief Public Prosecutor, Rostock, at present Schwerin/Meckl.
36. Chief Public Prosecutor, Stettin.
37. Chief Public Prosecutor, Stuttgart.
38. Chief Public Prosecutor, Vienna.
39. Chief Public Prosecutor, Zweibruecken.
40. Plenipotentiary of the Reich Minister of Justice for the Emsland convict camps in Papenburg.

41. German State Minister for Bohemia and Moravia in Prague.
42. Supreme Command of the Wehrmacht, Berlin.
43. Reich Leader SS and Chief of the German Police (Pommerenin) [sic].

44.
[illegible marginal note]

[Stamp] Berlin, 25 January 1944

TRANSLATION OF DOCUMENT NG–230
PROSECUTION EXHIBIT 331

LETTER FROM ARMED FORCES HIGH COMMAND TO THE FOREIGN OFFICE, COPY TO DEFENDANT VON AMMON, 4 APRIL 1944, CONCERNING TWO NOTES OF M. DE BRINON, VICHY GOVERNMENT AMBASSADOR, ON NIGHT AND FOG CASES

Berlin, W 35, 4 April 1944
Copy Tirpitzufer 72–76

High Command of the Armed Forces
14 n 16.18 WR (I/3)
259/44g

Secret

To the Foreign Office
Berlin W 8

Subject: Prosecution of offenses against the Reich or the army of occupation in the occupied territories

2 enclosures*

Enclosed two notes of the French Ambassador and Secretary of State de Brinon are submitted

The High Command gives the following comment upon them:

In virtue of the directions given by the Fuehrer on 7 December 1941, capital punishment will be inflicted on principle in the occupied territories for offenses of non-German civilians which are directed against the Reich and the army of occupation and are endangering its safety or readiness for action. Whenever capital punishment would not be probable or could not be immediately inflicted and executed, the perpetrator will be brought to Germany and sentenced there. In some cases perpetrators who have been sentenced in the occupied territories will be committed for imprisonment to a penitentiary in Germany. This will be done for political reasons on principle in case of capital punishments in-

* The enclosures were not a part of the document received in evidence.

flicted on women, men of 70 years and older, and fathers of numerous children under age, excepting punishments inflicted on account of murder or of such crimes which are in connection with actions (e.g., partisans).

The transfer to Germany will be made, in accordance with the wishes of the Fuehrer, in order to make an efficacious and lasting warning example. The Fuehrer desires the relations and the population to be kept in suspense as regards the fate of the perpetrator. To German and foreign bureaus it will be replied to inquiries and petitions—"The perpetrator has been committed to prison, further information cannot be given."

To Ministerialrat von Ammon

It is therefore impossible to comply with the wishes of the Ambassador de Brinon. The High Command requests you to inform him in due form.

BY ORDER:

[Typed] signed DR. HUELLE

Berlin, 6 April 1944

High Command of the Armed Forces
14 n 16.18 WR (I/3)
259/44g

To the Reich Minister of Justice
Berlin W 8

In reference to letter of 17 March 1944 (V s*1* 263/44g). The above copy is forwarded to you for information

BY ORDER:

[Signed] DR. HUELLE

[Handwritten note]

To previous correspondence [illegible].
Prosecution of offenses against the Reich or the army of occupation in the occupied territories

[Initial] A [von Ammon]
2.5

TRANSLATION OF DOCUMENT NG–262
PROSECUTION EXHIBIT 333

FILE NOTE INITIALED BY DEFENDANT VON AMMON ON 10 MAY 1944, CONCERNING THE STATUS OF NIGHT AND FOG CASES AS OF 30 APRIL 1944

Copy

IV n 313/42 secret

Survey of the Status of NN Proceedings on 30 April 1944

I. The following cases were transferred by the military authorities to:

a. Chief Public Prosecutor Kiel—
12 proceedings with 442 defendants.

b. Chief Public Prosecutor Oppeln—
729 proceedings with 4048 defendants.

c. Chief Public Prosecutor Breslau*—
1273 proceedings with 2149 defendants.

Total—2014 proceedings with 6639 defendants.

* (in the case of Breslau as of 31 March 1944)

II. Charges preferred by:

a. Chief Public Prosecutor Kiel—
9 proceedings with 345 defendants.

b. Chief Public Prosecutor Oppeln—
494 proceedings with 1578 defendants.

c. Chief Public Prosecutor Breslau—
813 proceedings with 1113 defendants.

d. Chief Reich Prosecutor with the People's Court—
134 proceedings with 588 defendants.

Total—1450 proceedings with 3624 defendants.

III. Verdicts have been submitted from:

a. Kiel Special Court—
8 cases with 168 defendants.

b. Oppeln Special Court—
307 cases with 725 defendants.

c. Breslau Special Court—
377 cases with 473 defendants.

d. Chief Reich Prosecutor with People's Court—
115 cases with 427 defendants.

Total—807 cases with 1793 defendants.

[Handwritten] To the files concerning the prosecution of criminal acts against the Reich and the occupying power in occupied territories.

[Initial] A [von Ammon]
10 May

TRANSLATION OF DOCUMENT NG–1886
PROSECUTION EXHIBIT 546

LETTER FROM DEFENDANT VON AMMON TO THE ATTORNEY GENERAL IN MUNICH, 22 NOVEMBER 1944, CONCERNING THE EXECUTION OF NIGHT AND FOG PRISONERS

The Reich Minister of Justice
IV a 676/44g

Berlin W 8, 22 November 1944
Wilhelmstrasse 65
Telephone: 11 00 44
Long distance calls: 11 65 16
Diary No. 1716/44g

SECRET

To the Prosecutor General in Munich 35

Subject: Certification of the personal data of executed NN prisoners

Reference: Diary No. 1584/44g

In view of the new arrangement concerning the treatment of NN prisoners in the future there no longer will be executions of NN prisoners in any large numbers.

Therefore, a closer examination of the suggestions, made by the director of the penitentiary and the detention prison Munich-Stadelheim, is not necessary. I request you to notify the latter accordingly.

BY ORDER:

[Typed] DR. VON AMMON[1]

[Official seal of the Ministry of Justice]

[Signed] RUTH
Certified: Court Official

EXTRACTS FROM THE TESTIMONY OF PROSECUTION WITNESS RUDOLF LEHMANN[2]

DIRECT EXAMINATION

* * * * * * *

MR. KING: Will you tell us briefly what your rank was and what your duties were in the High Command of the Armed Forces?

[1] This document was introduced in evidence during the cross-examination of defendant von Ammon. See extracts from his testimony reproduced at the end of this section.

[2] Complete testimony appears in the mimeographed transcript (23, 24 Apr. 47), pages 2586–2643.

WITNESS LEHMANN: I was the Ministerialdirektor in the High Command of the Armed Forces, and I was Chief of the Legal Division of the Armed Forces.

Q. Do you know of the so-called Nacht und Nebel Decree which was issued in the latter part of 1941 over the signature of Keitel?

A. I am very well informed as to how that came about.

Q. Will you tell us briefly how the Nacht und Nebel program was supposed to work? In other words, what was the theory upon which this "Erlass" or decree was issued?

* * * * * * *

A. There arose in France, after the beginning of the Russian campaign, the resistance movement which became very active. Hitler complained to the justice administration of the armed forces that on account of their attitude they were not in a position to suppress that resistance movement. That is the general background for the Nacht und Nebel Decree.

In detail this is what happened—In the beginning of October 1941 I received a letter from Field Marshal Keitel—but I want to state here that Keitel was always at headquarters, whereas I was always in Berlin. In this letter, which all my assistants have read, Keitel passed on a directive which he had received from Hitler. The letter was quite long, several pages in handwriting. In that letter, it was expressed that Hitler considered the resistance movement in France a tremendous danger for the German troops. It could be seen that the methods previously used were not sufficient to suppress that movement. There was no sense in passing sentences of prison terms—considering conditions as they were—which were handed down after a long period. That was not the right deterrent which the armed forces should employ; therefore, new means would have to be found.

Q. Now, Witness, you have given us some background on the history of the Nacht und Nebel Decree. Will you tell us with some particularity how the Nacht und Nebel program was supposed to work? In what way were the resisters to be handled under the Nacht und Nebel Decree?

A. Yes. That was also stated in that letter by Keitel. The Fuehrer demanded that Frenchmen who were suspceted of such acts, during night and fog—that is where the expression comes from—should be brought across the border and that in Germany they should be held completely incommunicado. That should only not apply in those cases where immediately a death sentence could be passed in France. This measure could be used as a deterrent

907802—51——53

but not the procedures as had been used heretofore. That was the general plan of Hitler's which did not include anything about the question as to who should deal with these people after they had been brought to Germany.

Q. Now, Witness, did you, in your position with the High Command of the Armed Forces negotiate with the Ministry of Justice regarding the Nacht und Nebel Decree?

A. Yes, but not immediately. At first, in a lengthy conference with Field Marshal Keitel, I tried to thwart the entire plan because I disagreed—I definitely disagreed with it. Details about that conference, I am sure, are not interesting for us now. In doing that, I only had a very limited success; that is, Keitel said that he would be ready to speak to the Fuehrer once more. But already on the occasion of this first conference, he stated that the Fuehrer insisted on the carrying out of that concept and he used a term which I cannot forget. Hitler had said with reference to that—"Nobody can deny that I am a revolutionary of considerable stature. Then I should know best how uprisings can be suppressed." Keitel then spoke once more to Hitler, as he stated, but it was of no avail. According to Keitel's information, Hitler said that there were things of which he understood more than jurists do.

In the conference with Keitel, I raised the question immediately as to who should deal with these matters in Germany now. Thereupon, Keitel said, that it would be most according to the desire of the Fuehrer if the Secret State Police would deal with it. But we were against that from the very beginning, and also Admiral Canaris was against it with the same severity.

After the argument had gone back and forth, I received the permission from Keitel to get in touch with the Ministry of Justice.

Q. Do you have any reason which you can state at this time as to why Hitler preferred the Ministry of Justice rather than the army court system to deal with Nacht und Nebel cases?

A. That question can only have been discussed between Keitel and Hitler. It was a way out which I had suggested, because under all circumstances I wanted to achieve that these matters should continue to be dealt with by judges, and since the aversion of Hitler against the armed forces justice was known, it could be assumed that he would still prefer civilian court to us.

* * * * * * *

Q. When did you first confer with a member of the Ministry of Justice regarding the assumption by the Ministry of Justice of the Nacht und Nebel program?

A. I went to see State Secretary Freisler, I believe, in October 1941. I went to Freisler because he dealt with the criminal cases in the Ministry. He was in charge of them.

Q. Can you tell us what purpose you had in mind in going to Freisler; what proposition did you discuss with him?

A. I discussed with him the proposition that the cases which the military courts in France would not keep should be taken over and tried by the civilian justice administration.

Q. What was Freisler's reaction to this suggestion which you made?

A. He was not enthusiastic about it but he agreed that one had to try and keep these cases for the administration of justice as such.

Q. Can you tell me this? Did Freisler have the authority to agree on behalf of the Reich Ministry of Justice to assume the trying of Nacht und Nebel cases?

A. That question I can only answer by saying that Freisler told me that first he had to think it over; and secondly, he had to discuss it with State Secretary Schlegelberger who was at that time in charge of the Ministry.

Q. Is it your impression that Schlegelberger was the individual in the Ministry of Justice to whom Freisler went to secure permission and authority on behalf of the Ministry of Justice to try the Nacht und Nebel cases?

A. That is hard to answer. I can only answer it out of my general background by saying that this was a question of considerable importance, and I thought it was quite clear that Freisler told me that he had to ask the man who was in charge of the Ministry, the acting Minister.

Q. Mr. Lehmann, on 23 December 1946 you put your name to an affidavit. Do you recall signing an affidavit about that time?

A. Yes.

Q. I point out to you that this affidavit is now in evidence before this Court as Document NG–484,* Prosecution Exhibit 307. I wish to read to you a statement from that affidavit, and ask you a question concerning it after I have read it. The statement is as follows: "Schlegelberger, who was then acting Minister of Justice,

* This affidavit is not reproduced herein.

was in my opinion the only person who could consent to take over these Nacht und Nebel cases by the Ministry of Justice." I ask you now, do you still agree with that statement?

A. Yes, with the reservations that I have made before; as far as I was informed about the routine in the Ministry.

* * * * * * *

EXTRACTS FROM THE TESTIMONY OF DEFENDANT SCHLEGELBERGER*

DIRECT EXAMINATION

* * * * * * *

DR. KUBUSCHOK (defense counsel for defendant Schlegelberger): To what extent did you participate in the legislative work and the execution of the Night and Fog Decree, the Nacht und Nebel Erlass?

DEFENDANT SCHLEGELBERGER: First, I must make a temporal limitation here. The Tribunal knows that on 20 August 1942 I left the Ministry of Justice. Thus, in regard to my person, only the previous period can be considered. During that time the procedure, as well as taking prisoners into custody, remained exclusively in the hands of the Ministry of Justice.

If I am supposed to make some statements about the decree, I would like to emphasize that the jurisdiction of the Ministry did not refer to the western territories, which are under consideration here. This was entirely under the competence of the military commanders. Hitler had issued the order to Keitel that in the future merely in very clear cases, and in such cases where the death sentence could be expected with certainty, the military courts were to pass sentences. The rest of the culprits were, for the purpose of a deterrent by the police, to be transported to Germany to remain under the custody of the police, and—and this is the expression he used—to disappear during night and fog.

The chief of the legal division of the Wehrmacht, Dr. Lehmann, realized what the situation was, and after unsuccessful attempts with Keitel and with Hitler he tried to have it avoided that the prisoners be left in the custody of the police by having them tried before the ordinary courts. He called on Freisler. Freisler did not disagree with Lehmann, and basically asked for my agreement. I gave my approval.

Here, too, I had to make a serious decision. On the one hand, the fate of the prisoners was concerned. If they were in police

* Extracts from the testimony of the defendant Schlegelberger have been reproduced above in several sections, including IV E, V B, V C 2 A, V D 2, and V E.

custody, their fate could not be controlled. On the other hand, there was the necessity to loosen certain regulations which formed definite components of our legal system.

The Fuehrer order was based on the fundamental idea that the deterring force, through the cutting off of the prisoners from every contact with the outside world, could be achieved in this manner. If we now wanted—and this is the decisive question—to have the direction of the prisoners, if we wanted to avoid having the prisoners remain in police custody and thus not carry out Hitler's decree but break its head, no other recourse was left to us but to conduct our court proceedings under the point of view of secrecy, since otherwise Hitler would immediately have forbidden and actually prevented the fact that ordinary courts should handle these matters.

However, in order to avoid any doubt, I want to emphasize expressly in the following that I have to state we are concerned only with regulations governing proceedings. The NN prisoners were supposed, and were, to be tried materially according to the same regulations which would have applied to them by the courts martial in the occupied territories. The rules of procedure had been curtailed to the utmost extent. In German law we also know of the possibility, because of the endangering of the security of the State, that the public is excluded when the opinion on which the sentence is based is pronounced. We now had to take one more step, to issue an order to make available the possibility that the pronouncing of the sentence itself would not be made in public. One could not avoid the recognition that otherwise the secrecy would not be maintained, and I have to repeat, the cases would have been taken out of our hands immediately.

Everything else was based on this. For example, the limitation in the selection of defense counsel. Germany had a very eminent legal profession, and in my opinion it was a matter of course that every lawyer fulfilled the oath of secrecy given to him by law. However, one had to realize that as with every other profession, the lawyer's profession too, during such times, was permeated with bearers of the resistance idea, and therefore, here too, a certain caution was needed and it was necessary to limit the selection of defense counsel.

It is well known that in the executive order which I signed—and it was the same as the draft submitted in the document book*—that I limited the use of foreign evidence. However, if one thinks the matter through correctly and thinks of the practical application, one will realize that this limitation worked only in favor of

* Reference is made to the draft contained in Document NG–077, Prosecution Exhibit 306, a letter of 16 December 1941, from the Reich Ministry of Justice. This document is reproduced earlier in this section.

the defendants because numerous acquittals occurred according to the principle, that governs other law as well as ours, *in dubio pro reo*. In accordance with this basic attitude, it was decisive, under all circumstances, to avoid the subsequent transfer of the NN prisoners to the police.

PRESIDING JUDGE BRAND: We will recess until 1:30 this afternoon.

AFTERNOON SESSION

(*The hearing reconvened at 1330 hours, 30 June 1947*)

THE MARSHAL: The Tribunal is again in session.

DR. KUBUSCHOK: We have come to the discussion of the NN regulations. Will you please continue there?

DEFENDANT SCHLEGELBERGER: I have taken the liberty to explain that the purpose in including ourselves in the procedure was to counteract Hitler's plan to have prisoners in the hands of the police. There arose a problem—If one had to consider that in the regular course of procedure a penalty was found which expired before the end of the war. In such cases there would not have been any possibility to keep these people but they had to be taken over by the police and that would have thwarted the purpose—of the inclusion of our administration. That, one had to consider. The matter was simple, if the prosecutor, after examining the facts, arrived at the result that the penalty had to be so low that the term would expire before the expected end of the war because then he did not demand that a date for the main trial be set; the procedure remained pending and the accused remained in the custody of the administration of justice. The situation however could become more difficult if the prosecutor intended to demand a higher penalty which probably would expire after the end of the war and if the court would arrive at a more lenient sentence. The way out could be found only by quashing the proceedings in time and in order to do that various means could be applied. It could have been put to the court, that is, by legislation of course, to make a decision for this continuance, and could also put the prosecutor in a position where he would demand discontinuance and then let the court decide for discontinuance. I took the latter approach. Therefore, I provided that if the court wanted to deviate from the demands of the prosecution it should inform the prosecutor so that he had the possibility to demand discontinuance, but with all emphasis I want to stress there can be no question that the courts were to be bound in any way by the demands for a penalty on the part of the prosecutor. That would have been quite irresponsible.

PRESIDING JUDGE BRAND: Dr. Schlegelberger, are you still speaking with reference to the NN case?

DEFENDANT SCHLEGELBERGER: Yes. So, it is quite out of the question that the courts were to be bound in any way to the penalty as requested by the prosecutor as Freisler has stated in a letter which was written for special service to Thierack and which is quite wrong, but I repeat again, the intention was only for the court to tell the prosecutor, "we are arriving at a milder sentence than you requested," so as to put the prosecutor in position to demand discontinuance; then the matter remained in the hands of the administration of justice; that is to say that the defendant was in the custody of the administration of justice. May I summarize. The provisions concerning secrecy had to be made so that the matter would not be taken out of our hands by Hitler. I was faced with the problem as to whether I should refuse to take over the NN case altogether, and the Tribunal will recognize that that would have been very simple for me. I could have held the position that as far as my department was concerned that I had nothing to do with the matter and therefore could reject it or refuse to have anything to do with it. But I could not take the responsibility to assist, to contribute, that the Hitler order be carried out and that the NN prisoners remain in the custody of the police. And, I believe that that decision has also found its justification in the findings of the International Military Tribunal concerning the treatment of these prisoners in the hands of the Gestapo.*

* * * * * * *

EXAMINATION BY THE TRIBUNAL

JUDGE HARDING: Dr. Schlegelberger, you have testified that you favored the decree as to Poles and Jews and the taking over of NN prisoners for trial, to avoid having these people turned over to the police, is that correct?

DEFENDANT SCHLEGELBERGER: (Nodded in the affirmative.)

Q. Why was that?

A. May I ask you a question, namely, does this question refer to the Poles and Jews, or as I now understand it, to the NN prisoners?

Q. It applies to both.

A. Well, that was for the following reason. From the cases of transfer about which I reported, I saw that the police was the instrument of power that Hitler used in order to do away with

* Trial of the Major War Criminals, op. cit., volume I, page 232 and following.

certain people without any legal procedure, and I wanted to give those people a legal procedure with a regular trial.

Q. Now the administration of justice at one time, at least, was responsible for the prosecution and trial of all crimes committed in the Reich, isn't that correct?

A. Yes.

Q. Was there ever an investigation with subsequent trial after 1 September 1939 for the abuse or murder of a person in the hands of the police or in a concentration camp?

A. I can answer that question by saying that the Ministry of Justice as far as I am informed—that is, these matters were in the penal sector—interfered in every case, even in the case of abuses and concentration camps where they could actually do something about it, only since 1939—I don't remember the exact date—these matters were taken out of our hands through the special jurisdiction of the SS.

Q. I don't believe you quite answered my question. Did the Ministry of Justice ever call or ever prosecute a member of the police or somebody connected with the concentration camp because of abuse of the prisoners or murder of prisoners in their hands?

A. Yes, the Ministry did so.

Q. In what cases? That was after 1 September 1939.

A. In any case, it did happen before September 1939. I regret, Your Honor, that I cannot give exhaustive information about this because those are events and trials which were outside of my official duty, but I can say with certainty and under the oath under which I am now that because of abuse in concentration camps measures were taken with the utmost energy.

Q. Did a person who had been handed over to the police or who was sent to a concentration camp, including Poles and other foreigners, have any recourse to the law as administered in the Reich, for his protection?

A. Well, if these people were in the hands of the police, we could not extend that protection to them. As long as those people were in a concentration camp, and to the extent that we had any jurisdiction over concentration camps—to that extent we always intervened, if somehow or other we could find out that there had been some abuse; but later on, from 1939 on, these matters came under the special SS jurisdiction, and we were no longer in a position to interfere*.

* Special jurisdiction of the SS was established by a decree of 17 October 1939, entitled "Decree on Special Jurisdiction in Criminal Proceedings against Members of the SS and Members of Police Formations on Special Tasks." This decree (Klemm 29, Klemm Ex. 29) is reproduced in section IV B.

Q. After that these people had no recourse to the law as administered in the Reich?

A. We could not give them any legal recourse; we of the Ministry of Justice could not extend legal protection to them.

Q. Did they have any legal protection?

A. Well, I would like to say there was a jurisdiction over the inmates of the concentration camp and this was in the jurisdiction of the SS courts. That SS jurisdiction in accordance with its duty, could intervene in the same manner as we if anything had happened, that was the legal protection afforded to them.

Q. That was the only legal protection they had?

A. Yes, I could not name any other.

Q. Now, by what laws, orders, or decrees were these people left to the sole jurisdiction of the SS and the police?

A. Well, the Poles and Jews, NN prisoners were only handed over to the police after my time in office. As long as I was in office this did not happen.

Q. I mean, by what order or decree—you speak of a time when the SS had their own courts—by what order or decree—

A. The SS got a special jurisdiction through a law of 1939. The handing over of Poles and Jews, of the NN prisoners, and other people took place through measures of the year 1942, I believe. However, I do not want to make this statement with certainty, because it was after I had resigned.

Q. After this order setting up special jurisdiction for the SS the Ministry of Justice could not prosecute them, isn't that correct—or try them?

A. No, it couldn't.

Q. Now, I have here this decree which is found in volume 2, on page 55, decree of 17 October 1939, relative to the Special Courts for the SS.* Are you familiar with that?

A. Yes.

Q. After that the Ministry of Justice could not try these people for abuse or murder of persons in their hands, is that correct?

A. Yes, I assume so. Please take into consideration when considering my answers that these matters were apart from my official activity. Therefore, I can rather give an expert opinion than a testimony as a witness.

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* Judge Harding refers to Article 1 which with other parts is reproduced as Document Klemm 29, Klemm Ex. 29 on page 190.

Q. Well, the effect of this decree was to deprive the people in the hands of the police of all legal recourse, is that not correct?

A. The effect was in any case that they had no recourse to the ordinary means of administration of justice. But the SS jurisdiction in my opinion had the same duties, the same possibilities for their people as we had.

Q. The only recourse, then, was to the SS administration of justice—now, on page 56 there is this decree which is signed by you, implementing that order, which places the police beyond the administration of justice.

A. I didn't quite understand.

Q. I have here on page 56 of volume 2 a decree concerning the jurisdiction of SS courts and police courts in the Protectorate Bohemia and Moravia* which implements to some extent the preceding decree which I called to your attention. This decree is signed by you, which sets up Special Courts for the police, that is, takes them out from under the administration of justice. Now, this is signed by you. Do you have any explanation of that?

A. May I ask you to state the date again, just the date?

Q. 15 July 1942.

A. Is that an order which was co-signed by Keitel? (Document handed to the witness.)

Yes. This decree, however, I believe, has nothing to do with the matters we have discussed so far. This decree as far as I remember, was connected with a decree of January of the same year. In this decree of January in the Protectorate military jurisdiction was rescinded, and only for certain cases the Commander in Chief of the Wehrmacht was granted the right, in the matter of attacks against the Wehrmacht, to found the competency of Wehrmacht courts. The text of this decree which concerns itself with the policy is almost literally the same one as that of the decree of January 1942 regarding the Wehrmacht. Here in this decree for the police, they were concerned with certain courts for the SS. But the Wehrmacht SS [sic], which was considered a special group of the SS was supposed to be treated in the same way [as the Wehrmacht]. Therefore, after a discussion between Keitel and the commander of the SS Wehrmacht [sic], the possibility just as it was given to the Wehrmacht, was given to the SS as a fighting troop, to found such courts. But this has nothing to do with the question of SS jurisdiction, which is another question.

* This decree is reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 205.

Q. Were there any other orders or decrees issued whereby prosecution of SS and similar units was taken out from under the administration of justice, and if so, what were they?

A. Yes, there was a special law about SS jurisdiction. At the moment, I cannot tell you the date, but it was from 1939. That is the civilian SS. But this decree refers to the SS as part of the Wehrmacht.

Q. Well, is that the decree of 17 September 1939 that I called your attention to?

A. The decree which you were kind enough to show to me just now.

MR. LAFOLLETTE: Will Your Honor permit me? It is October. Your Honor said September.

JUDGE HARDING: It is October, yes.

DEFENDANT SCHLEGELBERGER: Yes, 17 October 1939. That is the decree about the SS jurisdiction.

Q. After that decree, did the Ministry of Justice have any means whereby they could protect a person in the hands of the police in any way whatsoever?

A. In my opinion, no; and that is why I tried to keep all these people away from the police. That is why I wanted to keep all these people within the sphere of the administration of justice, so that I could protect them.

Q. Then these foreigners, Poles, and Jews in the hands of the police were beyond any recourse of law in Germany, is that correct?

A. Not in my opinion.

Q. What recourse did they have?

A. Well, they probably had to turn to the higher SS office and to ask for help.

Q. Was that recourse in law or is that merely administrative?

A. Yes. That was more administrative.

JUDGE HARDING: That's all. That answers my question.

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EXTRACTS FROM THE TESTIMONY OF DEFENDANT VON AMMON*

DIRECT EXAMINATION

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* The entire testimony appears in the mimeographed transcript (1–4 Aug 1947), pages 6377–6473.

DR. KUBUSCHOK (counsel for defendant von Ammon): You have stated that you were not a confirmed National Socialist. In view of your attitude, did you not have conflict of conscience sometimes during your activity in the Ministry of Justice?

DEFENDANT VON AMMON: To a certain extent I have to answer "yes" to that question. In my official activity, I occasionally had to apply laws of other legal regulations or had to follow instructions issued by my superiors with which I was not quite in agreement in my own mind. In such cases I considered it my duty to follow such regulations and provisions which in my opinion though unpleasant were after all effective. Likewise, I considered it my duty to follow the instructions issued by my superiors. However, I would not have considered myself obligated to follow instructions issued by my superiors which were contrary to law. Such illegal orders however were not given to me. In such cases, however, a certain amount was left up to my own discretion and that happened in many cases. When I applied that discretion I tried as far as possible to make my own opinion apply. Of course, the possibility in those directions were not overly large since as a Referent I had to obtain the agreement of my superiors, the more important decisions. Because of my lenient attitude I was frequently objected to, especially by my superior Vollmer and the Minister of Justice Thierack.

Q. Did your attitude change when the war broke out?

A. Due to the outbreak of the war nothing changed in my basic attitude. I was of the opinion that since the war had broken out, independent of its consequences for national socialism, it would bring about the decision, "to be or not to be" for Germany. Therefore, I believed that every German had to fulfill his duty in his official position.

Q. I now come to the main charge which the prosecution has raised against you in regard to your dealing with the so-called NN cases. Under what circumstances were you entrusted with this new field of work?

A. The distribution of the Referate [sections] was as a rule made by order of the department chief without asking the Referent about it in advance. Thus, I too in February 1942 was assigned by my department chief, Ministerial Director Crohne, to work with NN cases without my knowing for the time being what these NN cases were all about.

Q. What tasks and authorization did you have as Referent of Department IV of the Ministry of Justice for NN cases?

A. In order to answer that question I first have to describe briefly the competency of Departments III, IV, and V.

Department III was the department for criminal legislation, Department IV was for the administration of criminal law, Department V was the department for the administration of penalties. It belonged to the competency of Department III; the preparations of the laws and regulations similar to laws, the housing of prisoners belonged to the competence of Department V and the treatment of these prisoners while they were in prison. Department IV, that is my department, dealt in the main with the cases against the defendants until they were sentenced by a court, including the clemency procedure. Furthermore, the issuance of general provisions regarding legal procedure in as far as Department III was concerned was not competent for this.

Q. As far as Department V was competent, what authorization did you as Referent have with regulation to your superiors?

A. Gramm and Mettgenberg have already testified to this, here on the witness stand. I only have to add some supplementary remarks. As Referent, I had to a certain extent the right to give my signature, that is to say, to a certain extent I could give written or oral statements by order. This right for signature, however, was limited, since due to my being subordinate to the department chief, and for the most part of my activities I was subordinate also to a subdepartment chief. During the first month of my activity in the NN cases my section was directly under the department chief. A few months later, however, Mettgenberg was put in charge as a subdepartment chief between me and the department chief. My authority in relation to my subdepartment chief and department chief were limited through general regulations rather carefully. The regulations applied which were contained in Exhibit 510 submitted by the prosecution.* May I refer to these regulations? Regarding the letters by the Ministry of Justice that were sent outside the Ministry of Justice which were submitted by the prosecution, in accordance with the provisions I mentioned, I did not sign a single one finally, but all the letters after I had also cosigned them I submitted to my subdepartment chief for signature. He then for the most referred them to the subdepartment chief or even to the under secretary or to the minister. If the prosecution, contrary to this, in this submission of several documents, stated that the letters of the Ministry of Justice were signed by me, that is an error. There are throughout letters for which I did give a cosignature, that is in the right hand lower

* Document NG-988, Prosecution Exhibit 510 consists of over one hundred mimeographed pages, dealing with the organization of Departments III, IV, V, and VI of the Reich Ministry of Justice. It is not reproduced herein.

corner, they bear my initials, but one of my superiors gave the final signature.

* * * * * * *

Q. As Referent in NN cases, did you have a large staff of assistants?

A. No. I never had more than one assistant, and he worked only part of the time in NN cases, and then only at the beginning of my activity with NN cases. From the beginning of 1943 on I worked entirely without any assistance. From that time on, due to the heightened drafting for the Wehrmacht, younger gentlemen who could be assistants, were available only to a very limited extent in the Ministry of Justice. From that time on I had only a so-called "Mittlerer Beamter," a civil servant in the intermediate level [of civil service] for registration and filing.

There was a special provision only for preparation of clemency pleas in death sentence cases. For that work, I had assistance from time to time.

Q. I refer to that extent to Document NG–988, Prosecution Exhibit 510, the plan of distribution of work which shows further facts. Witness, please give us a survey over the periods when the general administration of justice participated in the NN cases.

A. We can distinguish between two periods during which the general administration of justice was concerned with NN cases. The first period extends from February 1942 until October 1942; the second from October 1942 until September 1944, and to some extent until the end of the war. During the first period the executive regulations of the Reich Ministry of Justice of 6 February 1942[1] were decisive in their original form as they had been issued by Schlegelberger and Freisler. Two factors characterized this period. First, the police were involved in the NN cases only to the extent that the transportation of the NN prisoners from the occupied territories was carried out by the police; and secondly, for the sentencing of NN cases only some Special Courts were competent. The competency of the People's Court did not exist at that time, for those cases.

The second period begins with the changes which were introduced soon after Thierack assumed office. The police now also became competent to the extent that the NN prisoners, for the detention of whom no legal reason existed any more, were transferred to the police for protective custody for the duration of the war.[2] And for the trying of NN cases, in addition to the individual

[1] Document NG–232, Prosecution Exhibit 308, reproduced above in this section.

[2] See, for example, Document NG–205, Prosecution Exhibit 328, a secret directive of 21 January 1944, reproduced above in this section.

Special Courts, the People's Court now is competent too. This second period ends with the order that the NN prisoners should generally be returned to the police. This order was issued in September 1944. The return, however, was carried out until the end of the war only partly so that at the end of the war numerous NN prisoners were still in the detention of the administration of justice.

Q. We shall now turn to the first period for which the executive regulations of 6 February 1942 were decisive. Witness, were you involved in the drafting of these regulations and the discussions with the OKW which preceded this decree and which the witness Lehmann testified about?

A. No. I neither participated in the formulation of the regulations nor in the preceding negotiations. The regulations were worked out in the departments for penal legislation, first Department II and later III, and at that time I did not belong to either of them. About the regulations and the preceding negotiations, I heard only on the day when the regulations were issued. On that day—it was 6 February 1942—the presidents of the courts of appeal and the attorneys general of those districts in which the NN cases should in the future be tried, had been ordered to the Ministry of Justice for a discussion.

Immediately preceding the beginning of the meeting my then department chief, Ministerial Director Crohne, had a message sent to me that I should come to the meeting because in future I would have to work with the penal cases which would result from the newly issued regulations.

I then attended that meeting and for the first time, from the mouth of State Secretary Freisler, who was presiding over the meeting, I heard about the Night and Fog Decree and the executive regulations issued pursuant to it.

Q. In the executive regulations of 6 February 1942 there are provisions about the limitation of foreign evidence. Paragraph 5 of the executive regulations, Exhibit 306[1], which, however, are here only in draft form gives this regulation—The use of foreign evidence material requires the prior agreement of the public prosecutor. Furthermore, paragraph 4 of the same regulation provides that the senior public prosecutor has to obtain the decision of the Reich Minister of Justice before he can use foreign evidence material or can agree to the use of foreign evidence material by the court. This latter regulation is contained in Exhibit 308[2].

[1] Document NG–077, Prosecution Exhibit 306, reproduced above in this section.
[2] Document NG–232, Prosecution Exhibit 308, reproduced above in this section.

The indictment asserts that it was one of the purposes of the NN procedure to prevent the defendants from having access to witnesses or any other evidence. What do you have to say about this?

A. First, I would like to correct you, Counsel. You quoted paragraph 4 of the circular decree of 6 February 1942, and by mistake you said that this was the same provision as paragraph 5 which you mentioned before. These are two different regulations. First is paragraph 5 of the executive order of 6 February 1942. That is Exhibit 306, and the second regulation is paragraph 4 of the circular decree of the same day, and that is Exhibit 308.

In answer to the question of what I have to say about the allegation in the indictment, that it was one of the purposes of the NN procedure to make it impossible for the defendants to have access to witnesses or any other evidence, I have to say that that assumption is entirely wrong. The limitations on foreign evidence material was not one of the purposes of the NN procedure, but the absolutely undesired result which resulted from the necessity of keeping the matter secret.

It could never result in a disadvantage for the defendant but would of necessity result in favor of the defendant. The German criminal procedure is based on the assumption that the defendant has no duty or no authority to prove anything. Therefore, any doubt had to work in favor of the defendant. In the same way, doubts which arose out of the limitation of foreign evidence worked in favor of the defendant. Moreover, foreign evidence was in no way excluded altogether but it should only be procured and used in such a way that the secrecy of the proceedings and the keeping incommunicado of the defendant would not be endangered.

Q. What was the effect of the regulations about the limitation of foreign evidence in practice?

A. According to my observation, in the majority of cases these regulations did not lead to any difficulties. In many cases the clarification of the facts was accomplished by the statements of the defendants or codefendants or on the basis of German evidence. This was the case especially in the numerous cases in which simple facts were involved. Thus, for instance, in most of the cases of illegal possession of weapons, a weapon was found in the possession of the defendant. Beyond this, the use of foreign evidence was admissible as far as the secrecy of the proceedings was not endangered by this. Thus, the Ministry of Justice in any case permitted that a foreign witness not before the court trying the case but in the occupied territories could be examined by an investigating judge. If this, however, did not bring about the desired

result, if there still existed some doubt as to the guilt, the defendant had to be, and was, acquitted. According to my observations, probably in all courts which had to deal with NN cases, a large number of acquittals were pronounced, because owing to the limitation of foreign evidence defendants could not be convicted. I remember, in particular, extensive trials before the Special Court of Oppeln against numerous defendants who were charged with participation in dangerous resistance movements in Belgium. According to the indictment, I was under the impression that heavy sentences would be pronounced. In effect, however, the result of the trials was quite different. The defendants maintained that it was not a dangerous resistance movement, but a harmless club. In view of the limitation of foreign evidence it was impossible to disprove this defense. Thus, the defendants had to be acquitted, or they could be given only slight penalties because of participation in a club not authorized by the military commander.

Q. Paragraph 6 of the executive orders of 6 February 1942 which have already been mentioned—that is, Exhibit 306[1]—makes the following provision: The public prosecutor can, until the sentence is pronounced, withdraw the indictment or ask that the trial be postponed. The court has to agree to the application of the prosecutor for suspension. If the court wants to deviate from the application made by the public prosecution, it has first of all, to afford them an opportunity to state their opinion.

Witness, what can you say about this regulation?

A. Dr. Schlegelberger, when he was examined, commented extensively on these regulations. I only have to add the following: The procedure described was, as Dr. Schlegelberger stated, introduced in order to prevent NN prisoners from being transferred to the police. For the court itself, in view of its prestige, it probably was not very pleasant. The authors of that regulation realized that too. As I said already in my affidavit of 17 December 1946, that is Exhibit 337[2], even Freisler said in this meeting of 6 February 1942, that with this regulation one had reached the utmost limit of what one could expect of the court. The authors of this regulation, however, believed that they had to put up with that regulation in the interest of the NN prisoners.

Q. The regulation of paragraph 6 of the executive orders which we just discussed—was it ever applied in practice?

A. I don't believe so. The regulation was in effect only for a brief period. Thierack, in October 1942 soon after he became Minister, rescinded it. During the time that this regulation was in

[1] This exhibit is a draft dated 16 December 1941 which was later published as an executory decree on 6 February 1942.

[2] Document NG–486, Prosecution Exhibit 337, not reproduced herein.

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effect, as far as I remember, only very few NN cases were tried. These were clear cases in which the court had no misgivings against agreeing with the plea of the prosecutor. If that regulation would have been applied, the Ministry certainly would have been informed about it, and I certainly would still remember it.

Q. On the changes which Thierack ordered in October 1942, Dr. Mettgenberg has commented.* Did you have misgivings against these changes, especially also against the transfer of NN prisoners to the police?

A. The changes which Thierack made also had, without doubt, a favorable side. The unpleasant regulation of paragraph 6 of the executive order of 6 February 1942 was removed. Even Freisler, as I mentioned before, stated about it that with this regulation the outside limit had been reached of what could be expected of the courts. Now, this bad condition was removed, that the justice authorities of the administration had to detain persons in whose cases the reason for detention had to be maintained by the procedure discussed by Dr. Schlegelberger. On the other hand, the transfer of the NN prisoners to the Gestapo was without doubt unpleasant. After the competency of the general administration of justice for the detention of NN prisoners who were acquitted or whose time of arrest had been removed, it again was returned to the armed forces. According to the provision of the NN decree, however, the armed forces, as a rule at least, were not allowed to return these NN prisoners to the occupied territories. Neither, for the reason of keeping this matter secret, could they be set free in Germany. The only way out that Thierack saw was their detention by the Gestapo and the OKW who in the last instance had to decide about this affair agreed to the suggestion by Thierack. If now I am asked if, in regard to the treatment of the prisoners by the police, I had misgivings, I can answer that in the following way: The prisoners were handed over to the police with the express provision that the detention was carried out only for reason of secrecy and in the interest of keeping the whole affair secret. Therefore, the Gestapo merely had to detain them and not to carry out a penalty. As far as I know, in the negotiations between Crohne and the Gestapo, the representatives of the Gestapo stated that in the case of detention of NN prisoners, they would take into consideration the fact that against the prisoners personally there was no longer any charge. Later on, the Reich Leader SS also ordered expressly that the NN prisoners, who were handed over to the police, always should be put on the level of Protective Custody I which was the most lenient level.

* The testimony of defendant Mettgenberg appears in the mimeographed transcript (31 Jul–1 Aug 1947) pages 6235–6271; 6274–6362. The testimony referred to is not reproduced herein.

Q. I refer to Exhibit 328[1] in regard to the last statements made by the witness.

Witness, as Mettgenberg testified in September 1944, the general administration of justice was again deprived of the competency for NN cases. It was ordered that NN prisoners generally should be handed back to police. What can you say about this?

A. I can confirm the statements made by Dr. Mettgenberg to their fullest extent and only have to make a few supplementary remarks. As Mettgenberg already testified, in the discussions at the OKW, which took place in the beginning of September 1944, the witness Hecker and I represented the Ministry of Justice. Since the matter could not be reported to Minister Thierack in advance, my department chief, Vollmer, had given me the instruction to reserve the right for the Minister to state his opinion. I acted accordingly during the negotiations. The representatives of the OKW then also agreed that the OKW would forward a draft of the intended order of the OKW to the Ministry of Justice and that the Ministry of Justice could then state its opinion on the draft, in writing.

In place of that the OKW then sent us an already filed decree which ordered the discontinuance of the NN procedures and the transfer of NN prisoners to the police. When I reported this to Mettgenberg and together with him to Vollmer, he was very much displeased about the manner of handling used by the armed forces. Vollmer said the OKW had byplayed us in that manner, and he instructed me to talk to the representative of the OKW by telephone and protest against this manner of conducting this business. He said the decisive thing, however, was that the regulation made by the OKW had to be accepted according to the division of business, as the OKW was competent for NN cases.

In accordance with the instructions given by Vollmer, I then telephoned the representative of the OKW and expressed our surprise at the manner of handling this. The representative replied that this was a misunderstanding and he regretted it very much; in any case I can testify that on the part of Department IV of the Ministry of Justice, no agreement for these regulations was given, but that Department IV only through force submitted to the regulation which was made without its agreement.

Q. The meeting in the building in the Reich Military Supreme Court in the beginning of September 1944 was presided over by Dr. Werner Huelle and at that time he was supreme judge. I submit an affidavit by Dr. Huelle that was taken on 17 July 1947.[2]

[1] Document NG-205, Prosecution Exhibit 328, reproduced above in this section.

[2] Document von Ammon 4, von Ammon Exhibit 2. This affidavit, except for the parts quoted, is not reproduced herein.

Following the usual introduction formula, it reads as follows:

"By order of the chief of the legal department of the Wehrmacht I presided over the discussion in the beginning of September 1944 in the building of the Reich Military Supreme Court in Berlin. In this meeting the question of the transfer of the NN prisoners was dealt with. The basis of this discussion was a Fuehrer order, which had ordered the return of the NN prisoners to the police.

"The representative of the RSHA insisted on the giving back of the prisoners who had already been sentenced, since the will of the Fuehrer referred also to those and by saying so he referred to a classification which Himmler had written about to Hitler.

"Although in view of this the discussion could have only the value of a technical discussion. I consider it absolutely possible that the referents of the Reich Ministry of Justice reserve to themselves the right of obtaining the opinion of their minister since they had not received instructions from him. More exact statements I can no longer make from memory. In what manner and by whom my office then received a statement by the Ministry of Justice, I do not know since I was not the Referent. With absolute certainty, however, I can say that only the transfer to the police for the purpose of commitment for labor for urgent armament work was considered for which the manpower of the prisoners was needed. My superior, Generaloberstabsrichter Dr. Lehmann, who himself had formerly been a member of the Ministry of Justice, always attached importance to relations without frictions with the administration of justice, and therefore, he had the questions which interested both offices discussed in common."

PRESIDING JUDGE BRAND: Will you tell me the author of that affidavit? I did not catch the name.

DR. KUBUSCHOK: Huelle. I submit this affidavit and ask to reserve the number, von Ammon Exhibit No. 2, for this affidavit.

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DR. KUBUSCHOK: From the documents submitted by the prosecution, it is apparent that keeping NN prisoners incommunicado was one of the main peculiarities of the NN procedure which was applied from the very beginning. In the opening statement by the prosecution, among others you too are being charged with having systematically carried out and approved these regulations about keeping the procedure secret. In this connection, Exhibit

319[1] is of interest. It contains a circular decree by the Reich Minister of Justice in which several directives are given as to how agencies of the Ministry of Justice are to handle NN cases in order not to endanger the cutting off of NN prisoners from the outside world. What can you say about the origin of this circular decree?

DEFENDANT VON AMMON: The circular decree was caused by reports of the Chief Public Prosecutors in Cologne and Essen, about the difficulties resulting from the strict regulations about keeping the NN prisoners incommunicado, especially when NN prisoners died, and they had made suggestions for overcoming these difficulties. The report of the Chief Public Prosecutor in Cologne is contained in Exhibit 314.[2] In this report the decisive questions are dealt with under paragraph [II and] III. The report of the Chief Public Prosecutor in Essen was not submitted in this trial here.

PRESIDING JUDGE BRAND: The morning recess—15 minutes.

DR. KUBUSCHOK: Before the recess, you answered the question as to the origin of the circular decree which we discussed. Please continue.

DEFENDANT VON AMMON: The circular decree, Exhibit 319, which took issue with the questions raised in the reports from the senior public prosecutor at Cologne and Essen was, as Mr. Mettgenberg has already stated here, the joint work of both Departments III and IV of the Ministry of Justice. I participated in the work on that particular decree, insofar as the competence of my department was affected by drafting the provisions contained in it. Various questions that were settled in that circular decree did not affect the competence of Department IV at all. Thus, for example, the question of burials of NN prisoners who died a natural death while serving their sentences and the question of the possessions they left behind was a matter for Department V to deal with. To that extent only Department V was responsible for the provisions which had been worked out. Apart from my section, there were other sections, partly in Department IV and partly in other departments which were competent. The questions which emerged therefore had to be dealt with by these various sections cooperating.

Q. What are your comments about the contents of the circular decree in general?

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[1] Document NG–269, Prosecution Exhibit 319, reproduced above in this section.

[2] Document NG–255, Prosecution Exhibit 314, reproduced in part above in this section. The report referred to here is not reproduced herein.

A. By that circular decree the existing provisions concerning secrecy were not made more severe in any way. The stringent provisions concerning the seclusion of the NN prisoners from the outside world had applied since the NN decree as such had been issued. As far as we were concerned it was a shock from the very beginning that in the case of the death of an NN prisoner, the relatives could not be informed. That was true in the case of a natural death, as well as in the case of a death sentence being carried out. We, naturally, were aware of the severity of such a provision, but we did not see any possibility of avoiding it, but as far as that was possible within the scope of the severe provisions we wished to take into account the principles of humanity. We did want to make sure that persons who had been sentenced to death would have spiritual care. We did wish to afford them a possibility not only to leave a holographic will but also to make a real testament before a notary or judge. We also wished that NN prisoners who had died should have a proper funeral. That was the purpose of the provisions in the circular decree of 6 March 1943.

Q. Please comment on the more important details of that circular decree?

A. The provisions under paragraphs 1, 3, and 5 of the circular decree, I believe speak for themselves. Concerning the other provisions I would like to say this. Paragraph 4 said that farewell letters by NN prisoners were not to be sent out. That was not a new provision but that was the unavoidable consequence of the NN decree, since the general administration of justice had to deal with NN cases. As early as the first day when the NN provisions had come into force, the Department V, the administration of punishment, had issued a provision to the effect that NN prisoners were not allowed any correspondence. The farewell letters of prisoners who had been sentenced to death also came under that provision. Paragraph 4 of the circular decree furthermore reads that the farewell letters from NN prisoners were to be kept in custody for the time being by the prosecution. It was to be made sure that the farewell letters, when the NN provisions would be rescinded, that is to say, at the latest at the end of the war, would be passed on to the relatives. Paragraph 6 of the circular decree laid down that the relatives were not allowed to receive information about the death of NN prisoners. That was a repetition of the old provision which had existed since the NN decree as such had been issued. It was an unavoidable consequence of the NN decree as such. Paragraph 7 of the circular decree laid down that the dead bodies of NN prisoners who had been executed or who had died from other causes were to be turned over to the Gestapo

for their funeral. That provision is not new and is not peculiar to the cases of NN prisoners. That is obvious from Document NG–257, Prosecution Exhibit 322. That document contains the reply from Thierack to the complaint by the chief of the Security Police, that this opinion had not been obtained before paragraph 7 of the circular decree was issued. Thierack's reply points out that that provision did not provide new tasks for the Gestapo. That the Gestapo was to carry out the funeral, that in itself was not of a dishonorable nature, but funerals in cases where the relatives could not take care of them, that in Germany is one of the duties of the police. Whereas, under the general regulations in such cases the corpse is offered to an anatomical institute for research purposes, an exception was made in the case of NN prisoners, and the corpse was buried. As the provision shows, we, of course, ordered that every NN prisoner receive a grave of his own which was not identified by his name, but figures or something of that nature.

Finally, paragraph 8 of the circular decree laid down that the possessions which NN prisoners had left behind were not to be handed over to the relatives. That also was the necessary result of the provisions which dealt with the seclusion of the NN prisoners from the outside world. On the other hand, we ordered that the possessions which the NN prisoners had left behind were to be taken in custody by the NN prisons and once toward the end of the war, a general public prosecutor—concerning the watches and other articles left behind by NN prisoners, wanted to make his own regulations. Naturally, I repudiated that view.

Q. In its opening statement the prosecution said this: If the armed forces in the occupied territories arrested the people by mistake, who quite evidently had not been guilty of any form of resistance against national socialism, then those victims, for the sake of keeping the program secret, had to be treated in the same manner in which other persons were treated who succeeded in getting away with a prison sentence. Is that correct?

A. That assertion by the prosecution is not correct. First of all, I consider it out of the question that the general authorities of the administration of justice ever had persons handed over to them who quite evidently had not made themselves guilty of any resistance to the occupying powers. Persons who had been arrested were not moved into Germany immediately after their arrest, but to begin with investigations were carried out inside the occupied territories and in particular the defendant was interrogated. In the course of those investigations obvious errors were soon discovered, and in that case the person concerned was not moved to Germany but was set at liberty in the occupied terri-

tories. May I refer to the testimony by the witness Lehmann?[1] He testified that the agency of the armed forces in the occupied territories had issued provisions which were to make sure that as far as possible only such matters were handed over to the general administration of justice which were clear cases on account of the evidence that had been obtained. If it did happen after all that a person who was obviously innocent was taken into Germany —I cannot remember that such a case ever occurred—there was the possibility to transfer him to the occupied territories. In this respect, I refer to Documents NG–226, Prosecution Exhibit 313 and NG–205, Prosecution Exhibit 328.

Q. According to the indictment one of the purposes of the NN proceedings is supposed to make it impossible for the NN prisoners to have access to a defense counsel. What do you have to say about this?

A. First of all, the same is true here that was true of the limitation of evidence obtained abroad. Certain limitations of the defense which had been ordered for NN proceedings were not the purpose of NN proceedings, but a consequence which resulted of necessity from the particular manner of these proceedings and from the wartime conditions.

We must distinguish between two different limitations of defense. First of all, a limitation of choosing a counsel; and, secondly, limitation of having counsel appointed by the court.

Q. Please comment first about the limitation of the free choice of defense counsel.

A. In respect to the seclusion of the NN prisoners from the outside world, which had been ordered, the executive office of the Ministry of Justice, in carrying out the NN decree from the beginning believed that a limitation of the free choice of defense counsel was necessary, but they believed that the provisions in paragraph 3 of the circular decree of 6 February 1942 would be sufficient.

Q. That circular decree of the 6 February 1942 is contained in Exhibit 308.[2] I quote the provision concerned: "The choice of a defense counsel requires the consent of the presiding judge who can only give such consent with the agreement of the public prosecutor. The consent may be withdrawn." Please continue.

A. In the subsequent time, however, we found those provisions not to be sufficient, in order to guarantee the secrecy of the proceedings which after all had been ordered. As the decisive docu-

[1] Extracts from the testimony of prosecution witness Lehmann are reproduced above in this section.

[2] Document NG–232, Prosecution Exhibit 308, reproduced above in this section.

ment on the subject is available to the Tribunal I can be brief. I am referring to Exhibit 314.[1] The document contains a report by the senior public prosecutor at Cologne, dated 15 October 1942. In that report he states at length that, so as not to endanger the secrecy of the NN proceedings, he had doubts about consenting to allowing a defense counsel to be chosen freely.

Similar reports, as far as I recollect, were received from other senior public prosecutors as well. The document also shows that at the Reich Ministry of Justice we only, after careful examination, decided on further limiting the free selection of defense counsel. From marginal notes which, however, can only be seen on the photostat of the document and which have not been entered in the document books, the following is to be seen. The question of the free choice of a defense counsel, I first on 22 September 1942 reported on to my subdepartment chief. In accordance with the result of that report of 1 December 1942, I then discussed the matter with the expert of the OKW over the telephone. He first of all reserved his opinion, but on 12 December 1942, he told me that the OKW took the view that the admission of defense counsel selected by the defendant in NN matters was not desirable.

We then contacted Department III of the Ministry of Justice, the department of penal legislation, and when that department took the same view as the OKW, Departments III and IV of the Ministry of Justice issued the joint regulation of 21 December 1942, which is contained in Document NG–255, Prosecution Exhibit 314.

* * * * * * *

Q. What about the limitations concerning the necessity of defense?

A. Originally concerning the necessary defense, a provision in paragraph 7 of the executive order of 26 February 1942 applied, according to which the appointment of a defense counsel required the consent of the public prosecutor. May I point out that the following wording of the executive order of 6 February 1942 has not been submitted here as a document. Exhibit 306[2] merely reproduced the draft of that executive order. The provision concerning the necessary defense was issued immediately before the executive decree was issued, and it is therefore not contained in the draft which we have before us here. In the subsequent period opinions were voiced according to which further limitation of defense was considered necessary. The prosecution has submitted

[1] Document NG–255, Prosecution Exhibit 314, reproduced in part above in this section. This letter referred to here is not reproduced herein.

[2] Document NG–077, Prosecution Exhibit 306, reproduced above in this section. Note entry on document indicating that it was dispatched.

Exhibit 317.[1] Although that document unfortunately is very incomplete, it does show that at the Special Court at Essen there had been difficulties in appointing defense counsel as frequently several defendants were dealt with in one proceeding and, on account of the collision of interests, a defense counsel had to be appointed for each defendant.

It is obvious that, in view of having to maintain the work of the court in general, the simultaneous employment of a large number of defense counsel was not desirable. Insofar, the desire of limiting the defense by appointed defense counsel was understandable.

If the report from the presiding judge of the Special Court at Essen points out that the interests of the defendants did not justify so much strain placed on manpower and material, I would point out in this connection that not one of the persons who dealt with the subject at the Reich Ministry of Justice shared that view.

The matter itself was then dealt with at Department III and not in our Department IV, because it concerned a proposed change of a legal regulation. The Referent of Department III then informed me of these events and made a suggestion of his own which unfortunately is not contained in this document.

I then reported the matter to Mr. Mettgenberg and together with him to Mr. Vollmer. The result of that report can be seen from the note made on 1 February 1943 which is initialed by Vollmer and which also bears Mettgenberg's and my initials.[2] That note provides for certain limitations of defense counsel appointed by the courts, but the document does not show the wording of the decree as it was actually issued later on.

What I remember is that after that decree had been issued, the limitation of defense counsel, appointed by the courts, applied neither to proceedings before the People's Court nor did it apply to those proceedings where the death sentence could be expected. How insignificant the practical effect of this limitation of the appointment of defense counsels by the courts was is revealed by the position which defense counsel hold under German code of procedure, a position which has been discussed here repeatedly. For the rest, according to my observations, the Special Courts in practice almost always appointed defense counsel.

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Q. Please state some details about the practice followed by the courts.

[1] Document NG–253, Prosecution Exhibit 317, reproduced in part above in this section.

[2] This note is a part of Document NG–253, Prosecution Exhibit 317, reproduced above in this section.

A. In the final result, and that is still my conviction today, the jurisdiction of the general courts in NN cases was absolutely adequate. This applies to the matter seen as a whole. It applies to the jurisdiction of the People's Court and especially to the jurisdiction of the Special Courts. In the case of the Special Courts you will see that few death sentences were pronounced whereas the People's Court in a large percentage of cases pronounced death sentences. However, the percentage of death sentences is not as high as I assumed in my affidavit of 17 December 1946. That is Exhibit 337.[1] In this affidavit I stated—purely off hand, I would like to say—that the majority, that is, more than fifty percent of those indicted before the People's Court were sentenced to death. I made that statement at the time to the best of my knowledge. However, I did not have any documents of any kind at my disposal, and I had to rely on my memory alone. Today, after I take into consideration the statistical material which the prosecution has submitted, I would assume that about fifty percent of the NN cases sentenced by the People's Court were sentenced to death. The death sentences which the People's Court passed were, I think, justified; and I can even say from an international point of view, the death sentence was appropriate. They were cases of espionage, guerilla activities, serious cases of aiding and abetting the enemy, as well as the support of enemy parachutists, etc. About the offenses which were the basis for sentences for the People's Court, the witness Walter Roemer[2] also testified here in this Court. I refer to the testimony of 24 April by this witness. I can also refer to what the defendant Lautz[3] said here on the witness stand. After examining the statistical material, I have to correct another sentence from my affidavit of 17 December 1946. In that case I stated that aiding and abetting the enemy always practically resulted in a death sentence before the People's Court. After careful consideration, however, I have no reason for expressing the opinion that the number of death sentences was larger in the case of aiding and abetting the enemy than in the case of espionage and guerilla activity. Here, too, I assume that the death sentence amounted to fifty percent.

Characteristic sentences in these courts were those pronounced for illegal possession of arms. I have already mentioned that in the decree issued by the military commander in normal cases the death sentence was provided and only in lighter cases a prison sentence. In fact, only very few death sentences were pronounced because of the illegal possession of arms. These cases were special

[1] Document NG–486, Prosecution Exhibit 337, not reproduced herein.

[2] Roemer's testimony appears in the mimeographed transcript (24 Apr 1947), pages 2652–2672.

[3] The testimony of defendant Lautz appears in the mimeographed transcript (23–25, and 28 Jul 1947), pages 5761–5775; 5781–6054.

cases, as for instance possession of an entire ammunition depot. In an overwhelming majority of cases—and I want to state that illegal possession of arms as far as the number of cases played an important role—only prison sentences were pronounced for the illegal possession of arms. The action by the president of the district court of appeals of Katowice who in the discussion at Oppeln instigated a more severe punishment because possession of arms was at that time generally rejected. In the few cases in which because of illegal possession of arms, the death sentence was pronounced, almost without exception the execution of the death sentence was avoided by clemency pleas.

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DR. KUBUSCHOK: I now come to the clemency proceedings of the Reich Ministry of Justice in death sentences pronounced for NN cases. Please comment on this.

DEFENDANT VON AMMON: The clemency procedure in NN cases was in principle the same as in the case of other death sentences. However, there were some peculiarities. One of these was that the Gauleiter did not participate in the clemency proceedings, because the crime had been committed in occupied territory and not within the sphere of a Gauleiter.

A further peculiarity consisted in the fact that Hitler, as I already mentioned before, reserved to himself the right to make the clemency decision in death sentences pronounced against women from the Occupied Western Territories.

Finally, I should like to point out that in NN cases, because of the lack of the possibility of a deterrent, there was no so-called "lightning" [Blitz] executions. The practice in regard to clemency questions followed by Thierack was, as has been discussed here frequently, severe. It was not easy for a Referent to succeed in getting clemency granted by him. Nevertheless, I succeeded in doing so in a number of cases.

However, when I made the attempt to bring about the granting of a clemency plea in several cases, I became subject to the scorn of Thierack who made derogatory remarks about the obstinacy which I applied.

Q. The NN regulations in the execution of which you had to cooperate—did you have any misgivings about them?

A. In the application of the NN regulations I was, of course, conscious of their severity. I considered especially severe the strict regulations about the seclusion of NN prisoners from the outside world which made any correspondence of the NN prisoners with their relatives impossible. Furthermore, I considered very severe

the regulations which provided that on principle also those NN prisoners, to whom no offense or at least no serious offense could be proved, should remain in custody. That I considered very severe. But I kept to the statements that were made when these regulations were issued, that these regulations were necessary in order to suppress the increasing resistance movement in the occupied territories.

The regulations issued seemed to me to be still better than—and this would have been possible in the case of offenses against the occupying forces in the occupied territories—indiscriminate death sentences.

As the witness Lehmann testified here, the seclusion of NN prisoners from the outside world was, so to say, the price to be paid for the possibility of greater leniency in sentencing. Under this point of view it seemed to me to be acceptable. That very strong resistance movements existed in the occupied territories, which in a certain sense could be considered as a second illegal army and influence the military situation considerably, is an historical fact.

Q. Did you have an opportunity to give up your NN section and to take over another section?

A. As I already stated in the affidavit of 17 December 1946 which I quoted repeatedly, I did not like dealing with NN cases. Whether a person likes his special professional field is, on the whole, dependent on his inner attitude. In any case, I can say about myself that the activity in a section in which of necessity, severity, and above all, death sentences appeared, was not to my liking, especially since people were concerned who as such were not criminals and who could not be denied a human understanding.

For that reason, in the summer of 1944, I made the attempt to swap my section with another section in the personnel division of the Ministry of Justice. At that time it was intended to promote Ministerial Counselor Wittland who was a member of the personnel division. In that case he would have left the Ministry of Justice. The section comprised organization of the courts and civil service law.

At that time I requested to receive this section when Wittland would leave. From August 1944 until January 1945, I used part of my time in order to get acquainted with the personnel department. However, the Party Chancellery then objected to Wittland's promotion, and, therefore, it did not take place; and I had to remain in my former section.

Q. Did you regard the NN regulations as being within the framework of international law?

A. In answering that question, I have to make a clear distinction. The NN decree was signed by Keitel on order of Hitler. The executive regulations for the NN decree were issued, first of all, by the OKW and for the sphere of the Ministry of Justice, by the Ministry of Justice. The basic executive regulations of the Ministry of Justice in regard to the NN decree were not worked out by me as Referent nor in my department at all. Apart from the leadership of the Ministry, the penal legislation department, Department III, was competent for this. Department IV and I as Referent were in a certain sense merely executive organs in the application of the existing legal regulations.

The examination as to whether the NN decree and the basic executive regulations were in accordance with international law was therefore up to the people who were competent for the issuance of the decree and working on the drafting of the regulations. But the executive organ neither has the duty nor the right for review as has been discussed here frequently.

Of course, as a jurist, I thought about these questions and can say that crimes of that nature as were prosecuted as NN cases can be punished with the most severe penalty according to international law, and that penalties of that kind are also usually applied by all states as is obvious, I believe; that courts martial which otherwise would have tried such cases in the occupied territory, were replaced by civil courts in the home country, is also not contrary to international law.

And now, as to the limiting regulations of the NN procedure, the essential factor was that a just decision by the court was not prevented by them. In the statements I have made so far, I have pointed out that the limiting regulations of the NN procedure did not exert a negative influence for the defendant in the proceeding.

Keeping the prisoners incommunicado had been ordered by the Fuehrer order and by the military authorities. The question of military necessity was not subject to review by us. International law puts these military interests above the personal interests of the inhabitants of the occupied territories.

From all these considerations I did not see that the NN regulations were contrary to international law.

Q. Since the prosecution has submitted documents about the conditions in concentration camps against all defendants who continued working in the Ministry of Justice after 1942, I have to ask you too what you knew about occurrences in concentration camps.

A. My various official positions could not afford me any knowledge about such events. Even at the time when members of the SS did not yet have their independent jurisdiction, when reports

about these excesses in concentration camps could thus still reach the Ministry of Justice, my section was not affected by this, and this was entirely regardless of the fact that these reports only provided knowledge of a very small section of actual conditions.

In conversations, too, within the Ministry I heard very little about these matters, probably because they were treated as secret, and I was not in a special confidential relationship with the Referenten who were working on these matters. For those reasons, for example, the occurrences in the Kemna and Hohenstein camps being known to me only here during this trial. I myself never visited a concentration camp. As far as private knowledge is concerned, I considered being kept in the concentration camp, of course, as something unpleasant, especially since the camps were cut off from the outside world, the uncertainty of the period of detention, the lack of orderly legal recourse. That abuses might have occurred for those reasons I assumed without knowing anything definite about it. I did not have acquaintances who had been in a concentration camp and from whom I might have found out some definite details. Although I had quite good relationships with Protestant church circles, for example, I did not even know, did not gain any definite knowledge about Niemoeller's* being kept in a concentration camp. About systematic killings and mass exterminations I heard only after the surrender.

* * * * * * *

CROSS-EXAMINATION

MR. WOOLEYHAN: Mr. von Ammon, last Friday you stated with regard to your relationship with the Nazi Party that you were a victim of Nazi propaganda and that you were not an enthusiastic Party member for ideological reasons. Weren't you omitting some very important events in your political career?

DEFENDANT VON AMMON: First of all, I believe that I did not express myself in that cross matter, that I described myself as a victim of Nazi propaganda. I only stated that under the influence of Nazi propaganda I saw many a thing in a more favorable light than it actually was, and that I was not an enthusiastic National Socialist, because from my ideological point of view, much kept me apart from the Party. I am not aware of the fact that I left out anything important when making such a statement.

Q. Then you don't consider it important, noteworthy enough to remember, that on 9 November 1923 you actively participated with Hitler and others in the famous Munich Putsch; why don't you remember that, Dr. von Ammon?

* Pastor Martin Niemoeller, Protestant clergyman in Berlin-Dahlen at the time of his arrest.

A. Of course, I remember that, but it is not correct that I left these events out, rather I stated that as a high school student as well as a college student I belonged to patriotic youth organizations and to Nationalists' associations. Among these Nationalists' associations also belonged the Bund Oberland, which actually, as you indicated, participated in the so-called Hitler Putsch of 9 November 1923.

Q. As a result of that Putsch in which you participated, wasn't Hitler tried and imprisoned for high treason, for trying to overthrow the German Republic by force?

A. Yes.

Q. Were you tried, Dr. von Ammon?

A. No.

Q. Why not?

A. Because my participation in the Hitler Putsch was so insignificant. By the way, my participation wasn't at that time even found out by the authorities, as was the case with the great majority of those who participated.

Q. If your participation and membership in the Nazi activity at that time had become known, you would have lost your job in the government, wouldn't you, or did you have a job at that time?

A. No, certainly not. First, I was still a college student at that time, as I stated before, and also I do not believe I would have lost my job. Many participants that is, many civil servants who participated at least, if they took part in a subordinate role such as I were not in any way affected in their positions. Moreover, I would like to state at that time it was not a Nazi activity within the meaning of that phrase, the Bund Oberland was not a National Socialist organization. It was a patriotic, self-protective organization, which in the years after the First World War in the fight against the attempted Communist uprising and in the fight against the Polish uprising in Upper Silesia in 1921, without a doubt had gained its merits. To be sure, I participated in the Hitler Putsch at that time, but at that time the fronts were not so well delineated as yet that the actual Putsch could be described as unequivocal Nazi action.

Q. If that is so, Dr. von Ammon, apparently officials in the Ministry of Justice were not aware of it really, because as I read your official personnel files here which came from the Ministry, and which I am sure you have seen many times with respect to your membership in the early political associations, you are credited with having participated, and I am quoting, "in the Nazi

uprising in Munich on 9 November 1923." Now, in later years, Dr. von Ammon, did the Nazi Party ever give you any tangible momento of that famous event of 1923?

A. First of all, in order to correct you, I would like to say that I never saw my personnel files, as you assume, Mr. Prosecutor. I do not know at all what is written in these personnel files. As far as the question is concerned whether I have a tangible momento of my participation in the Hitler Putsch, I have to answer that this momento was limited to a pass which permitted me to participate in the festivities which took place yearly on 8 and 9 November in Munich—

Q. Ah—

A. And I may also add that I only seldom made use of this pass.

Q. What number was that card or pass?

A. Unfortunately I don't recall.

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Q. Now, Dr. von Ammon, there is just one thing further in this custody-of-the-Gestapo business that confuses me. After the arrangement had been made late in 1944 to transfer these Nacht und Nebel prisoners to the Gestapo for protective custody, there has been a lot of talk here about the fact that the court authorities finally handed these people over to the Gestapo, at least in some measure.

What actually was involved in this handing over of Nacht und Nebel prisoners to the Gestapo as far as the courts and the justice administration were concerned? By handing over, what actually did happen, so far as the courts and the Ministry are concerned? Did you sign a release? Did you actually put them in trucks and take them to the other side of town, or what happened?

A. Unfortunately I cannot give you that information. You have to turn to the Referent of the department for penal administration, to the witness Hecker,[1] who carried out those transfers.

Q. Dr. von Ammon, with respect to the winding up of the Nacht und Nebel affairs in the Ministry in the handing over of these people to the Gestapo, the witness Hecker in Exhibit 416[2] says that you attended a number of the conferences during which this method was ironed out. It's surprising that you don't know how it happened. How did these people get off your hands? Was it a paper transfer, or what was it?

[1] Robert Hecker was an official of Department V (which dealt with the execution of court sentences). The chief of Department V was defendant Engert. The entire testimony of prosecution witness Hecker is recorded in the mimeographed transcript (18 Apr, 9 and 12 May, and 7 Jul 1947), pages 2363–2386, 3047–3083, 3111–3114, and 4823–4870.

[2] Document NG–737, an affidavit by Hecker, not reproduced herein.

907802—51——55

A. No, two ordinances of Departments IV and V were issued at that time, and they were issued to the chief general prosecutors concerned, to the effect that they were to transfer the prisoners to the competent authority, the Gestapo.

* * * * * * *

Q. You mentioned that the courts in enforcing the Nacht und Nebel program by trying Nacht und Nebel defendants, particularly the Special Courts, had been moderate in their sentences. Now, in view of that, I'm wondering if that is true for the reason that after the Nacht und Nebel program was terminated by these arrangements in 1944, you wrote a letter to the Attorney General in Munich and you told the Attorney General in Munich that in view of the new arrangement concerning the treatment of Nacht und Nebel prisoners in the future, namely their transfer to the Gestapo, "There no longer will be executions of Nacht und Nebel prisoners in any large numbers."* Now, tell me, Dr. von Ammon, if these courts were so lenient and gentle with these Nacht und Nebel defendants, why did you see fit to mention that death sentences weren't going to be in any large numbers in the future? That's the same as saying they were large in the past, isn't it?

A. I stressed above all that the sentences passed by the Special Courts were moderate. It is true that the Special Courts only passed a few death sentences. I did say, however, on the contrary that the People's Court did pass a large number of death sentences and even mentioned that 50 percent of the persons indicted by the People's Court were sentenced to death. Those sentences which were intended to be executed in Munich were sentences which had been passed by the People's Court.

Q. In any event, whether it was the People's Court or the Special Court, after that Nacht und Nebel program was dissolved, you were of the opinion then that large numbers of death sentences would not be passed in the future?

A. No, actually I was of the opinion that no further death sentences would be passed. The only thing that could still happen was that death sentences would be executed that had been passed prior to September 1944.

Q. And from your letter, it appears that up until that time, they had been large in number, does it not?

A. Well, that is a relative concept—that word "large."

Q. Oh, of course.

A. I believe that in view of the long period of time—from 1942

* Document NG–1886, Prosecution Exhibit 546, reproduced above in this section.

until the end of 1944—the number of death sentences which were actually passed is relatively small.

Q. May it please the court, the prosecution offers as Document NG–1886, Prosecution Exhibit 546, the letter written by defendant von Ammon which we have just been discussing.

PRESIDING JUDGE BRAND: The exhibit is received.

* * * * * * *

EXAMINATION BY THE TRIBUNAL

PRESIDING JUDGE BRAND: I understood you to say that you did not know of any innocent person who was brought to Germany under Nacht und Nebel procedure.

DEFENDANT VON AMMON: I was referring to the assertion of the prosecution. The prosecution had maintained that evidently innocent persons had been treated in exactly the same manner as guilty NN prisoners, and it was in reply to that, that I stated that evidently innocent persons were never brought to Germany at all; that is to say, as far as my knowledge goes. If, however, it did happen that a person was evidently innocent and had been brought to Germany, then there was a possibility of releasing him back to the occupied territories.

Q. I still understand you to say that you knew of no innocent person brought under Nacht und Nebel procedure.

A. It may have happened, naturally, but—

Q. I am referring to what you said. Did I correctly understand you to make the statement that you knew of no innocent person who was brought to Germany under Nacht und Nebel procedure?

A. I would like to restrict that to evidently innocent persons, as opposed to a person whose innocence only later was made clear. That naturally happened, too, and such cases did occur and such cases were brought to Germany.

Q. That is a very material modification of your former statement, because you also said that considerable numbers were acquitted. I assume that you do not consider that persons who were acquitted were necessarily guilty; you presume them innocent if they were acquitted, don't you?

A. Or that the evidence was not sufficient to prove them guilty.

* * * * * * *

REDIRECT EXAMINATION

DR. KUBUSCHOK: In reply to a question by the prosecutor, you spoke of your membership with the Bund Oberland, and you stated

that the Bund Oberland on 8 November [9 November] 1923 took part in the so-called Hitler Putsch. You stated that the Bund Oberland was an association—a so-called Nationalistic association of which many members were college students. Did that organization Oberland at a later time ever become incorporated in the NSDAP? Did that nationalistic organization ever become a National Socialist unit by way of incorporation?

DEFENDANT VON AMMON: No. After the Bund Oberland had participated in the Hitler Putsch on 9 November, it was dissolved. I believe that at some time later on it came back to life, but I personally no longer took any part in it. As far as I know, it never in any way was incorporated in the National Socialist movement.

Q. How far did you participate in the events of the night of 9 November 1923?

A. The company of the Bund Oberland to which I had been assigned was alerted, on the evening of 8 November 1923. I was not alerted because my name was not on the alert list. I had joined the Bund Oberland only a little before that time. Therefore, I was only told about it on the morning of the 9th. I then joined my company which was stationed in an inn by the Isar, at Bogenhausen, in Munich. There I spent a few hours with the company; then we marched off to the East. There we disbanded and returned to Munich one by one. That was my participation in the event of 9 November.

PRESIDING JUDGE BRAND: May I ask you—were you armed? Were you armed at that time?

DEFENDANT VON AMMON: Yes, I had a gun.

* * * * * * *

E. High Treason and Treason, Malicious Acts, Undermining the Military Efficiency, Public Enemies

PARTIAL TRANSLATION OF DOCUMENT NG–685 PROSECUTION EXHIBIT 259

EXTRACTS FROM A LETTER BY CHIEF PUBLIC PROSECUTOR AT HAMM TO THE MINISTER OF JUSTICE, FOR DEFENDANT SCHLEGELBERGER, 29 JANUARY 1941, CONCERNING TREASON, BREACH OF REGULATIONS BY FOREIGN WORKERS, CRIMINAL PROCEEDINGS AGAINST POLISH CIVILIANS, AND APPLICABILITY OF DECREES AGAINST PUBLIC ENEMIES AND VIOLENT CRIMINALS

The Chief Public Prosecutor
3130 a GSTA. 1.06/216

Hamm (Westphalia) 29 January 1941
Telephone: 1780–87

REGISTERED

To the Reich Minister of Justice

Attention: Under Secretary Dr. Schlegelberger
Berlin W 8
Wilhelmstrasse 65

Subject: Situation report

Enclosures: 2 copies of the report
2 printed forms
1 bulletin of the Criminal Police Office, Dortmund

I. High Treason

The department in charge of high treason cases is highly taxed because of the numerous, and in part also very extensive emigrant problems. Upon my request, the president of the court of appeal has seen to it that the criminal senate will hold 4–5 meetings a week from now on. I hope that in this way the majority of all cases can finally be settled in the course of the spring.

II. Administration of Criminal Jurisdiction for Juveniles

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V. Breach of Work Contracts and Unauthorized Change of Residence of Foreigners

1. In my last situation report I already pointed out the difficulties which are created by the criminal prosecution of foreigners, especially Polish civilian workers, who leave their place of work and their assigned place of residence without authorization.

The directors of the labor offices and the Reich Trustee for Labor of the economic territory of Westphalia-Lower Rhine as a rule do not prefer the necessary charges for criminal prosecution, in accordance with the decree concerning the restrictions for changing the place of work, dated 1 September 1939—Reich Law Gazette I, page 1685—and in accordance with the decree concerning the fixing of wages, dated 25 June 1938—Reich Law Gazette I, page 691.

Upon inquiry, the Reich Trustee for Labor for the economic territory of Westphalia-Lower Rhine has informed me that "in accordance with an agreement between the Reich Minister for Labor and the Reich Leader SS and Chief of the German Police, breach of work contracts by Poles are to be punished by the

Secret State Police with protective custody or concentration camps. The meaning of this step"—so writes this Reich trustee—"is that in the case of Poles the strictest measures are to be taken at once in order to create a deterrent effect. For this reason we made it a point in my office to transfer the cases involving breach of work contract by Polish civilian workers to the Gestapo (Secret State Police) for further action. Only in those cases where the Polish workers involved were already under arrest on charges of vagrancy, vagabonding, etc., and investigated, have I in those cases known to me, preferred charges for breach of work contract, so that all the punishable offenses of the Pole could be adjudicated in *one* court trial."

In one individual case, concerning a member of Protectorate, the Reich Labor Trustee for the economic districts of Westphalia and Lower-Rhine refrained from demanding legal action stating, as a reason, that "all foreigners including the Czechs" were exempt from criminal action where this question is concerned.

Contrary to the opinion of the above-named authority, the Reich Trustee for Public Service, who had been informed of the attitude fundamentally taken by the Reich Labor Trustee for the economic districts of Westphalia and Lower-Rhine, has strictly upheld the charges he had preferred against members of the Protectorate who had broken their contracts. In the case in question, the demand for punitive action was based upon the recommendation of the Reich Minister for Transportation to the Reich Trustee for Public Service, dated 24 June 1940 and 13 August 1940 respectively—51.533 Pldaa. According to a statement by the Reich Trustee of Public Service, entered into the criminal record files, the Reich Minister of Labor stated at that time in reply to the report of the Reich Trustee for Public Service referring to a regulation dated 17 July 1940—III b 15062/40, that he had no objections, if he—the Reich Trustee—should prefer charges in accordance with the wishes of the Reich Minister of Transportation. On the other hand the competent office of the Reich Protector thinks it more advisable, not to punish workers from the Protectorate employed within the Reich proper for breach of work contract or to punish them only very mildly as otherwise great difficulties would be encountered in the further recruitment of Czech workers from the Protectorate for jobs in the Reich proper. At any rate, I have dealt with the criminal procedure against workers from the Protectorate for breach of work contract in a special report to the Protectorate also taking up the question concerning the competence of the German courts in the Protectorate for passing sentence in case of breach of contract, committed in the Reich proper.

According to this there seems to be a difference of opinion within the Reich Ministry of Labor as to the question in which cases the competent authorities should prefer charges against foreigners who have broken their contracts. In order to get uniform action on matters concerning punitive regulations it seems desirable to have the Reich Minister of Labor effect a settlement that negotiations between the Ministries concerned and the Reich Protector will result in an agreement to follow one standard rule in preferring charges against members of the Protectorate.

Polish civilian workers leaving their working place *and* their place of residence without permission have at times—when no charges had been preferred against them—been prosecuted and punished according to the viewpoint of article 2 of the ordinance [VO], concerning the treatment of foreigners of 5 September 1939—Reich Law Gazette I, page 1667. This procedure is not without objection, because the Poles concerned were not in the Reich proper on 6 September 1939 when this decree took effect, and it is not known whether they had been informed of this regulation according to article 1 of the ordinance.

*VI. Criminal Proceedings against "Zivilpolen" [Polish Civilians]**

With regard to criminal proceedings against the so-called Zivilpolen—as has been pointed out by me before—an uncertainty has developed which can no longer be tolerated. One cause for the uncertainty regarding criminal proceedings is found in the fact that some matters are handled by the State police independently, and the other is that sentences passed by the regular courts are not based on uniform standards. It may happen that the regular court may sentence a criminal to 2 to 3 years of imprisonment —concurrently or separately—while the State police may pronounce the death sentence for the same crime. In order to overcome these intolerable conditions I have issued directives to the senior public prosecutors and to the public prosecutors of the district and have therein called attention to the following aspects:

Civilian Poles are under the jurisdiction of the regular courts because no special provisions are made for them. However, it is not sufficient, firmly to advocate this principle, but the real effect of jurisdiction can only be secured by consequent and energetic *action* according to this principle, and by administering justice with the speed and severity called for by the situation. In this way it was made possible in the criminal case Bugajny (IIIg 23

* This letter was written before the promulgation of the Decree concerning the administration of penal justice against Poles and Jews in the Incorporated Eastern Territories of 4 December 1941, reproduced as a part of Document NG–715, Prosecution Exhibit 112, on page 632. The first four sections of the decree also applied to Poles domiciled or residing in Poland on 1 September 1939 "and who committed punishable acts in any part of the German Reich other than the Incorporated Eastern Territories." (Sec. XIV.)

5023/40) for the regular jurisdiction to become effective and to do justice to the case. The State police had decided not to hand the case over to the office of the public prosecutor and, with the objective of having the State police deal with the case, reported it to the Security Main Office. I learned about this case from a newspaper report, and I asked the senior public prosecutor to procure a legal warrant of arrest, to put the accused into a court prison, and then through investigations of his own to ascertain the facts of the case, and to prefer charges as soon as possible. The Pole was thereupon condemned to death for criminal violence and forthwith executed without intervention of the State police.

The result obtained in this case must, however, not mislead us, and make us forget that as a rule successful action depends on two other conditions.

For one thing, it is necessary that the office of the public prosecutor be notified immediately. One cannot depend on the chance that a newspaper will report a case. It must be made sure, therefore, that the local police will immediately report crimes committed by civilian Poles to the office of the public prosecutor.

The other thing is the question of the measure of punishment. According to article 1 of the GewVVO[1] the death sentence was called for in the criminal case Bugajny. But what punishment should be given, e.g., for indecent assault—cases in which the State police generally also pass the death sentence. The question is whether Zivilpolen should on principle be judged according to article 4, VVO[2] when in the individual case special circumstances according to article 4, VVO do not exist.

In my opinion this question may be answered with yes, if (1) political crimes or, (2) crimes against the body, life, or possession of a German are involved. The term "body, life, or possession" is taken from article 2 of the VVO and it is, therefore, to receive an accordingly free interpretation. It would not apply, e.g., refusal to work, and also not to any crimes of the Zivilpolen among themselves.

The following points should lend support to—

(1) That Poles are citizens of an enemy state, whose representatives in foreign countries are continuing to fight against Germany.

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[1] GewVVO, abbreviation for "Verordnung gegen Gewaltverbrecher"—Decree against Violent Criminals—dated 5 December 1939. Article 1 of this decree makes the death penalty mandatory for acts of "armed violence" as defined therein. The decree is reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 193.

[2] VVO, abbreviation for "Verordnung gegen Volksschaedlinge"—Decree against Public Enemies—dated 5 September 1939. Article 4 of this decree makes the death sentence possible but not mandatory. The decree is reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 188.

(2) That they are citizens of a nation which contrary to all international laws has massacred 60,000 German civilians and mistreated and plundered others.

Therefore, this is not a question simply of malicious crimes, work sabotage, or indecent assault, etc., but crimes which due to the fact that they were committed by Poles against the German Reich or against a German fellow countryman considering the type of Polish warfare (see (1) and (2) above) appear in a different light.

Of *this type* of crime it can, in my opinion, be said that it was committed by taking advantage of war conditions and is therefore especially contemptible. For the Zivilpolen have only come to Germany proper because of the war conditions (insufficient work in Poland, lack of workers in Germany). Here they are due to the war situation (drafting of fathers, shortage of other personnel) without sufficient supervision, in the midst of German nationals especially women and children, and in German factories as well as in other establishments of great importance to the German armed forces.

The Zivilpole too is without doubt aware of all these circumstances. These circumstances have not necessarily been the actual reasons for this action. But often this will be the case with the stirred up Polish national hatred.

Of course it is not quite certain whether the courts, especially those courts which until now have punished the crimes committed by Zivilpolen very moderately or even mildly, will agree with this legal conception and, if the occasion arises, will pronounce the death sentence in case of an especially serious crime. However, this question does not seem hopeless to me, if the Ministry will exert its influence through circulars, articles in the "Deutsche Justiz", or in oral discussions. I think that a special directive stressing the importance of such an administration of justice in the interest of safeguarding a normal course of jurisdiction, would also bring results. According to our experience so far, it should generally be possible to avoid the application of Article 4, VVO in cases of *Polish females*.

Acting:
[Signed] DR. HAFFNER,
Senior Public Prosecutor

[Stamp]
Certified: [Signature illegible]
Court Clerk

TRANSLATION OF DOCUMENT NG-548
PROSECUTION EXHIBIT 347

LETTER FROM DEFENDANT LAUTZ, CHIEF REICH PROSECUTOR AT THE PEOPLE'S COURT, TO THE REICH MINISTER OF JUSTICE, 23 FEBRUARY 1942, CONCERNING THE QUESTION OF PROSECUTING FOREIGNERS FOR TREASON AGAINST GERMANY FOR INJURIES TO ETHNIC GERMANS ABROAD

The Chief Reich Prosecutor at the People's Court
File No.: 3 J 85/40 secret

Berlin W 9, 23 February 1942
Bellevuestrasse 15
Telephone: 21 83 41
[Stamp] Reich Ministry of Justice
2 March 1942

To the Reich Minister of Justice in Berlin W 8
Wilhelmstrasse 65

[Handwritten] Is this matter to be taken with the attached file? St. g 10a. No! In my opinion it belongs to Gp. 4 March [Signed] A [von Ammon]

Subject: Application of article 91, paragraph 2, Penal Code, in conjunction with article 2, Penal Code for the protection of Germans with foreign citizenship

Enclosures: 3 copies of report

The Reich Leader SS and Chief of the German Police [Himmler] recently asked me to recheck several expert opinions given in several preliminary proceedings here, among them *criminal case 3 J 85/40, secret, against Haupt and others;* the above-mentioned legal question, which was not definitely decided in the judgments passed by the 2d senate on 19 May 1938 in the *criminal case 14 J 785/37, secret, against Krippner;* and that passed by the 3d Senate on 14 June 1938 in the *criminal case 7 J 105/37, secret, against Zueckert.*

The expert opinion in the case against Haupt and others, contains the following statements, in the part concerning this:

The Reich Leader SS and Chief of the German Police in the Reich Ministry of the Interior
S II A 4 No. 12/41 = 558 = secret

Berlin, 13 December 1941

SECRET

To the Chief Reich Prosecutor of the People's Court
To Chief Reich Prosecutor Dr. Barnickel—or deputy in the office in Berlin.

Subject: Preliminary proceedings against the employee Edith, Margarete Haupt, born in Poznan on 7 May 1918, on a charge of treason

[Illegible Marginal Notes]

The systematic shadowing of ethnic Germans also served to obtain reasons for persecution measures and chicaneries in the course of the battle for suppression and extermination. The Poles carried out these measures against the ethnic Germans in a manner which the Germans considered to be absolutely arbitrary, contrary to international law, and brutal (cf. for instance, Freisler, "Development of the nationality law of ethnic German groups," in *German Justice,* 1941, pp. 881 ff.).

As far as *Reich Germans,* who in exceptional cases were not prohibited from participating in the above-mentioned ethnic German organizations, are concerned by this, article 91, paragraph 2 of German Penal Code, is to be taken into consideration.

As far as *ethnic Germans* are concerned, paragraph 91, section 2 of German Penal Code, is not directly applicable, as ethnic Germans according to formal national law were not German, but Polish citizens. I can only express my opinion in the *form of a suggestion,* that in the case of the betrayal of ethnic Germans to the foreign police, article 91, paragraph 2 of German Penal Code is to be applied accordingly on the basis of article 2 of German Penal Code (vide People's Court 2d Senate of 19 May 1938, *vs.* Wenzel Krippner, document number 14 J 785/37–2 H 22/38; different opinion: People's Court 3d Senate of 14 June 1938,*vs.* Walter Zueckert, document number 7 J 105/378–3 L 78/37; decision of 24 October 1940 to quash criminal proceedings in the criminal case, *vs.* Anton Reiprich, document number 4 J 86/40g).

An offender who has caused, or who wanted to cause ethnic Germans to be punished or otherwise prosecuted by Polish (Czech, or Lithuanian) authorities was hitherto almost never punished, because in such cases the intention, according to articles 88, 89, and 90c of the German Penal Code, i.e., the knowledge that he had acted against the interests of the *Reich* could not be proved satisfactorily owing to a lack of comprehensive political training and of judgment, article 91, paragraph 2 of the German Penal Code, was considered to be non-applicable.* Such an offender

* Reference is made to the articles of the Reich Penal Code defining treason. The provisions of this code concerning "high treason" and "treason" were amended early in the Hitler regime by the law of 24 April 1934, "amending provisions of criminal law and criminal procedure." This same law established the People's Court with competence in treason cases. Provisions of this law defining treason are reproduced on page 169 as a part of Document NG–715, Prosecution Exhibit 112, and the provisions establishing the People's Court are reproduced on page 23, as part of the same document. Article 91 of the Reich Penal Code, as amended by the law of 24 April 1934 reads, "(1) Whoever established contact wtih a foreign government or a person acting for a foreign government with the intention of causing a war or forcible measures against the Reich or other serious disadvantages to the Reich, will be punished by death. (2) Whoever established contact of the kind described in paragraph (1) with the intention of causing serious disadvantages for a national of the Reich, will be punished with hard labor for life or for not less than 5 years."

deserves a much heavier punishment, for his dishonorable behavior—behavior which up to now has generally been considered as contemptible in judicial decision and conclusions made by public prosecutors—than, for instance, a person who only apparently was connected with a foreign intelligence service for purposes of treason, but who must be punished according to Article 90c of German Penal Code. The offender nearly always knew that "Germans" were concerned.

Even considering the possibility that a decision, according to article 91, paragraph 2 of German Penal Code, falls into the hands of a foreign government, it would not cause additional attacks against the Reich in foreign affairs, if this decision contains a complete explanation. Such a legal standpoint neither demands the ethnic Germans living on the former borders of the Reich to behave disloyally toward the foreign nation, nor does it take away from the foreign nation the right to exercise a normal police control over the ethnic Germans. This corresponding application according to the above always provides that foreign police control served purposes and measures contradictory to international law and law of minorities. This is especially applicable to the border districts which were taken from the Reich, according to the Treaty of Versailles. Nor does this opinion, for instance, object if single members or groups of ethnic German organizations now and then should have overstepped the bounds of loyalty, for this was not the cause, but the *consequence* of foreign compulsory measures.

I would consider as improper only the laying down generally and legally of a treatment applicable to treason committed by ethnic Germans, by adding a supplementary regulation to the second paragraph of article 91 of the Penal Code. It is true that consideration regarding foreign policy would oppose this. But on the other hand, in my opinion, the lack of an express regulation of penal law for the protection of ethnic Germans does not prove that article 91, paragraph 2, of the criminal code should be applied in every case. On the contrary, I consider this to be a task for the courts to fill a gap in the law, which has been left open for state political reasons, by creating a law in the appropriate cases.

The basic idea of article 91, paragraph 2 has been expressed as follows in the verdict of the People's Court 4th Senate of 8 April 1940, against Horst Moses (4 L 2/40):

> "The National Socialist State is especially well aware of its responsibility toward its citizens, and of its duty to protect all its members, especially if they are abroad and do not enjoy the full protection of law. Hence, it feels its integrity endan-

gered, even in the case of a conspiracy by a foreign government against a single Reich citizen, and wants to lend the threatened person its legal protection, as far as this is possible, from the home country."

The Reich made no secret of the fact that with regard to the protection of Germans it does not only claim the right to protect Reich Germans, but also ethnic Germans living on its borders. The Reichstag speech made by the Fuehrer on 20 February 1938, strikes me as fundamental, even if it was directed especially against the then Czechoslovakian Republic. In this speech, he pointed out, among other things:—

"* * * two of the states situated on our frontiers alone have more than ten million Germans * * *.

"The fact that [these persons] were separated from the Reich by constitutional law, cannot deprive [them] of their ethnic political rights (volkspolitische Rechtlosmachung); i.e., the general rights of an ethnic self-determination which, incidentally, were solemnly granted to us as prerequisites of the armistice in Wilson's Fourteen Points. These rights cannot be disregarded simply because Germans are concerned! In the long run it is impossible for a world power with self-respect to know that they have ethnic comrades [Volksgenossen] at their side who, owing to their sympathy or their ties with the whole population [Gesamtvolk], its fate, and its ideology, are being continually, and gravely harmed. The fact that it is possible, if there is good will, to find ways to reach compromise [Ausgleich] or to ease this suffering, has been proved. But he who tries to prevent such easing in Europe by force will one day invite force among the nations.

"For it cannot be denied, that as long as Germany was powerless and defenseless, she had simply to tolerate the fact that there was a continual persecution of German people on our frontiers. But in the same way as England represents her interests over the whole world, the Germany of today will know how to represent and to protect her interests, even if they are more limited. And these interests of the German people comprise also the protection of those Germans who, of their own accord, are not in a position to ensure for themselves along our frontiers the right of commonly human, political, and ideological independence * * *." [End of quote from Hitler's speech.]

I request, therefore, the re-examination of this question on account of its fundamental importance in regard to legislation and to clarify its principle—in the first place, for the jurisdiction of the Chief Reich Prosecutor at the People's Court—so that this

question may through indictments in the respective cases, also be decided in court. It is, of course, not intended by these statements to anticipate the weighing of evidence in the present case.

"* * * I induced the Foreign Office to participate in the aforementioned expert opinion. The Foreign Office did not make any particular comment on the statements concerning purely legal matters, but has pointed out that questions in the sphere of *foreign politics* could not be raised, if the court in cases such as the present, acted in accordance with article 91, paragraph 2 of the Penal Code for the above-mentioned reasons. This comment applies firstly to such cases in which the ethnic groups of former Poland, Lithuania, as well as the former Czechoslovakia, and Soviet Russia are concerned. In cases in which other countries are involved, the question would, if necessary, have to be examined individually." [End of Himmler's letter.]

The president of the People's Court, to whom I applied for a comment on this judicial problem, in view of the above-mentioned two different verdicts, has stated:

"A discussion with the presidents and the deputy presidents of the senates of the People's Court on the legal question, whether article 91, paragraph 2 of the Penal Code may be applied in connection with article 2 of the Penal Code* in connection with the protection of ethnic Germans of foreign nationality, resulted in the following unanimous interpretation:

"The application is confirmed—

(1) if the wrong [Unrechtsgehalt] of the act—apart from the requirements that all other necessary constitutive elements [of the crime] must be present—is so serious as absolutely to demand punishment,

(2) if the granting of equal rights to an ethnic German and to a German national does not present for the state to which the ethnic German belongs, a grave detrimental proposition from a political point of view, which is prejudicial to its sovereignty and to its friendly relations with the Reich,

* Article 2 of the Reich Penal Code, as amended by the "Law Amending the Penal Code" of 28 June 1935, introduced the principle of "creation of law by analogous application of penal laws," and declared punishable any act "which deserves punishment according to the fundamental idea of a penal law or the sound sentiment of the people." Extracts from this amending law are reproduced on page 176, as part of Document NG–715, Prosecution Exhibit 112. Article 91, paragraph 2, of the Reich Criminal (Penal) Code, as amended, established the principle that intentional causing of "serious disadvantages for a national of the Reich" in connection with a foreign government was treasonable. This provision, however, did not go so far as to declare that acts against "ethnic Germans of foreign nationality" could constitute treason against Germany. Hence, the discussion of Article 2 of the Reich Penal Code as amended with its provision for punishment "according to the fundamental idea of a penal law or the sound sentiment of the people" and the "creation of law by analogous application of penal law."

(3) if the act is not subject to punishment from any other legal point of view according to German penal law nor subject to punishment according to the laws of the foreign state (article 4 of the Penal Code)."

I agree firstly with the Reich Leader SS and the President of the People's Court that a direct application of article 91, paragraph 2 of the Penal Code, which obviously, expressly, and knowingly—see also the draft of the new penal code—protects only German nationals will not be made in favor of ethnic Germans. Furthermore, I concur with the conception that the general political development which has meanwhile come about, particularly during the last years, enabling the Reich largely to protect its ethnic members of foreign nationality to a greater extent than has been possible hitherto must be borne in mind in this particular instance. Therefore, I find it necessary on principle to protect by means of the German Penal Code those ethnic Germans who have seriously suffered through action such as mentioned in article 91, paragraph 2 of the Penal Code, provided that the action, in accordance with sound public sentiment, deserves punishment analogous to this provision, but where such punishment considering the wrong of the particular case cannot be pronounced on account of any other directly applicable penal regulation. In this connection, my standpoint—and this agrees with Laemmle, "German Justice," 1940, page 775, and with the practice of the People's Court mentioned therein—is that the act which is punishable according to article 91, paragraph 2 of the Penal Code must be considered as an act of high treason against the Reich to which article 4, paragraph 3, number 2, of the Penal Code, not article 4, paragraph 2, is applicable. Whether in other respects the prerequisites for an appropriate application of article 91, paragraph 2, in conjunction with article 2 of the German Penal Code exist, will, in my opinion, depend upon the examination of each individual case, in which also questions of foreign politics will have to be taken into consideration, although these already have been eliminated to a large extent by the comment of the Foreign Office contained in the expert opinion of the Reich Leader SS.

In this connection, I wish to quote, by way of example, two cases of preliminary proceedings which have recently come to my hands, and which concern particularly serious aspects.

In the proceedings of 3 J 304/41 *vs.* Hellig, the defendant, an ethnic German, formerly resident in Northern Bukovina, and formerly of Rumanian nationality, who since became a German national, repeatedly guided, for high reward, ethnic Germans of Rumanian nationality, who had been surprised by the Russian occupation of Northern Bukovina by the Soviet Russians in 1940,

allegedly in order to enable them to illegally pass the frontier into Rumania, but then played them into the hands of the Russian frontier guards.

In the proceeding 11 J 8/42 g *vs.* Golek, the defendant, a former Polish national, of the Polish ethnic group, in the years of 1938 and 1939 in Poland handed over to the Polish authorities his friend, the ethnic German Leo Hardt, of Polish nationality, by accusing him wrongly of treason in favor of the Reich and by concealing in the latter's house a Polish army regulation book for the purpose of incriminating him. As a result of this action of Golek, Hardt was condemned to 6 years of imprisonment for espionage in favor of Germany.

In the majority of the cases, as in the two cases cited, it will be offenses, which have been committed by foreign nationals abroad against ethnic Germans. To that effect I shall have to report in each individual case especially for the purpose of reaching the decision on initiating prosecution according to article 153a, paragraph 2, Code of Criminal Procedure, so that the doubtful problems mentioned above will have to be decided upon there in each case. There are cases possible, however, in which the offender acted also or only within Germany proper so that a report is practically unnecessary. In view of this and on account of the fundamental importance of this problem, I believed, I should submit it in general already at this time with the request for a *decision,* as to whether my *interpretation is approved.*

[Signed] LAUTZ

PARTIAL TRANSLATION OF DOCUMENT NG–337 PROSECUTION EXHIBIT 186

THE LOPATA CASE, APRIL-DECEMBER 1942. EXTRACTS FROM THE OFFICIAL FILES INCLUDING: VERDICT OF LOCAL COURT SENTENCING LOPATA, A POLE, TO 2 YEARS' IMPRISONMENT; DECISION OF THE REICH SUPREME COURT GRANTING NULLITY PLEA FILED BY CHIEF REICH PROSECUTOR; VERDICT OF THE NUERNBERG SPECIAL COURT (DEFENDANT ROTHAUG PRESIDING) SENTENCING LOPATA TO DEATH; THIERACK'S REFUSAL TO PARDON; LOPATA'S LAST PETITION FOR CLEMENCY; AND THE RECORD OF EXECUTION OF THE DEATH SENTENCE

Ds.14/1942

In the Name of the German People

VERDICT

Local Court Neumarkt (Oberpfalz) in the criminal case against—
Lopata, Jan, Polish farm-hand in Bodenhof

at present under arrest pending trial for assault, in its public session on 28 April 1942 in which took part:

1. Local Court Judge Egger

2. Public Prosecutor Durchholz, as counsel for the prosecution

3. Inspector Fuchs, as Registrar

V.R.A. 163/164/42

On the basis of the trial—Lopata, Jan, born 24 June 1916 in Kajscowka, District Myslenice; parents: Michale and Anna Lopata, née Mosul, single, Polish farm-hand, at present in arrest pending trial, is sentenced to an imprisonment of 2 years in a prison camp for the crime of assault according to article 185 of the Penal Code together with a violation according to section 1a, 7 of the Police Regulation of the Governor in Regensburg, 28 May 1940, No. 1032 f 47; and of 23 December 1941, No. 1032 f 48, section 44a of the Police Penal Code, both in connection with articles III and XIV of the penal decree for Poles of 4 December 1941,* Penal Code I, page 759, and to a fine of 35 RM—and in default of payment an additional week in prison camp, and to the costs for the trial and for the execution of the sentence.

FINDINGS

The accused who is a Pole and who on 1 September 1939 was resident at Kajscowka in the district of Myslenice in Poland was employed as an agricultural laborer by the farmer Therese Schwenzl at Bodenhof in the parish of Muehlen. In the beginning of February 1942, Mrs. Schwenzl together with the accused and a Polish maid were cutting chaff. The accused stood to the right of the chaff-cutting machine. Without saying anything he suddenly touched Mrs. Schwenzl's genitals through her dress. When thereupon she said: "You swine, you think nothing terrifies me. You think you can do that to me because my husband is sick." The accused just laughed and repeated his action. At this Mrs. Schwenzl slapped his face. In spite of this he did it again. Finally, he had a quarrel with the Polish maid and did no longer molest the farmer's wife.

On 8 February 1942, the accused left his place of employment without permission and was arrested on 9 February 1942 when calling at the employment exchange at Neumarkt/Oberpfalz.

The circumstances are proved by the absolutely trustworthy statement given by the witness Mrs. Schwenzl under oath. The stubborn denial of the accused is disproved by statements made by the witness.

* This decree of 4 December 1941 is reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 632.

907802—51——56

In the witness Schwenzl's description there is nothing to prove that the accused went as far as to use force against the witness. Therefore, this is no case of sexual crime according to article 176, paragraph (1), Penal Code, but only a case of personal assault according to article 185, Penal Code.

No sentence has been proposed pursuant to article 2 of the decree concerning wages of 25 June 1938. The fact is that the accused left his place of employment and cannot be punished under articles 2 and 8 of the ordinance, dated 5 September 1939, Reichsgesetzblatt I, page 1667, dealing with the treatment of foreigners, since it has not been established that the accused had left the place where he stayed at the time of a public summons in accordance with section 1 of the same ordinance. However, articles 1a and 9 of the police decree of the Regierungspraesident [president of local government] of Regensburg dealing with the treatment of Polish labor should be applied.

According to this, the accused has been proved to have assaulted another person and to have violated the police orders regarding the treatment of Polish labor by another action. He therefore is to be punished for personal assault according to article 185, Penal Code, together with a violation of articles 1 and 9 of the police decree of the Regierungspraesident of Regensburg, dated 28 May 1940 No. 1032 f. 47, supplemented by the ordinance dated 23 December 1941 No. 1032 f. 48 and dated 3 June 1941 No. 1032 f. 27 in conjunction with articles III and XIV of the Criminal Code for Poles dated 4 December 1941, Reichsgesetzblatt I, page 759.

* * * * * * *

Although the accused was treated well in Schwenzl's house, he was as lazy as he was insolent and presumptuous. The manner in which the accused committed this act of insult to the honor of his employer [Mrs. Schwenzl] shows an enormous degree of insolence and shamelessness which can be found only among persons belonging to the Polish people. The fact that the husband Schwenzl was ill in bed at the time the crime was committed has an aggravating effect. It demonstrates the mean and treacherous character of the accused that he did not find it convenient to confess but denied it all stubbornly. He stubbornly continued his denial even in the face of the sworn statements of the witness Schwenzl. It therefore seems appropriate to sentence the accused to 2 years' imprisonment at a detention camp in application of articles III and XIV of the Penal Code for Poles dated 4 December 1941, Reichsgesetzblatt I, page 759. For the unauthorized leaving of his place of residence the usual fine of 35 RM or 1 week of detention camp was considered to be an appropriate punishment.

Costs—Article 465, Code of Criminal Procedure.—There is no cause to take into account the time spent in arrest pending trial in view of the mean conduct shown by the defendant, article 60, Penal Code.

[Signed] EGGER

No charge because of insolvency.

Neumarkt (Oberpfalz), 6 May 1942
The Registrar of the Local Court Neumarkt (Oberpfalz)

[Signed] SCHROTH
Clerk

[Decision of the Reich Supreme Court upon the nullity plea]

1 C 566/42
(I StS 26/42)

DECISION

In the criminal case against the Polish agricultural laborer, Jan Lopata, last residence Bodenhof, in the parish of Muehlen, now at the main camp at Maltheuren, for assault among other offenses:

The Reich Supreme Court, Penal Senate, in secret session of 14 July 1942 has decided with regard to the nullity plea of the Chief Reich Prosecutor.[1]

The sentence of the local court at *Neumarkt (Oberpfalz)* dated 28 April 1942, Ds 14/42, is annulled with its relevant findings in as far as the accused was sentenced for assault. In this connection the case will be returned to the lower court, *namely to the Special Court at Nuernberg,* for a new trial and sentence.

FINDINGS

By the afore-mentioned verdict the accused has been sentenced to 2 years at a detention camp for personal assault according to article 185, Penal Code, in conjunction with articles III and XIV of the Criminal Code for Poles dated 4 December 1941, Reichsgesetzblatt I, page 759. The sentence has been declared valid.

The Chief Reich Prosecutor has filed a nullity plea and has moved to annul the sentence by decision and to return the case to the lower instance, namely the Special Court at Nuernberg for a new trial and sentence. The motion has been granted.

The sentence passed by the local court is defective in law insofar as it does not discuss at all as to whether article 4 of the decree against public enemies of 5 September 1939[2] (Reichsgesetzblatt

[1] Concerning the "nullity plea," see section V C 1 b.

[2] The decree of 5 September 1939 is reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 188.

I, p. 1679) is applicable. That this is applicable may very well be assumed considering the facts established. According to these facts the possibility exists that the defendant knowingly took advantage of the wartime conditions when committing the crime, inasmuch as he was aided by the lack of other labor and a thereby conditioned insufficient supervision and watching, or inasmuch as he presumed that because of the labor shortage no charges would be preferred against him lest not to lose a hand. In the summary of the local court as to the sentence imposed it has been emphasized that the action of the defendant proved an unheard of amount of impudence. This impudence, considering the facts, could possibly be explained only by the fact that the defendant considered himself indispensable, and therefore presumed he did not have to reckon with the preferring of charges.

With this judicial error the judgment has become unjust since, if also article 4 of the decree against public enemies is applicable which may very well be assumed, a much more severe sentence is deemed necessary.

[Typed] signed: SCHULTZE

[Typed] signed: RAESTRUP

[Verdict of the Nuernberg Special Court]

COPY

Reg. f.H.V.Sg No. 433/42

VERDICT

In the name of the German People:

The Special Court for the district of the Nuernberg Court of Appeal at the Nuernberg-Fuerth District Court pronounces the following sentence in the case against Lopata, Jan, Polish agricultural worker, last place of residence Bodenhof, on account of defamation and other offenses. The sentence was pronounced in open session on 26 October 1942. Persons present were—

The Presiding Judge: President of the District Court Chamber Dr. Rothaug.

The Associate Judges: District Court Judge Dr. Ferber and Local Court Judge Dr. Pfaff.

The Prosecutor at the Special Court: Senior Public Prosecutor Paulus.

Chief clerk Kastner as registrar of the office.

Lopata, Jan, born on 24 June 1916 in Kajsocowka, single, Polish agricultural worker, last place of residence Bodenhof, in arrest pending trial for this case is, by application of articles II, III, and XIV of the decree concerning Poles and Jews, sentenced to death for a crime under section 4 of the decree against public enemies in connection with assault, and will have to bear the costs.

FINDINGS

1. The accused is a Pole; he belongs to the Polish ethnic group. He grew up in Kajscowka as son of a farmer and cattle dealer, he attended school for 6 years according to local custom. He can read, calculate, and write. According to his testimony, the parents of the accused died over 20 years ago. A brother and a sister of the accused live in the Government General. After he left school—in 1931—the accused worked on a farm for his aunt because his parents had died. At the age of 20—in 1937—the defendant took up work as a farm hand.

2. After reporting voluntarily, in spring of 1940, the defendant was assigned by the labor office Neumarkt/Oberpfalz to work for the farmer Josef Schwenzl in Bodenhof, district Neumarkt/Oberpfalz. Early February 1942—on a day which can no longer be clearly specified—the wife of the farmer Schwenzl, together with the accused and a Polish girl were cutting chaff in the barn. The accused was standing on the right hand side of the machine to carry out the work. Suddenly while working, the accused without saying anything, touched with his hand the genitals of farmer Schwenzl's wife through her dress. When she said after this unexpected action of the defendant, "You swine, you think nothing terrifies me, you think you can do that because my husband is sick," the accused laughed and, in spite of this admonition, again touched the genitals of the farmer's wife through her dress. The wife of farmer Schwenzl slapped his face after that. In spite of this, the accused continued with his aggressive conduct, for a third time he touched the genitals of the farmer's wife through her dress.

On account of that the farmer's wife started a heated quarrel with the accused. The accused started to quarrel with the Polish maid too, and no longer molested the farmer's wife.

II

The accused did not make a complete confession. He states that he only once, for fun, touched the genitals of the farmer's wife through her dress.

The court is convinced, on account of the testimony given by the witness Therese Schwenzl, who makes a trustworthy impression, that the incident occurred exactly as described by the witness. Therefore, the court based its findings on the testimony given by this witness.

The prohibition to have sexual intercourse with a German woman was known to the accused, he also knew about the severe punishments laid down for Poles who do not comply with this regulation. When the accused was assigned a place of work by the labor office Neumarkt/Oberpfalz in spring 1940, this regulation was pointed out to him according to the testimony of the witness Reiser; he was also given a printed guide of conduct for enlightenment. The statement of the accused that, in spite of all, he had no knowledge of this regulation because when given the instruction no interpreter was present, and because he did not peruse the guide of conduct, proves to be a scant excuse; because when asked why he denied having been aggressive towards the farmer's wife in his interrogation by the local court at Neumarkt, a fact which can be proved on hand of the record made there on 28 April 1942, the accused says that he did not want to confess, not even partially, fearing that the death sentence would be pronounced.

Thus, the defendant gives the impression of a definitely degenerate personality who is distinguished by irritability and a positive propensity to lying; all his inferiority is based on his character and the reason can obviously be found in his belonging to the Polish subhuman race.

III

The established facts show first of all that the defendant grossly assaulted the honor of farmer Schwenzl's wife by his frequently touching her genitals. The defendant fully realized the despicable nature of his mean and base aggressive conduct. He thereby committed the offense of personal assault—article 185, Penal Code, 13 March 1942. The insulted person preferred charges in writing on account of the personal assault.

This, however, does not cover the full extent of the defendant's crime.

The drafting of men into the armed forces effected a serious labor shortage in all spheres of life at home, last but not least in agriculture. To balance this, Polish laborers, among others, had to be used to a large extent in the Reich, mainly as farm hands. These men cannot be supervised by the authorities to such an extent as their insubordinate and criminal disposition would necessitate. Since there is a lack of the necessary supervision, these

Poles are becoming impudent and insubordinate. At the same time, they know that they can indulge in all manner of activities, because we have to depend on them, and because it is difficult to find replacements.

The defendant has lived in the greater German domestic sphere for a sufficient length of time to know about these circumstances caused by the war as he saw them daily with his own eyes.

From the very beginning of his employment with Schwenzl the defendant was a lazy and stubborn fellow. Frequently he refused to work; when once in the morning in the presence of the Pole, farmer Schwenzl's wife made a casual remark to her husband to the effect that someone would have to beat her to death if she had to eat as much as the "Polak" did, the defendant at noontime refused to take his midday meal. He also induced the Polish servant maid to offer the same passive resistance. Farmer Schwenzl did not permit the defendant to act like that, he called the Pole to account in the stable. The defendant put up resistance toward his admonitions by arming himself with a pitchfork. In the hallway of the farm, farmer Schwenzl continued his admonitions. The impudence and disobedience of the defendant is shown in all its impressiveness by the fact mentioned by the witness Schwenzl, that the Pole at the threshold of the farm hallway turned against the farmer again and only let him go when the sheep dog which they kept on the farm attacked the defendant from the back.

As proved by the defendant's behavior as a whole, he took advantage of the circumstances caused by the war also in the crime under discussion. Being a Pole who had been given the opportunity to earn a fair wage in the Reich, he acted in the basest conceivable way. His crime as well as all the rest of his impudent behavior classify him as a public enemy. The German population which today is especially sensitive toward such attacks and needs —according to the sound public sentiment—an increased protection against such foreign elements by sentences beyond the customary penal code.

Accordingly, the defendant was to be sentenced in connection with personal assault also a crime under section 4 of the decree against public enemies of 5 September 1939.

IV

The defendant is a Polish national in the meaning of the Ordinance on Legal Procedure against Poles and Jews in the Incorporated Eastern Territories of 4 December 1941. On 1 September 1939 he was living on former Polish territory; therefore punishment has to be pronounced according to article III of the

ordinance mentioned above, of articles II and XIV in other instances.

The action of the defendant means a considerable violation of the peace to the persons immediately concerned by his base actions. The rural population is right in expecting most severe measures against such terrorization by foreign elements. But beyond disregarding the honor of farmer Schwenzl's wife, the attack of the defendant is directed against the purity of the German blood. Looked at from this point of view, the defendant showed such a great deal of insubordination living in the German domestic sphere that his action has to be considered especially grave. Anyone who is acting like the defendant commits an outrage against the defensive power of the German people in the emergency of war. Wartime demands an essentially increased protection of the home country against the dangers of war.

Accordingly, as outlined in article III, paragraph 2, second sentence of the ordinance concerning Poles and Jews, the crime of the defendant which, compared with his other conduct, shows a climax of unspeakable impudence, has to be considered as especially serious. Thus, the death sentence had to be passed as the only just punishment which is also necessary in the interest of the Reich security to deter Poles with a similar attitude.

Decision as to the costs—article 465 Criminal Code of Procedure.

[Typed] signed DR. FERBER

[Typed] signed ROTHAUG

[Amtsgerichtsrat] AGR. Dr. Pfaff was not in town on account of official business.

[Typed] signed ROTHAUG

Certified.
Nuernberg, 29 October 1942

The registrar of the Office of the Special Court for the District of the Nuernberg Court of Appeal at the Nuernberg-Fuerth District Court.

[Signature illegible]
Clerk

[Stamp]

District Court
Nuernberg-Fuerth

[Refusal of pardon by the Reich Minister of Justice]
Certified true copy

In the criminal case against Jan Lopata, sentenced to death by the Special Court with the Nuernberg-Fuerth District Court on 26 October 1942 as a public enemy according to the ordinance concerning penal law applying to Poles, I decided after having been authorized by the Fuehrer not to make use of the right of pardon, but to let justice take its free course.
Berlin, 19 November 1942

The Reich Minister of Justice
(Seal) [Typed] signed: DR. THIERACK

[Stamp]

Reich Ministry of Justice
Ministerial Chancellery

This is to testify that the text corresponds with the original.
Berlin, 22 November 1942

[Signed] PETERSEN
Senior Secretary of the Ministerial Chancellery

IV g–11–2417.42

[Petition for Clemency]

[Handwritten marginal note] Special Court Nuernberg. Sentence: 26 November 1942.

[Handwritten] Translation from the Polish language of a petition for clemency.

Stanislaus Bieniasz

Jan Lopata, born on 24 June 1916 in Kajscowka, district of Myslenice.

Petition for Clemency

In 1940, I stayed in Germany as an agricultural worker with the farmer Josef Schwengel at Bodenhof, where I had my residence together with Angelike Murzyn until 1942. Later on, on Sunday 7 February, I went to another farmer whose name was Josef, I do not know his surname, but I know where he lives. He urged me continuously to come to him, and I went to see him on Sunday 7 February. On Monday 8 February, I went to the regional labor office together with the farmer's wife and from there the policeman took me along to prison, for what reasons, I do not know. Maybe on the grounds that for 2 years I worked hard and well at

the farmer's; the Lord can see that from heaven how they treated me and such things. The Polish woman is my very best witness, because she has been working together with me and she knows everything, how the farmer beat me in the beginning, and how he did not want to pay me. The testimony given by the farmer's wife during the proceedings is not absolutely true. She has not told what they had hidden in the corn on the second floor of the barn. Neither did she tell that they slaughtered a pig for New Year's day. At that time they chased us out of the house, and we were supposed to go to Peihof? [sic] and have a glass of beer together with the Polish woman. I immediately refused to do that, and that is the reason why they urged us and said that they would also go and have a glass of beer and that we should not return home too early at least not before 8 o'clock. They themselves would not return so early either, at any rate not before late in the evening. When we then came back later—the sun had already set—they were already at home. I was just about to enter the room in order to cut a few slices of bread for myself, as I always did. When I came home Sunday night, and at that time cut bread for New Year's Eve, the farmer was already at home and was doing something in the other room. He called to his wife to bring him some salt. She went upstairs to get the salt. When she came down with the salt she tried to hide it in a way that the Polish woman should not see it. The pig had been delivered only shortly before the New Year. On New Year's day, in the morning, the pig was still there and on the other day, Friday morning, that pig was not there any longer. At the time mentioned in the evening, we were urged to go to bed and later on, they turned on the light and arranged something in the other room at night. The windows were screened. I do not know why. Because I was angry I left them. The farmer's wife said that I did not want to get up in the morning, and that I did not want to work. All that was seen by the Polish woman. Now I would be deeply obliged if the death penalty could be commuted into a prison term. I beg you very much to do that, I forward my petition to the lawyer so that he may try to bring it about. If I had enough money, I would pay him, but what can I do, if I have not got any? Perhaps I might beg the defense counsel to do so without pay, and I beg him most humbly to have this petition carried through as soon as possible.

Munich, 22 November 1942

Signed: JAN LOPATA

For the correctness of the translation:
Munich, 26 November 1942

[Signed] STANISLAUS BIENIASZ

[Report of execution of Lopata]

Sg 433/42 V.R. Sg. II 371/42

Nuernberg, 3 December 1942

The Chief Public Prosecutor

1. Report: To the Attorney General—personally or to his official representative in Nuernberg

Subject: Execution of the death sentence against the Polish farm worker Jan Lopata, single, last residence: Bodenhof

In addition to the ordinance of the Reich Minister of Justice, IV g–11–2417 b/42 issued 19 November 1942

Enclosure: Original of the decree IV g–11–2417.42 of the Reich Minister of Justice, dated 19 November 1942

The death sentence was carried out on 30 November 1942

The execution took 1 minute 10 seconds altogether. From the defendant's being handed over to the executioner until the falling of the axe, 7 seconds elapsed.

The execution took place without any incidents.

Please find in the enclosure the original of the decree of the Reich Minister of Justice, dated 19 November 1942.

II. To Public Prosecutor Dr. Dorfmueller for due information and further orders (carrying out of the sentence).

III. Information to the Chief Public Prosecutor, Munich, according to Reich Ordinance of 21 May 1942, 4417—VIII a–10–1003 Article 2b (2).

[Signed] HOLLMANN
Senior Public Prosecutor

[Handwritten marginal notes] I. duly noted.
II. To Attorney at law, Dorfmueller.

3 December 1942

TRANSLATION OF DOCUMENT NG–412
PROSECUTION EXHIBIT 77

REQUEST BY UNDER SECRETARY FREISLER FOR A "DRAFT ON THE RETROACTIVE EFFECT OF THE MORE SEVERE NATIONAL SOCIALIST REGULATIONS" FOR TREASON, 18 MAY 1942; AN INTEROFFICE MEMORANDUM THEREON, AND A CIRCULAR LETTER FROM DEFENDANT SCHLEGELBERGER TO VARIOUS REICH AUTHORITIES ATTACHING A DRAFT OF A PROPOSED LAW AND REQUESTING APPROVAL

[Handwritten] Reich Chief Prosecutor Lautz will return from official trip on 22 May.

To Ministerialdirektor Schaefer

I ask you to submit as soon as possible a draft on the retroactive effect of the more severe National Socialist regulations for cases of treason upon the earlier period. You can perhaps discuss the cause with the Chief Reich Prosecutor on the telephone.
18 May 1942

[Initial] FR (Freisler)

[Handwritten Notes] Urgent
Herr Rietzsch:

Please discuss this with me.

[Initial] SCH [Schaefer]

19 May

Settled.

[Initial] R [Rietzsch] 20 May

Note—Reich Chief Prosecutor Lautz, who could be reached only after his return from a journey, states that *one* case has been discovered where a German subject from the Memel district had betrayed to Lithuania prior to 1933 important State secrets on the organization of the supporting operation set up by the Reich for the Memel district.

In view of the extent and importance of the State secrets which were revealed, and betrayal was deserving of death. The disclosure of further severe cases of treason from the time prior to the seizure of power is to be expected.

[Signed] RIETZSCH 26 May

BY ORDER OF UNDER SECRETARY DR. FREISLER:

Berlin, 27 May 1942

The Reich Minister of Justice
III a 454.42 g

Official in charge: Ministerialrat Rietzsch

Secret
[Handwritten Notes] III a 891/42 g.
Immediately!

To:

1. The Chief of the High Command of the Armed Forces, III a 683/42 g.
2. The Reich Air Minister and Commander in Chief of the Air Force.

3. Reich Marshal Goering, Plenipotentiary of the Four Year Plan, III a 608/42 g.
4. The Reich Minister of the Interior.
5. The Reich Minister and Chief of the Reich Chancellery, III a 454/42 g.
6. The Chief of the Party Chancellery, III a 609/42 g.
7. The Foreign Office, III a 537/42 g.

[Stamp]
To the office 30
May 1942, finished
and dispatched
June

Draft of a Law to Supplement the Regulations against Treason

Dispatched: 2 June 1942

1 Enclosure
[Handwritten] to be mimeographed

I. The trial of the emigrated Jew Leo Israel Sklarek before the People's Court has proved anew that, in severe cases of preparation for treason (art. 92 Reich Penal Code), there is need of instituting the death penalty which so far is not provided for in article 92 of the Reich Penal Code. When deliberating on the draft of the Penal Code, the Fuehrer, during a cabinet session, had personally emphasized the necessity of threatening even with the death penalty in cases of preparation of treason. I, therefore, propose to supplement article 92 of the Reich Penal Code accordingly.

II. Inquiries that could be opened on the grounds of discoveries in the occupied eastern towns have disclosed a case of treason in the time prior to the seizure of power, when a German subject betrayed important military secrets. The act of treason of that German subject deserves death but cannot be punished with the death penalty according to the hitherto valid regulations since a retroactive effect of the law altering regulations of the Penal Code, dated 24 April 1934,* Reichsgesetzblatt I, page 341, which reformed at the time, the regulations against treason, is not provided for as yet. The disclosure of further severe cases of treason may be expected. It is, therefore, recommended that in the individual case, the section chiefs concerned be authorized to order the retroactive effect of the regulations against treason in order to arrive at the imperative severe punishment in particularly serious cases of more remote date.

* The relevant provisions of this law are reproduced on page 231 as part of Document NG-715, Prosecution Exhibit 112.

Enclosed please find the draft of a law containing the two regulations discussed above with the request for approval.

The Acting Minister,
[Initial] SCH (Schlegelberger) 27 May

[Initial] FR (Freisler) 26 May

2. Copy to Ministerialrat Rietzsch.
3. To Ministerialdirector Schaefer after his return with the request to note.
4. 1 month.

Dispatched: 2 June 1942

[Handwritten] Enclosure to III a 454.42 g.

Law for supplementing the regulations against treason of 1942

The Reich Cabinet has enacted the following law which is herewith promulgated:

Article I

Paragraph 1

Article 92 of the Reich Penal Code is supplemented by the following concluding paragraph:

In particularly serious cases the death penalty has to be passed.

Paragraph 2

The regulation of paragraph 1 is also valid in cases of criminal acts which were committed prior to the date this law came into effect.

Article II

The Chief of the High Command of the Armed Forces, the Reich Air Minister and Supreme Commander of the Air Force, as well as the Reich Minister of Justice may each order within their jurisdiction that the penal regulations against treason (articles 88 to 93a of the Reich Penal Code in the version of the third part of the law dated 16 September 1939, Reichsgesetzblatt I, p. 1841) should be applied also to criminal acts which were committed prior to the date the law dated 24 April 1934, Reichsgesetzblatt I, page 341, came into effect.

Article III

The law is also valid in the Incorporated Eastern Territories.

Fuehrer Headquarters,.....1942

The Fuehrer and Reich Chancellor

The Chairman of the Ministerial Council for Reich Defense
The Reich Marshal
The Chief of the High Command of the Armed Forces
The Reich Minister of the Interior
The Acting Reich Minister of Justice
The Reich Minister and Chief of the Reich Chancellery
[Handwritten] to III a 454/42 g.

PARTIAL TRANSLATION OF DOCUMENT NG-595 PROSECUTION EXHIBIT 136

THE BRATEK CASE, 10 DECEMBER 1942-20 JULY 1943. EXTRACTS FROM THE OFFICIAL FILES, INCLUDING GESTAPO REPORT OF 10 DECEMBER 1942; JUDGMENT OF THE PEOPLE'S COURT AFTER TRIAL OF 20 MAY 1943; AND NOTE OF 20 JULY 1943 ON THE EXECUTION OF THE DEATH SENTENCE

Secret State Police
Office Innsbruck
File No. III B—3240/42 g.

Innsbruck, 10 December 1942
Herrengasse 1
Telephone: 1230, 1231, 2107
Long Distance: 2159

Imprisonment!

To Chief Reich Prosecutor at the People's Court or deputy in office
Berlin W 9
Bellevuestrasse 15

[Stamp]
SECRET!

[Stamp]

The Chief Reich Prosecutor at the People's Court
Received: 14 December 1942

Subject: Case against the Pole, Stanislaw Bratek born on 3 January 1920 in Wolbrom

Incident: Your file No. 9 J 195/42 g.

Enclosures: None

The Secret State Police Office Breslau informed me additionally about the following details concerning the accused:

"From January 1940 to 6 September 1942 Bratek was employed as a farm hand in Roggendorf at the State-owned farm Buchenhang. On 13 October 1941 and on 6 September 1942, he

left this place of work without permission. In the first case, he was arrested at the police border in Kosten on 13 October 1941, district of Kreuzburg (Upper Silesia), and after having been warned, was taken back to his place of work. After the second breach of his working contract he was arrested at the station in Munich on 8 September 1942. When being arrested B. illegally wore the Hitler Youth badge, and was in possession of 2 tobacco ration cards, bearing his name, and stated that he wanted to escape to his aunt, Stefanie Truempler, Zuerich 4, Zwinglistr. 24 (Switzerland). On 8 September 1942 he was sent to the reformatory labor camp Munich-Moosach by the Secret State Police Office Munich—Document No. 27311/42 II E 3/Hoe—from which he escaped on 10 September 1942. B. has not been involved in any activity of a criminal, political or counter-espionage nature."

BY ORDER:

[Signed] SCHMID
SS Obersturmfuehrer

File after acknowledgment.
15 December 1942

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9 J 195/42 g
1 H 90/43

In the name of the German people

In the case against the shoemaker Stanislaw Bratek of Buchenhang (Lower Silesia), born at Wolbrom (Government General) on 3 January 1920, a Pole, at present held in custody during judicial proceedings, charged with preparation for high treason and other crimes, the People's Court, First Senate, as result of the trial, held 20 May 1943, in which took part as judges—

People's Court Judge Laemmle, president

District Court Judge Dr. Schlemann

S.A. Gruppenfuehrer [Major General] Haas

S.A. Gruppenfuehrer Hohm

S.A. Gruppenfuehrer Koeglmaier, as representative of the Reich chief prosecutor

Local Court Judge Dr. Pilz

duly pronounces—

The defendant, as a Pole, ventured to aid the enemy of the Reich by leaving his job in Lower Silesia, on 6 September 1942, to go to Switzerland and to get in contact with the Polish Legion there. After having been arrested first in Munich, he succeeded in escap-

ing from an internment camp with two other Poles and in proceeding toward the Swiss frontier. On his way, he was arrested at Lochau (Vorarlberg).

He therefore is sentenced to *death*

The defendant, who is an ethnic Pole and who, as a former Polish subject, had on 1 September 1939 his residence within the territory of the former Polish republic, in November 1939 volunteered for employment on a farm in Germany which he obtained at Metschlau (Lower Silesia). His conduct, however, was by no means in accordance with his voluntary enlistment. Already a few weeks later he left his working place without permission. He was picked up and allocated for work to a farmer in Buchenhang (district of Glogau, Lower Silesia). In October 1941, although his living was provided for by free board and lodging and monthly wages of 30 reichsmarks, he left that job, too, without authority. Again he was arrested and brought back to his Buchenhang working place after having served a prison term of 3 months, pronounced on charges of breach of the working contract, in January 1942. Instead of, as a Pole, taking his sentence as a serious warning, the defendant after having received certain pieces of information on Switzerland from Poles when on leave to his home town, gradually made up his mind to deprive Germany permanently of his capability to work, to escape to Switzerland, and to apply there with the Polish or English consular office for enlistment in the Polish Legion. On 6 September 1942, he began to carry out his plan. Secretly he left Buchenhang and took a train running toward the Swiss frontier, taking with him his savings of 100 Reichsmarks and a Hitler Youth badge as camouflage. He was, however, arrested in Munich on 8 September and brought to the labor reformatory camp Moosach. On 10 September 1942, he escaped from the camp together with two other Poles who also wanted to go to Switzerland and continued his trip to Switzerland by going to Lindau. From there he tried to get to the Swiss border on foot and in order would have had to cross it illegally. On his way there he then was arrested by a customs official in Lochau (Vorarlberg) on 12 September 1942.

The defendant admits the facts with the one proviso that his sole motive had been to look for a job in Switzerland and that he wanted to get in touch with some Polish people who, as he knew, lived in Switzerland, and whose addresses he had got in his home town as being able to get him work.

This defense cannot be given credit. The defendant held a job in Germany and got, as a Pole, such fair wages that he was able to save 100 RM within a comparatively short period. There was

907802—51——57

therefore no good reason why he should have given up his place of work in Germany, in order to look for work in a foreign country, especially considering the illegal frontier crossing which in wartime is particularly dangerous. How little, after all, he really *did* care for serious work is shown clearly by the fact that he repeatedly and without authorization left his place of work.

It must therefore have been for *other* reasons that the defendant considered the idea of going to Switzerland. Based upon the experience gained by the senate in similar cases, the way which was chosen by the defendant, in order to reach the Swiss frontier, was taken by many other Poles escaping from their employment in Germany for the purpose of enlisting in the Polish Legion in Switzerland. On account of the hostile propaganda from abroad, carried on everywhere among the Poles, it was generally known to the latter that in Switzerland, through the Polish Consul of the Polish puppet government, or through the British Consul, there existed an opportunity of joining the Polish Legion, whose aim, as the court knows, is to bring about the restoration of an independent Polish state including forced separation of the Incorporated Eastern Territories from the Greater German Reich, by rendering military service on the enemy side. According to the view taken by the senate, the defendant became informed about these circumstances while on leave in his home town. All the more so, as he expressly admits having acquired the idea of escaping into Switzerland from there. Furthermore, it should be added that the defendant is a young and sturdy Pole, who was absolutely fit for military service in the Polish Legion. Besides this, his general anti-German attitude which is shown by his breaches of contracts is compatible with his enlistment in the Polish Legion, hostile to Germany. Finally he makes the same statement for his defense as has always been made by other Poles trying to join the legion, who are arrested in the neighborhood of the Swiss frontier. Apparently, this was recommended as a pretense by the Polish propaganda machinery from the very beginning in cases in which escape should fail. Taking into consideration all these circumstances, the defendant's escape to Switzerland leads to the only possible conclusion that he wanted to join the Polish Legion intending to fight as a member of the latter against the armed forces of the German Reich and to help bring about the success of the treasonable purposes of the Legion, which in spite of his denial and according to the view of the senate, were known to him. He therefore may be considered as convicted of preparation of high treason according to article 80, paragraph 1; article 83, paragraphs 2 and 3 of the Penal Code and of undertaking to aid

the enemy from inside our country according to the provisions of article 91b of the Penal Code.[1]

At the same time he has made himself guilty of a crime according to article I, paragraph 3, last sentence, of the Penal Decree for Poles of 4 December 1941.[2] Because, being a Pole, he has intentionally inflicted damage to the interests of the German people by malevolently leaving his important agricultural job, above all, during harvest time in September 1942, and by escaping abroad, thus trying to rob forever the German people of his own labor. In view of the lack of farm workers, each single farm hand is decisive for maintaining the food supply of the German people, and in consequence, for its staying power in the fight for freedom. Every deduction of manpower whatever is detrimental to the German interests in a total war. This was absolutely clear to the defendant who admits it, too.

According to article 73, Penal Code, the penalty can be drawn from the penal decree concerning Poles which *loc. cit.* demands exclusively the death penalty as a rule, this being taken from the most severe penal law applicable here.

The senate, considering the defendant's character, could see no reason for deviating from this threatened basic punishment, and for treating it as a less serious case. By serving a 3 months' prison term imposed previously on account of breaches of contracts, the defendant had been given sufficient warning. He was offered a last chance finally to come to his senses and to reason by his internment in the labor reformatory camp Moosach. All that, however, could not make the least impression on him. On the contrary, although as a Pole he was held to excellent conduct and unrestricted labor service in view of the blood guilt of which the Poles before and at the outbreak had made themselves guilty against the German people, he stubbornly stuck to his hatred against Germany. Furthermore, beyond the fact that he deprived us of his services, he stubbornly and without disregarding the opposing difficulties, continued to pursue his aim of fighting against Germany on the enemy side, and of accomplishing his attempt at high treason. The death penalty therefore represents the only adequate measure which does justice to the criminal action committed by the defendant, who is dominated by his fanatical hatred against Germany, and to the security requirements of the German people. This appears absolutely necessary in order to create a deterrent.

[1] The various articles of the Reich Penal Code mentioned in this sentence are all contained in the law of 24 April 1934, amending provisions of criminal law and criminal procedure. This law amended numerous articles of the Reich Penal Code. It is reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 169.

[2] This decree, entitled "Decree concerning the Administration of Penal Justice against Poles and Jews in the Incorporated Eastern Territories," is reproduced as part of Document NG–715, Prosecution Exhibit 112, on page 632.

It has been for these very reasons that the People's Court passed the death sentence on the defendant.

As a condemned person, the defendant has to bear all costs of the proceedings.

[Signed] DR. SCHLEMANN

LAEMMLE

Munich, 20 July 1943

File number: AR. VII 442/43
The Chief Reich Prosecutor Munich I
To the Reich Minister of Justice
Berlin

SECRET

through the Chief Reich Prosecutor at the People's Court, c/o the Local Court Judge Dr. Pilz or his representative in office

Berlin W. 9
Bellevuestrasse 15

Subject: The case against Stanislaw Bratek. Concerning decree of 1 July 1943—IV g 10a 1098/43 g—

Official in charge: Senior Prosecutor Roemer
In 2 copies—With one attachment for the Reich Minister of Justice and 2 further enclosures for the Chief Reich Prosecutor
Concerning 9 J 195/42 g.

The execution of the death sentence against the person named took place on 19 July 1943 at the Munich-Stadelheim prison. 1 minute, 10 seconds elapsed between his leaving the cell and final execution, and from the moment he was handed over to the executioner to the fall of the axe, 10 seconds. There are no accidents or other happenings to be reported.

[Typed] signed KUMMER

Certified: [Signature illegible]
Clerk

[Stamp]

The Chief Prosecutor

Munich

PARTIAL TRANSLATION OF DOCUMENT NG-381
PROSECUTION EXHIBIT 159

THE BECK CASE, 5 APRIL–21 SEPTEMBER 1943. EXTRACTS FROM THE OFFICIAL FILES INCLUDING REPORT OF LOCAL NAZI OFFICIAL, 5 APRIL 1943; REPORT TO THE GESTAPO IN VIENNA, 4 JUNE 1943; LETTER FROM DEFENDANT BARNICKEL TO THE PRESIDENT OF THE PEOPLE'S COURT, 30 JULY 1943, ENCLOSING INDICTMENT SIGNED BY BARNICKEL; AND JUDGMENT OF THE PEOPLE'S COURT AFTER TRIAL OF 20 SEPTEMBER 1943

Ortsgruppe
Rembrandtstrasse
2., Obere Donaustrasse 35
Telephone: A 43-0-72

Vienna, 5 April 1943
NSDAP Gau Vienna
Kreis II
The Kreisleiter

[Stamp]
NSDAP Kreisleitung II
12 April 1943

S/Jo.

Subject: Oskar Beck, of mixed race, Vienna, 2.,
Obere Donaustrasse 12

I enclose a report from the competent block leader on Oskar Beck. Beck is of mixed race, 1st degree, but he behaves like a 100 percent Jew and is a malicious enemy of Party and State, who unfortunately could not be caught up to now. I had already raised objections against the man when, at approximately 11 o'clock at night, he removed wireless sets from his shop to install them in his flat. I reported to you personally on this matter at the time, but there was then no means of initiating proceedings against him.

The present report may make it possible to apprehend Beck.

Heil Hitler!

The Ortsgruppenleiter
[Illegible Signature]

[Stamp]
National Socialist German Workers Party
Ortsgruppenleitung Rembrandtstrasse

To the NSDAP, Gauleitung Vienna
Gau Personnel Office
Main Office for Assessing
Political Reliability
Vienna, I, Gau Building

Assessment to be sent to:
(Exact designation and address of office to which reply is to be sent).

To the Secret State Police,
State Police Office Vienna,
Vienna, I
Morzinplatz No. 4

Reference of inquiring office:
IV A 3—853/43
Vienna, 4 June 1943

[Handwritten] 285981

Political assessment requested for:
Name: Beck
Date of birth: 21 July 1899
Occupation: Radio dealer
Place of residence: Vienna II
Other addresses from 1932 until now:
First name: Oskar
Place of birth: Vienna
Where employed: Independent business man
Street: Obere Donaustrasse 15/9
Of mixed race: 1st degree.

Purpose of inquiry: State Police proceedings

[Handwritten] 10 June 1943

Confidential!
Answer from Personnel Office

Vienna, 29 June 1943
P.B. 285.981/hei/bu

The above-mentioned was a member of the Social Democratic Party, and while it was banned he was a voluntary member of the Fatherland Front.* He was at that time an adversary of the [National Socialist] movement.

There has been no change in his opinion up to the present. He does not belong to any of the affiliated associations of the NSDAP and gives very small sums to collections.

On political grounds exception must be taken to Beck, who is of mixed race, 1st degree.

Heil Hitler!

[Signed] VOLKMER
HEIDE

---

* Political organization founded by the Austrian Government in 1934 after the dissolution of the Social Democratic Party and the National Socialist Party.

Berlin W 9, 30 July 1943
Bellevuestr. 15
telephone: 21 83 41

The Reich Chief Prosecutor at the People's Court

Reference: 9 J 617/43

Please quote in your answer

[Handwritten] E 19/8

R.

To the President of the People's Court
Here

Subject: Criminal case against
radio engineer and dealer, Oskar Beck
from Vienna for undermining military efficiency

Enclosure: 1 volume of files
9 copies of the indictment

I enclose the indictment together with enclosures, with reference to my submissions contained in the latter part of it.

If Attorney Dr. Jerabek obtains admittance as defense counsel, no counsel need be appointed (pages 14 and 15 of the indictment).

Prosecution under article 2 of the law of 20 December 1934* has been ordered as a precaution (page 17 of the indictment).

As deputy:
[Signed] DR. BARNICKEL
Berlin, 30 July 1943

Chief Public Prosecutor at the People's Court
9 J 617/43

Arrest!

Indictment

The radio engineer and radio dealer Oskar Beck, born on 21 July 1899 in Vienna, from Vienna II, Obere Donaustrasse 15; bachelor, no previous convictions, provisionally arrested on 3 June 1943, from that day on under detention pending judicial investigation in virtue of the warrant issued by the examining magistrate at the Court of Appeal in Vienna on 17 June 1943—2 S Js 1750/43—at detention prison I in Vienna, so far without defense counsel, is charged by me, in Vienna in March or April 1943 to have undermined the defensive strength by malicious incitement against war work for women.

* Reference is made to the "Law on Insidious Acts against State and Party, and for the Protection of Party Uniforms," Document 1393-PS, Prosecution Exhibit 508, reproduced in section IV-B.

Crime according to article 5, paragraph I, number 1 of the Extraordinary War Penal Ordinance.*

Main result of investigations

The accused attended the elementary school and a 4-year high school course in Vienna, and for 5 years attended a trade school for electro technicians, was employed until 1924 in a number of places; and since then has had a shop of his own with a net income of 200 reichsmarks per month. He is of mixed race, first degree; his mother was a Jewess. From 1919 until March 1922 he was a member of the Social Democrat Party. He is now a malicious adversary of the National Socialist State.

In March or April 1943, he repaired the wireless set of Theresia Draxler, retired post office secretary. When leaving her apartment, he saw an application form for joining the total war effort on the kitchen table. He asked the witness Draxler whether she had already filled in the form and added:

"Do you know that every woman who goes to work, sends one soldier to his death"?

The witness Draxler did not answer him. Then the accused left the apartment.

He denies, but has been convicted by, the trustworthy statement of the witness.

The remark of the accused aims at preventing a person from fulfilling the duty of registering for the total war effort. This attempt to burden the conscience of a woman who is willing to work by seeking to make her responsible for the heroic death of soldiers jeopardizes the devotion of women for work, and has a damaging effect on the nation's fighting morale and its will of self-preservation in total war. The accused could not count on Mrs. Draxler keeping his remark to herself, but had to reckon with the fact that she would speak of the incident to other people and that his utterance would become known to wider circles.

Evidence

I. Statements of the accused.

II. Witness: Post office secretary, retired, Theresia Draxler in Vienna II, Scholzgasse Nr. 2.

* Reference is made to the "Decree concerning Special Criminal Law in Wartime," 17 August 1938, the relevant provisions of which are reproduced on page 184, as part of Document NG–715, Prosecution Exhibit 112. Article 5 of this decree is entitled "Undermining of Military Efficiency."

I request that trial shall be ordered, detention pending investigation be maintained, and defense counsel be appointed for the accused.

As deputy:
[Signed] DR. BARNICKEL

Received: 21 September 1943

9 J 617/43
4 L 150/43

In the Name of the German People

In the case against the radio engineer and radio dealer Oskar Beck, born 21 July 1899 in Vienna, resident in Vienna, at present under detention pending judicial investigation for undermining the military efficiency, the People's Court, 4th Senate has decreed that, following the trial held on 20 September 1943, at which the following were present, as judges:

People's Court Counsellor Mueller, president

District Court President Mittendorff

Kreisleiter Reinecke

City Councillor Ahmels

City Councillor Vahlberg, as representative of the Reich Chief Prosecutor

Senior Prosecutor Jaeger

The defendant is sentenced to death and to the loss of civil rights for undermining the military efficiency.

He bears the cost of the proceedings.

Findings*

The 44-year old defendant has had German citizenship since the "Anschluss." His deceased mother was a Jewess. After passing through primary school and a 4-year high school course, he was trained as an electrician at a trade school in Vienna which he attended for 5 years, and then held several jobs until 1924. Next, he worked independently as a radio engineer and radio dealer in Vienna. He claims to have earned about 300 RM a month lately. From 1919 to 1922 he was a member of the Social Democratic Party. *Later on he belonged to the "Fatherland Front."*

The Draxler couple were among his customers in Vienna to whom he had sold a radio several years ago. At Mrs. Draxler's request he had repaired it several times. In March 1943 Mrs. Draxler called him in again to overhaul the radio. As he left the

* All italicized parts in this portion of the document are handwritten in the original.

apartment, he happened to see lying on the kitchen table an application form for employment in the total war effort. Believing this to be Mr. Draxler's form, he asked Mrs. Draxler whether she too had filled in such a form. When she informed him that she had got the form for herself, he said: "You realize, of course, that every woman who goes out to work, sends a soldier to his death"? Mrs. Draxler who was very indignant about this remark refused to answer, and he left very soon afterward. Later on she spoke of this incident to some of her acquaintances, among others to the wife of a political leader in the NSDAP who reported it to the Ortsgruppe.

The senate considers these facts to be correct on account of the trustworthy statements made under oath by Mrs. Draxler. The defendant admits that he was in the apartment of the witness in the spring of 1943 to test the radio and to have left through the kitchen; he denied emphatically, however, during the preliminary proceedings as well as at the trial to have made the remarks with which he is charged or any similar remark. He maintains to have only discussed business matters with Mrs. Draxler as with his other clients. The woman might have been annoyed that the radio had been out of order several times and had therefore reported him. The witness might have heard the remark from somebody else and mixed it up. His attitude was not hostile to the Third Reich. He had advised a National Socialist, Walter Pindur, who during the Schuschnigg period had supplied him with cardboard out of which swastikas had been cut, to be careful. The Party members, senior customs inspectors Schmidt and Scerences would be in a position to testify to it that he had not been an enemy of national socialism. An inquiry at the Ortsgruppe Rembrandt would show that he had done repair work for them free of charge.

The defendant cannot have any success with this defense. The witness Draxler firmly maintained her statements in the face of all his objections and the senate, from her bearing at the trial, gained the conviction that the witness did not wrongfully accuse the defendant out of annoyance because her radio did not work. Furthermore, she denied to have been annoyed at all and pointed out quite rightly that she had not made the report. The senate is convinced that by his denials the defendant is only trying to avoid the serious consequences of his offense. To interrogate the witnesses Pindur, Schmidt, and Scerences and to obtain a statement from the Ortsgruppe Rembrandt in Vienna is superfluous in view of the facts, especially if one considers that for ulterior motives the defendant would not have disclosed his true opinion to these witnesses nor to the Ortsgruppe.

The way in which the accused spoke calmly and deliberately, and without any apparent cause, only an enemy of the State can think and speak.

The utterance which the accused is known for certain to have made to the witness Draxler was liable to impair her as well as other people's willingness to work for the total war effort. By this remark he attacked therefore the fighting morale and the will for self-preservation of the German people, and this he did "publicly" within the meaning of article 5, number 1 of the Extraordinary War Penal Ordinance, as he had to count on the fact *and he actually did count on it* that the witness, whom he did not know well would spread his remarks—as actually did happen. The senate is furthermore of the opinion that the accused was fully aware of the defeatist nature of his remark and the publicity in the above sense. Thus, the conditions under article 5, paragraph 1, number 1 of the Extraordinary War Penal Ordinance of 17 August 1938 apply. The fact that the intention of the accused was without any result as regards the witness, does not affect this state of affairs—the purpose of the above ordinance is not merely to prevent any undermining of the people's will to self-preservation, but to prevent all possibility of undermining it.

It is out of the question to assume a less serious offense because the accused acted with the intention to undermine morale and because [by the remorse combined with it]* *the appeal to the emotions* of a woman prepared to join the war effort represents a *well calculated* and particularly mean *and dangerous* attack on the German nation's will to self-preservation. Accordingly, the death sentence, which is the only penalty provided for the crime of undermining the military efficiency, was passed on the accused.

Owing to the dishonesty of his offense, the accused forfeited his civil rights.

Costs have been awarded according to the law.

[Signed] MITTERDORF
MUELLER

TRANSLATION OF DOCUMENT NG-546
PROSECUTION EXHIBIT 141

DRAFT OF A NOTICE TO HITLER, INITIALED BY DEFENDANT ROTHENBERGER AND VOLLMER, NOVEMBER 1943, REPORTING A DEATH SENTENCE IMPOSED BY THE PEOPLE'S COURT UPON A FORMER GERMAN NAVAL CAPTAIN FOR REMARKS ALLEGED TO HAVE ASSISTED THE ENEMY AND UNDERMINED THE MORALE OF THE ARMY

The Reich Minister of Justice
Fuehrer Information 1943 No.

* Bracketed text is crossed out in original document.

On 18 October 1943, Guenter Paschen, retired naval captain [in German navy] from Flensburg, was sentenced to death by the People's Court for assisting the enemy and for undermining the morale of the army.

Paschen, whose family on his mother's side comes from Denmark and who is married to an English woman, was a veteran in World War I and took part in the Skagerrak battle and later on in the Finland operation. Last, he was liaison officer with General von der Goltz. Having retired after the collapse, he was a naval training officer from 1926–1936.

Paschen, since his retirement, is a resident of Flensburg and moves in the circle of the Danish minority. He had a political discussion at the end of August 1943 with two Danes, unknown to him, who wanted to rent a furnished room in his house. He then expressed the view that he did not believe in a German victory and that he thought the secret weapons to be propaganda bluff. Furthermore, he stated that Denmark had been treated unjustly in 1864 and that the Reich must give Schleswig back to Denmark.

One of the Danes adopted these views as his own and tried to shake the confidence in victory of a woman naval auxiliary with whom he had an affair.

The sentence will be executed.

Berlin, ... November 1943

(Expert on the case: Chief Public Prosecutor Dr. Franke)

[Initials] R [Rothenberger]

V [Vollmer]

PARTIAL TRANSLATION OF DOCUMENT NG–674 PROSECUTION EXHIBIT 100

CIRCULAR LETTER FROM THE REICH MINISTRY OF JUSTICE TO LEADING JUDGES AND PROSECUTORS, 19 FEBRUARY 1944, TRANSMITTING EXCERPTS FROM REPORTS OF A CONFERENCE OF JUSTICE OFFICIALS ON CASES OF "UNDERMINING" AND "MALICIOUS POLITICAL ACTS"*

The Reich Minister of Justice
3131 E—I p 2 43

Berlin W 8, 19 February 1944
Wilhelmstrasse 65
Telephone: 110044
Long distance: 116516

* Concerning this document, see extracts from the testimony of defendant Lautz reproduced below in this section.

Confidential

To: 1. The Presidents of the Reich Supreme Court and of the People's Court

2. The Reich Chief Prosecutors at the Reich Supreme Court and at the People's Court

3. The Presidents of the District Courts of Appeal

4. The Attorneys General at the District Court of Appeal

Subject: Meeting on 3 and 4 February 1944

Enclosures: Additional copies for the presidents of the district courts and the chief public prosecutors

Enclosed please find a copy of excerpts from some of the reports in the field of criminal justice of the Reich Ministry of Justice made at the session on 3 and 4 February 1944. Point No. 7 was not discussed at the session, I beg you to discuss this point, too, at the meeting planned with the judges and prosecutors of your district and to see that they observe the instructions given in the copy.

[Stamp]
Reich Minister of Justice
Ministerial Chancellery

BY ORDER:

[Typed] DR. VOLLMER
Certified: [Signed] BLUENKE
Clerk

313 E—3 a 3376
To: The Chief Public Prosecutors, for information
Munich, 7 March 1944

The Attorney General

BY ORDER:

[Typed] signed: KEIDEL
Chief Public Prosecutor

---

1. *Definition of cases of "Undermining" [Military Efficiency] and cases of "Malicious Political Acts"* *

The relations between the law on malicious acts against State and Party, article 2, paragraph 1, and the decree concerning special penal law in wartime, has changed during the fourth and fifth year of the war. The development was speeded up by the events at Stalingrad and in Italy. This found its outward expression in the following measures: setting up a special committee for cases of undermining the morale—for serious and acute attempts at undermining morale—in the Reich Ministry of Justice, a corresponding agreement with the Reich Security Main Office, by taking steps concerning the distribution of work at the People's Court and by a press campaign. A number of Special Court districts and also certain criminal divisions with the district courts of appeal have not yet followed the new practice. The severity of their sentences does not agree with the penalties of the sentences at the People's Court. Conditions are to be made clear by this report and by a Judges' Letter.[2] The temporary defensive attitude at the front means a burden for the home front. The enemy is looking for weak spots, and thinks he has found them in the will for self-assertion of the inner front, as it was 1914–1918. Since the Italian events he has been intensifying this attack. The not very numerous cases of defeatism resulting from it have led to a new line in the administration of justice in cases of undermining of military efficiency, which is to be organically followed in the treatment of cases concerning malicious political acts. The following cases dealt with by the Reich Ministry of Justice, are intended to illustrate this line.

Clear cases of serious undermining of the military efficiency

Case Dr. Geiger—a 52-year-old physician, Party member, no prior convictions.

Offense—In summer 1943, the condemned man made a remark during the treatment of the pregnant wife of a Hitler Youth Leader who was at the front at that time that she had courage in having a child now. For if things went wrong, we would be in a bad way. After the events in Italy the war was lost for us, a

* The first-mentioned law, Document 1393–PS, Prosecution Exhibit 508, is reproduced in section IV B, and extracts from the second mentioned law, as a part of Document NG–715, Prosecution Exhibit 112, on page 184. Article 2, paragraph 1 of the law of 20 December 1934 provides that "Whoever makes statements showing a malicious, inciting or low-minded attitude toward leading personalities of the State or the NSDAP, or about orders issued by them, or about institutions created by them which are apt to undermine the confidence of the people in its political leadership, shall be punished with imprisonment." The decree of 17 August 1938 on special criminal law in wartime established and defined the new offense of "undermining of military efficiency" and makes the death sentence mandatory. In view of the different penalty under the two laws, the question of indicting a person who allegedly made defeatist remarks under the one law or the other was most significant.

[2] Concerning Judges' Letters, see the materials in section V C 3 b.

victory of the Russians meant our physical death, a defeat by the English and Americans was still the smaller evil. She—the patient—was too much under the influence of Nazi propaganda. To the scared question of the pregnant woman, what was going to happen to all of them, the condemned man answered that persons living such an "exposed" position (as her husband) naturally would be dealt with in the first place. Then there would be a mass Katyn.*

Sentence of the People's Court—8 September 1943—death sentence. Request of the public prosecutor—death sentence. Plea for clemency was refused.

Case Weber—a 60-year-old dentist, Party member, no previous convictions.

Offense—In August 1943 the condemned man made the remark to a patient—hardly anybody still believed in victory. Medieval methods of torture were applied in our concentration camps; especially homosexuals were being too harshly dealt with; we had murdered a million Jews and therefore had incurred a grave burden of guilt. Rudolf Hess was the right man but not the Fuehrer. The condemned man went on literally: "Moreover, in 4 weeks' time, the Fuehrer will no longer be alive. You will hear about it."

Sentence of the People's Court of 15 September 1943—death sentence. Request of the public prosecutor—death sentence. Plea for clemency was refused.

In cases of undermining the morale the consideration of the actual nature of the facts must not be excessive. In the fifth year of the war every German has to think about the effect of his remarks to other people. The same applies to foreigners, who are working here and enjoy German hospitality. Critical, for instance, authorized discussions of the political and the war situation are not punishable only as long as they are not calculated to shake the convictions of others.

Up until now, no need has been observed to give the prerequisite "publicly" in article 5 of Extraordinary War Penal Ordinance a more rigid interpretation than is done in cases of malicious political acts.

As such to be considered are remarks falling under article 2 of the law against insidious attacks on State and Party, which do not result in influencing other people. Two examples are the cases of Krejci and Kochzius.

Case of Krejci—41-year old home worker, no previous convictions.

Offense—In spring 1943 the condemned woman told the following joke:

"Who is the biggest farmer in Germany"?

* A town west of Smolensk where a mass grave of 10,000 Polish army officers was found. See Trial of Major War Criminals, op. cit., volume XXIII, page 426.

"Adolf Hitler, he owns a lame dog, a fat pig, and many million sheep."

(With the lame dog and the fat pig she meant Goebbels and Goering.)

Sentence of the Special Court II Berlin of 5 October 1943—6 months imprisonment.

Case of Kockzius—a 57-year-old printer.

Offense—At the beginning of 1942, the condemned man answered the greeting, "Heil Hitler," with, "Shit."

In December 1942 when Fuehrer parcels were distributed in the plant, he made the remark that he did not want the Fuehrer and these parcels, he was no beggar.

In January 1943 the condemned man declared, that the Fuehrer was a tramp; a vagabond without a Fatherland who came from abroad where only beggars lived; he intended to make the Germans into beggars too; he was making the people ridiculous in the eyes of foreigners by the street collections. The entire government as well as the Party consisted of tramps and rascals.

To a Party member he remarked, that he had better hurry up and get out, otherwise he would be hanged from a tree later on. Sentence of the Special Court II Berlin of 28 September 1943—1 year imprisonment.

Border line cases are the cases of Graf, Kessel, Eckert, and Heinitz.

Case of Graf—a 65-year-old farmer, no previous convictions.

Offense—In spring 1943 the accused declared, "Hitler must abdicate, then the war will stop."

In autumn 1943 he made the remark, "The war will not stop until Hitler abdicates."

In October 1943 he remarked, "The Germans bled to death in the advance, and now they bleed to death in the street. In summer, one runs to save every little berry, and now one has to watch how everything perishes. It only depends on a few gentlemen. With the war it is just the same thing. All their throats should be cut."

In agreement with the general public prosecutor, the Chief Public Prosecutor proposes not to order prosecution under article 2 of the statute against malicious political acts but to warn the defendant by imposing a fine. The defendant had a good reputation and was a participant of World War I, had several sons at the front, and had already backed the NSDAP before it had taken over.

The opinion of the field offices that this case was one of malicious political acts cannot be agreed to. It rather represents a case of undermining the morale, which has already been submitted to the Chief Public Prosecutor for examination.

* * * * * * *

Case Eckert—domestic servant, 50 years of age, single, no previous convictions.

Offense—In the afternoon of 14 September 1943, the accused, in a shop, said to the female proprietor in front of partly unknown persons, "By Christmas, the war will long be over. Germany has long since been divided up." Obviously she alluded to a defeat in the very near future. When asked by an employee of the local health insurance office, how she thought it would be if the war were lost and we would all have to go to Russia; the accused replied, "Very well, let them send those 5 million SS men there. During the last air raid on Mannheim the SS, those bloody swines, chased the people out of the shelters with rubber truncheons for fire-fighting and clean-up work."

The Chief Public Prosecutor with the approval of the General Public Prosecutor wants to base the charge on article 2 of the law against malicious political acts or insults to the State or Party (Heimtueckegesetz)[1] and to propose a prison term of 9 months. This is a border line case. Certainly the statements made by the accused in their second part fulfill the conditions of malicious political acts or insults to the State or Party. Regarded as a whole, however, the accused obviously had in mind to injure the listeners' will to pull through, as can be seen from the first part of her statements. When she met with resistance in doing so, she tried to support her opinion by abusive language and by telling atrocity stories. The trend of her statements therefore was directed toward undermining [the military efficiency].[2] Therefore, the accused will, in the first place, have to be prosecuted under this provision.

* * * * * * *

PARTIAL TRANSLATION OF DOCUMENT NG-671 PROSECUTION EXHIBIT 220

EXTRACTS FROM THE SITUATION REPORT OF DEFENDANT LAUTZ, CHIEF PUBLIC PROSECUTOR AT THE PEOPLE'S COURT, TO THIERACK, 19 FEBRUARY 1944, CONCERNING THE UNDERMINING OF MILITARY EFFICIENCY

Copy

Berlin W 9, 19 February 1944
Bellevuestrasse 15

The Chief Public Prosecutor of the People's Court
4206 E—2.36

[Initials] KL [Klemm]

[Stamp]

[1] The reference is to the act of 20 December 1934, which does not provide for the death penalty.

[2] The reference is to the decree of 17 August 1938, which makes the death penalty mandatory.

907802—51——58

SECRET

To the Reich Minister of Justice
Berlin W 6
Wilhelmstrasse 65

Decrees of 25 October 1933—IIIa 19570/35 and 29 October 1942—3130–Ia *9* 1746–.

Enclosures: 2 copies of the report.

[Handwritten illegible marginal notes]

[Handwritten note] M.D. IV Mr. B.S.S. request to be informed in regard to p. 9.

[Signed] MARTIUS 28 February

Situation Report

A. *High treason and undermining of military efficiency within the Reich territory (except for the Protectorate)*

I. *General.*

* * * * * * *

In accordance with the expectation expressed already in my previous report of 8 October 1943, the number of incoming reports on investigations concerning undermining of military efficiency has again increased considerably. At present the daily average amounts to about 25 cases. Since, in addition, numerous investigations which are not handled by special proceedings and which could not yet be concluded are pending. I am forced at present due to the pressure of business in my office and the further difficulties caused by the effects of the terror raids to make more extensive use of my right to turn matters over to another office. However, in the interest of a uniform jurisdiction the indictments will principally be served before the People's Court in all cases where—

a. The undermining activity involves members of the Wehrmacht.

b. Greater significance is ascribed to the statements of the accused because of his position in public life or in the economy.

c. The accused has become known as an enemy of the State on principle or a systematic instigator either according to his personality or because of the nature of his offense.

d. The personality of the accused in connection with the nature of his offense or the effect he strived for seems to point to special treatment.

e. The offender belongs to the clergy.

In view of the necessity of turning over proceedings, even in which the offense can be called a serious one without question, I have generally informed the chief public prosecutors concerned in advance of the altered way in which I am going to handle my right to turn matters over to another authority. In addition to this they will in each single case be especially informed about my conception of the case and will be requested within the limits of my right of turning cases over to them, not to consider taking on less serious cases but to strive for the highest possible penalty if the state of the investigations at the moment the case is handed over give a sufficiently clear picture of the case in this respect. In comparison with the previous report, no essential new experiences were gained regarding the nature of the offenses and the personality of the offenders. Especially could it not be determined that the number of punishable offenses increased, particularly in those territories subject to a special air terror of the enemy. It is rather characteristic that the manifold rumors about alleged riots among the population in the cities damaged by air raids often arose in regions not at all or only slightly affected by the air terror. This leads, on the one hand, to certain conclusions as to the intentions of the propagators of these rumors. On the other hand, however, it can be taken as a pleasing sign for the truly disciplined attitude of the population that suffers most from the enemy's air terror.

II. *Special Proceedings.*

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[Typed] signed: LAUTZ

EXTRACT FROM THE TESTIMONY OF DEFENDANT SCHLEGELBERGER[1]

DIRECT EXAMINATION

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DR. KUBUSCHOK (counsel for defendant Schlegelberger): According to the document I have before me, Document NG–412, Prosecution Exhibit 77,[2] the Ministry of Justice made a suggestion to increase the severity of penal provisions concerning the preparation of treason. Would you explain this?

DEFENDANT SCHLEGELBERGER: The situation with regard to the law was the following: Preparation for treason [Landesverrat] could not be punished by death. Treason, that is to say the betrayal of the native country in my opinion, is the most severe and most

[1] Extracts from the testimony of defendant Schlegelberger have also been reproduced in sections IV E, V B, V C 2 a, V D 2, and V D 3.

[2] Reproduced above in this section.

serious political crime, and the danger inherent in that crime reveals itself already in its preparation. As can be seen from the document, the question had come before the public and had been discussed in public on the occasion of the Sklarek case, and had become the subject of a heated discussion. It was known to me that Hitler once before in a cabinet meeting had taken the position that preparation for treason should be punished by death. It was quite obvious for me that as a consequence of the Sklarek case and, on that, Hitler's point of view was also known to other people, a new storm would come up; in fact it was the expressed purpose to force matters upon the administration of justice so that afterward one could make use of these matters, by saying that the administration of justice itself was not strong enough to find the right position, or in order to institute and justify proceedings outside the administration of justice. I considered it appropriate, therefore, to bring this question into the stage of a legal regulation as quickly as possible. In the draft the death penalty was provided for very serious cases, cases of aggravating circumstances, and that provided the guaranty at least for the fact that in ordinary court proceedings it would have to be examined whether that really was a severe case. The danger was quite acute that unless in time such a law would be promulgated, other elements, namely, the police, would have seen to it and would have taken care of it wholesale without examining individual cases. Since the cases in question were cases of the past, retroactive measures had to be permitted. That is well within all legal guaranties.

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EXTRACTS FROM THE TESTIMONY OF DEFENDANT LAUTZ*

DIRECT EXAMINATION

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DR. GRUBE (counsel for defendant Lautz) : Mr. Lautz, is it correct that in 1938 you received an offer to become senate president in the Reich Military Court?

DEFENDANT LAUTZ: That is correct. I was well known to the Ministerial Director at the High Command of the Wehrmacht, Lehmann, who appeared as a witness before this Tribunal and who offered me in 1918 to become senate president at the Reich Military Court.

* Extracts from the testimony of defendant Lautz are also reproduced in section C 1 b. His entire testimony is recorded in the mimeographed transcript 23–25, 28 July 1947, pages 5761–5775; 5781–6054.

Q. Just a moment, I believe you made a mistake, you meant to say 1938?

A. Yes, 1938.

Q. At that time, would you have improved your financial situation if you had accepted?

A. Yes. The position was much better paid.

Q. Why did you not accept that position?

A. I did not accept it only for the one and decisive reason that I did not want to leave the beautiful district of Karlsruhe for the time being.

Q. For how long were you general public prosecutor in Karlsruhe?

A. Unfortunately, only until 1939.

Q. May I now ask you, who was Parey?

A. Parey was Reich Public Prosecutor since 1936, later chief Reich prosecutor [Oberreichsanwalt] at the People's Court in Berlin.

Q. And for what reason did Parey leave his office as Chief Reich Prosecutor at the People's Court?

A. At the beginning of November 1938. He had an automobile accident.

Q. When did you find out for the first time that you were being considered as Parey's successor?

A. At the beginning of December 1938. The then Under Secretary Freisler, on order of Minister Guertner, informed me that Guertner had chosen me as his—that is, Parey's—successor.

Q. Did you make any efforts to obtain that position?

A. Not at all.

Q. Did you do anything against your appointment as chief Reich prosecutor at the People's Court?

A. I was very much interested in getting out of being appointed to that position, and because of that I consulted with the personnel division of the Ministry as to how I could prevent my appointment. However, I was told that Minister Guertner attached importance to my taking that position, and therefore, being a civil servant I complied.

Q. May I ask you why you had an aversion to that office?

A. First of all, because of the exclusive occupation with political penal cases and in connection with that the absolute dependence

upon the Ministry which was my superior was not an inducement for me; even though, at that time, I could not have the remotest idea that war would shortly break out, that Minister Guertner would die, and that through all these events a course would be followed in politics which, in any case, was not in accordance with the one that I imagined.

That was my main reason. My second reason was that I wanted to remain in Karlsruhe.

Q. When were you appointed Chief Reich Prosecutor?

A. I was appointed on 1 July 1939.

Q. At that time, did you still count upon becoming Chief Reich Prosecutor, since Parey had already left the office some time before?

A. Since it took such a long time I had the hope, quietly, that perhaps another person would be found.

Q. Did you ever find out whether any office of the Party or any other organization of the Party was in favor of your appointment as Chief Reich Prosecutor?

A. I never heard anything about that.

Q. When, in effect, did you assume your office as Chief Reich Prosecutor at the People's Court?

A. Due to illness, I only assumed office on 20 September 1939, in Berlin.

Q. However, you had already been appointed on 1 July?

A. Yes.

Q. Mr. Lautz, may I ask you this? Before 1933, did you belong to a political party?

A. From 1924 to 1930, I was a member of the German People's Party. That was the party of Minister Etresemann, who became well known through the policy of understanding which he followed toward the victorious countries of 1918, and whose efforts, in particular to reach an understanding with France in order to bring about peace in Europe, I welcomed very warmly and supported.

Q. When did you become a member of the National Socialist Party?

A. On 1 May 1933.

Q. Will you please tell the Tribunal for what reasons you joined the Party?

A. Before the spring of 1933, I belonged to the Prussian Judges' Association, in which organization I worked on press matters as

a member of the board of directors. The Prussian Judges' Association decided to urge its members to join the Party. I joined because, according to the situation prevailing at the time, I considered it to be the correct and proper thing to do.

Q. Mr. Lautz, at that time in 1933, did the joining of a party have the significance of 100 percent approval of the Party platform? Was it not rather like this, that since the Weimar era joining a party by no means implied that one approved of its ideology?

A. In the case of many persons who joined the Party at that time, that was so.

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Q. Through my documents in Lautz document book 1, I have already shown that the competence of the People's Court to sentence defeatist cases was introduced only beginning in February 1943. Witness, for how long did the special penal regulations for wartime exist on which these trials against undermining of military efficiency were based?

A. This special wartime penal order is from 1938* which was put into effect only on 26 August 1939.

Q. Originally the Reich military court was competent for those cases of undermining of fighting force or the other military courts, is that correct?

A. Yes. That is correct, not only for members of the Wehrmacht but also for civilians.

Q. In 1940 the competency in regard to civilians was transferred to the general courts?

A. Yes. That is correct.

Q. Who became competent at that time for the cases of the so-called public undermining of military efficiency?

A. Public undermining of military efficiency was prosecuted by the senior public prosecutors at the special courts and/or was to be tried by the Special Courts.

Q. When in 1943 the cases of so-called public undermining of military efficiency were transferred to the People's Court, had the law, in effect, been applied for 4 years?

A. Yes.

Q. Is it correct, Witness, that the decision as to whether a public undermining of military efficiency was proved depended upon

* Decree concerning special criminal law in time of war and special emergency, 17 August 1938, reproduced in part as a part of Document NG–715, Prosecution Exhibit 112, on page 184.

the following two points: first, what does the legislator mean by an attempt to undermine; and second, when was this attempt to undermine committed in public? Is it correct that those were the two nuclei in this question?

A. Yes.

Q. Is it furthermore correct that, when in 1943 the People's Court became competent, these two basic questions of undermining of fighting efficiency were based on a general jurisdiction originating first from the Reich Military Court, then the Reich Supreme Court, and then of the Special Court—that these decisions existed already?

A. The Reich Military Court had in several very basic decisions decided these questions without any doubt.

Q. In regard to these points from which it is especially evident that the definition of "public attempt of undermining" had already been laid down definitely in 1943. I shall prove by some further documents. Witness, how did the individual cases of undermining come to your office?

A. That differed. In part, the senior public prosecutor at the Special Court who considered the case as leaving room for no doubt submitted the files to me. If, on the other hand—and that occurred in the majority of cases—he harbored doubts whether this was not merely a malicious act, then, as was his duty, he reported it to the Minister of Justice, and the Minister of Justice decided whether a case was to be regarded as undermining of fighting efficiency and should be transferred to the chief Reich public prosecutor.

This is evident from the affidavit by the witness Franke, which the prosecution submitted.

Q. May I refer to the fact that this is Exhibit 515[1] submitted by the prosecution. Furthermore, I am referring to Exhibit 97[2] of the prosecution. Witness, did it continue the way you described it just now, later on too?

A. Later on, two more basic changes occurred. A very severe decree of 13 August 1943 was introduced. Minister Thierack required a more expeditious and more emphatic trying of certain especially serious cases of undermining of fighting strength. For

[1] Document NG-1474, Prosecution Exhibit 515, is not reproduced herein. The cross-examination of Dr. Horst Guenther Franke concerning this affidavit is recorded in the mimeographed transcript, 22 September 1947, pages 9265-9280. The affiant Dr. Franke was the official in the Reich Ministry of Justice who succeeded defendant Joel in the fall of 1943 as chief of the ministry section dealing with crimes against war economy.

[2] Document NG-510, Prosecution Exhibit 97, a decree of 8 March 1943 by Thierack further defining the jurisdiction of the People's Court in case of "subversive undermining of German military efficiency." This decree is not reproduced herein.

this purpose, it had been ordered that the RSHA submitted those cases which were not very numerous, either through the hands of the Minister of Justice or directly to me. I submitted them to a special division because the division which treated other cases of undermining of military efficiency was no longer in a position, merely due to the large number of cases, to take over this new work also. These cases in the main are those in which the so-called quick trials [schnell termine] took place which have frequently been discussed here already. Due to the importance of the cases, Freisler also did not let anybody deprive him of trying these cases basically in his senate. Moreover, due to a later decree by the Minister of Justice, it was laid down that in the preliminary investigation of the cases which were to be submitted to the chief Reich Public Prosecutor, that the presidents of the district courts of appeal should be included in order to avoid too many of these files being submitted to the office of the Reich Public Prosecutor.

The final decree which concerns these cases, and which I am citing because perhaps it is important in the von Braun case, is the following instruction by the minister. If an indictment is filed before the Special Court in a malicious acts case, and during the trial the Special Court decides however that possibly this might be an undermining of military efficiency in which case the Special Court was not competent to sentence, then the Special Court should not through an uncontested decision refer this to the People's Court, but the Chief Reich Public Prosecutor should ask for an adjournment so that the chief Reich public prosecutor could examine the case in every individual case. If he considered it not suitable, he was to return it to the Special Court. In this way, it was intended to prevent that through such decisions against which it could do nothing, the People's Court was burdened with cases which did not concern it.

Q. Witness, how were pending cases treated? How were the cases which came to it treated by the office of the Reich prosecutor, and especially how was the conduct of the members?

A. When the order came into effect—the order of 29 August 1943—at which time the People's Court became competent, at that time I was on an official trip outside of Berlin. When I returned, I found out that the defendant Barnickel, who at that time was my deputy, had handed over the handling of the cases which came to his division. At that time, he was of the opinion—at least, that is what he told me—that his division was less burdened and therefore was in the best position to be able to handle the new influx of cases. I let matters stand as they were.

First, we introduced the following treatment of the cases and we also maintained this for several weeks and months. At certain

intervals of 2 or 3 days, every case that was handled by the expert or the Referent in the presence of the division chief was reported to me, and then we made a decision as to whether we wanted to file an indictment before the People's Court and for what reasons this was necessary. Varying reasons governed this. In part, the cases were so serious that there was no doubt about this. In part, we considered it necessary in order to bring about certain basic decisions on principle—to bring about the sentencing by the senate of the People's Court. During that time, the number of prison sentences that were pronounced was without doubt larger than the number of death sentences. The enormous incidence of new cases, however, brought it about, and this is also apparent from the situation report which the prosecution submitted, in the beginning of 1944—

Q. I may interpolate here that the defendant is speaking of Prosecution Exhibit 220.[1]

A. That at the end of the year 1943, quite a considerable number of cases were in arrears. Therefore, I decided that in regard to the cases of undermining of fighting strength to gather them in a special division which would have the task—especially in regard to the backlog cases—to clean it up as quickly as possible. Among these, there were a number of cases of arrest whose expeditious handling was necessary especially because in a large number of these cases the transfer to a subordinate court was necessary. Therefore, I could not act in any other way. No division chief was anxious to be given this new division. Therefore, I decided that the defendant Rothaug should take it over.[2] First of all, he was the youngest division chief, and up to then he had been in charge of a division which was so small and insignificant that it was easiest to replace him by a senior public prosecutor.

From the situation report which I mentioned, it is also evident what the number of cases was which came to us at the time. They amounted to about seven to eight hundred a month. This figure shows me that when I was interrogated preliminary to this trial, I made a wrong estimate. At that time I thought it was twice as high as it actually was.

Q. Witness, you have just said that the number of cases in the undermining of military efficiency increased to about seven to eight hundred cases a month. I would like to put another question to you on that subject. Did that mean that before the People's Court seven hundred to eight hundred cases of undermining of military efficiency were tried every month?

[1] Document NG–671, Prosecution Exhibit 220, reproduced in part above.

[2] Prior to his assignment in the Reich Ministry of Justice, defendant Rothaug had been presiding judge of the Nuernberg Special Court.

A. No. That figure refers to the number of cases which were submitted to the Reich prosecution for examination. As I will mention later, only a small percentage of those cases—I estimate about 10 percent—were kept back. All other cases were returned to subordinate courts. In my situation report, if I may repeat that, I only gave the number which I did mention there because only at the trial here I saw that situation report again. I ascertained that the figures which I had given in Exhibit 126,[1] from memory were evidently incorrect.

Q. By that you mean to say that the figures in Exhibit 126, the figures which you gave from memory, are too high?

A. That is what I did mean to say.

Q. How did you, in general, treat these questions of undermining military efficiency?

A. To a large extent the treatment of such cases depended on the clear instructions from the Minister of Justice. It also depended on the basic importance of these cases. To mention one example, I would like to revert once again to the situation report of 9 February 1944, that is Exhibit 220. In that report it says that the undermining of military efficiency when committed by clergymen would have to be tried before the People's Court. That was due to a decree by the Reich Minister of Justice. Generally speaking, however, in treating these cases I attached the greatest importance to having every single file examined carefully by the head of the department so that those points would not be left unobserved which would justify treating that case in a more lenient manner. For in particular the transfer of these cases as being cases of lesser importance to the district courts of appeal or to the Special Courts, to that I attached the greatest importance, as far as it was at all possible. That is proved not only by the testimony of the witness Gruenwald[2] before this Tribunal but it is also evident from Prosecution Exhibits 178, 474, and 100.[3] For the numbers of cases where criticism was exercised by the ministry on sentences passed by lower courts, and in particular at the Weimar conference [*NG–674, Pros. Ex. 100*] would remain

[1] Document NG–659, Prosecution Exhibit 126, an affidavit of defendant Lautz dated 17 January 1947, is not reproduced herein.

[2] Bruno Gruenwald appeared as a prosecution witness. His testimony is recorded in the mimeographed transcript, 3 June 1947, pages 3879–3910.

[3] These exhibits are all reproduced herein in whole or in part. Document NG–676, Prosecution Exhibit 178, is a letter of 5 July 1944 from the defendant Klemm to the president of the district court of appeal and the attorney general in Stuttgart concerning cases of defeatism (sec. V C 3 b); Document NG–627, Prosecution Exhibit 474, is a letter of 1 March 1945 from defendant Klemm to the president of the district court of appeal and the attorney general in Hamburg, concerning dangerously lenient sentences (sec. V C 3 b); and Document NG–674, Prosecution Exhibit 100, is a report of a conference held in Weimar on 3 and 4 February 1944 concerning undermining morale and malicious political acts (sec. V E).

incomprehensible unless many cases which were more serious had been transferred to the lower courts by the Reich prosecution.

In the last analysis, perhaps the percentage of cases which we kept back, as I mentioned before, and of the cases where an indictment was filed, at the People's Court, I estimate those cases at 10 percent.

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Q. Witness, do you still remember what information you received in regard to the question whether recruiting offices for the Polish Legion existed in Switzerland?

A. I said that already. From the answer of the head office of the border police in Stuttgart, it was apparent without doubt that according to the information which they had from Switzerland that there was an illegal recruiting and transport service which helped Poles to get to Switzerland and to Africa; to that extent, Switzerland apparently did everything that it was possible to do, and as far as it could; and from the files it is occasionally apparent that the Swiss border officials returned the Poles who had crossed the border from Germany; but in all cases they probably did not succeed.

Q. Had the Ministry of Justice also informed you to what extent recruiting offices for the Polish Legion existed in Switzerland?

A. If I remember correctly, the same information had also reached us from the Foreign Office via the Ministry of Justice.

Q. Thank you. The prosecution seems to assume that the indictments were not the results of attempts to join the Polish Legion, but were a means to prosecute Poles because of their flight from Germany and their places of work. Please comment on this.

A. For us, that certainly was not the motive for the filing of an indictment, because we were convinced that the suspicion was justified. Moreover, against such allegations the fact probably speaks which can be gathered from Exhibit 259* of the prosecution. From that it can be gathered that particularly at the time in question here, hundreds perhaps thousands of Poles left their places of work in the Reich; and if only a very small number of these were tried before a court because they wanted to join the legion, this makes it apparent that they were not tried only because they left their place of work. The other participating offices, that is the police and the counterintelligence of the OKW, were

* Document NG–685, Prosecution Exhibit 259, reproduced in part at the beginning of this section.

probably also of the opinion that here we were faced not only with flight from the place of work, but flight for a special purpose.

The general situation was just as I described it. During the war the German Reich, as any warring power, had closed its borders and this had been done for reasons of the security of the State and was therefore necessary because everybody who crossed the border and reached neutral country or an enemy country took along with him important experiences and knowledge which he had gained in the warring country. Poles knew that too.

Q. Witness, you have already stated before that a Pole, only for the reason that he had left his place of work on his own, could not be tried and sentenced by the People's Court. Now, according to your determinations in the individual cases in which Poles were indicted because of attempts to reach the Polish Legion, did other reasons for suspicion also play a role which supported the suspicion on the basis of which then in accordance with the law you were obliged to raise an indictment?

A. I just wanted to talk about that.

Q. Will you please state what reasons for suspicion have regularly played a role also?

A. If somebody crosses the border with a certain purpose in mind and he is caught in the act, then, in the most infrequent of cases will he be inclined to say and be ready to say what intentions he had in mind, for in so doing he would damage his own case. Criminal cases which were conducted under this point of view—and this is probably not the case only in Germany—therefore are based to a large extent on the justified conclusions one can draw from the facts available.

Now, it was here known generally what I have already stated, that this way led to the Polish Legion if one started out on it. Secondly, it was known that among the Polish workers in southwestern Germany these conditions and knowledge thereof were widespread. Furthermore, it was generally known to those workers too that favorable conditions for work could not be expected in Switzerland; and finally, it was in accordance with the experiences which had been gathered in other trials that a large number of these people who crossed the border after their arrest did not even deny this intention. These general considerations alone would have, in my opinion, justified such a strong suspicion that in accordance with German Code of Criminal Procedure sufficient suspicion for the filing of an indictment existed, and that thus the indictment had to be filed in accordance with the law.

The two indictments which bear my signature are the Bratek and Stefanowitsch cases. The following element, however, is

added. Bratek had referred to the fact that he only wanted to cross the border in order to avoid work.

DR. GRUBE: In the Bratek case here we are concerned with Prosecution Exhibit 136.[1]

DEFENDANT LAUTZ: As I said, he claimed it was only for the reason to attempt to seek work that he did want to cross the border. By means of the additional investigations which the division chief instituted, however, it had been found that he did not like to work; he had already left other places of work, so that his statement that he wanted to seek new work in another country in which there were difficult conditions of work did not seem very credible. So for that reason his statement had to be accepted with reservations.

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CROSS-EXAMINATION

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MR. KING: I ask you if it were possible to commit treason against an individual who was not of German citizenship in the period which we are discussing.

DR. GRUBE: I object to this question. This is a question which is asking only for the personal opinion of the witness.

PRESIDING JUDGE BRAND: The objection is overruled.

DEFENDANT LAUTZ: If I understand you correctly, Mr. Prosecutor, you want to know whether the act of treason was punishable only when it, the act, was directed against the State as such, or also when it was directed against an individual person.

MR. KING: Yes. My following question was going to refer to the differences which you raised. But actually you have stated it very well. I want to know whether at this time the period which we are concerned with at the moment, if during that period treason could be committed against an individual who was not a German citizen, and I take it that your answer on that is no, is that correct?

DEFENDANT LAUTZ: That had been different ever since the law of 1934.

Q. Yes. I know but I am speaking of the law prior to 1944.

A. No, what I said was 1934. I said the law before 1934. I am referring to the law 1934 with article 91 [of the Reich Criminal (Penal) Code] which then became a law.[2]

[1] Document NG–595, Prosecution Exhibit 136, reproduced above.

[2] Reference is made to the law of 24 April 1934 "amending provisions of criminal law and criminal procedure," the pertinent parts of which are reproduced on page 169 as part of Document NG–715, Prosecution Exhibit 112. This law expanded the previously existing concepts of treason and high treason.

That article says that the act of treason can be directed against a German national as an individual, and it was a question of interpretation whether "German" should here be interpreted as being of German blood or being a German citizen, and the famous document in which I made a report to the Reich Ministry of Justice deals with that question.* It is that report which concerns itself with that question. The courts in the Reich interpreted article 91 to the effect that it was not the nationality which was decisive but the race, the blood.

Q. Yes. Well, it is that letter to which I want eventually to refer. I wanted, however, to get your understanding of the earlier laws before we get around to discuss the question of that letter. What you have just said was that article 91 which was adopted in 1934 expanded the concept of treason to the extent that there could be treason against an individual who was a Reich national; is that correct?

A. Against a German. And who is a German? That was a question of interpretation. I believe I can best make myself clear if I come back to the example which is mentioned in this report. After the occupation of the eastern territories, that is Poland, that is to say after the occupation of those territories, which formerly had been German, the following case came to our knowledge. An ethnic German, a person who was a German by blood, had had the following experiences. Behind his back a Polish agent had hidden espionage material in his home without the German knowing that that material had been hidden there. The Polish agent then chased the Polish police after him, and his home was searched by the Polish police. The material was found and the German who was completely innocent but who could not prove his innocence was tried in Poland before 1939 and he got a very heavy prison sentence. I don't think you would approve of that, would you? When we occupied the eastern territories that case came to our knowledge—

Q. Excuse me, Dr. Lautz. Is this the Krippner case to which you refer, or is this the Moses case? There are two of them which you mentioned in this report.

A. No, no. I cannot remember the—

Q. Would you like to see that exhibit?

A. I cannot remember the name unless you would show me the document. The name doesn't matter. It is the facts of the case that matter here.

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* Report contained in Document NG–548, Prosecution Exhibit 347, reproduced above in this section.

Q. I think you will find this report referred to in document book 5–B, beginning on page 73 of the German text.

PRESIDING JUDGE BRAND: Dr. Lautz, will you finish what you were saying when counsel interrupted you?

DEFENDANT LAUTZ: Yes. I will. After the occupation of Poland that shameful case, to use a mild expression, came to the knowledge of the German authorities; and we were now concerned with the question as to what could be done; and the application of article 91 of the German Criminal (Penal) Code was interpreted so that in this case treason had been committed against a German. Treason had been committed against a man of German blood, treason which could be prosecuted.

Q. It was treason against one of German blood who was not then a German citizen.

A. He was not a German citizen, but he was of German blood.

Q. The date of that again? When that happened, when it came before this department?

A. Your Honor, may I just have a look at the report? May I have a look at the report to make sure of the date?

Q. Yes.

A. That is the case Goleck, which is mentioned in the report. The false accusation against the person of German blood was made in the year 1938, that is to say, it happened before the war.

Q. And it came up to the Ministry of Justice after the war to decide?

A. That happened during the war when Polish files were confiscated.

MR. KING: Dr. Lautz, you have the letter before you now?

DEFENDANT LAUTZ: Yes.

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Q. May I ask you to refer to the top of page 75 in the German text, I believe it is? It is the middle of page 68 in the English.

PRESIDING JUDGE BRAND: What exhibit are you referring to?

MR. KING: I am referring to Document NG–548, Prosecution Exhibit 347, Your Honor.

Now, could we look at that separate opinion of yours at the end of the letter?

DEFENDANT LAUTZ: Yes.

Q. Go ahead, please.

A. It begins with the words, "With the Reich Leader SS and the President of the People's Court I agree with this."

Q. Dr. Lautz, see if you can find this portion in the document which you have. I am sorry you don't have the document book as it was originally distributed. I had it paginated for that. Can you find this statement? You say, "Therefore"—and I believe this is part of your letter—"Therefore, I find it necessary, on principle, to protect by means of the German Criminal (Penal) Code those racial Germans who have seriously suffered through action such as mentioned in article 91, paragraph 2 of the Penal Code, provided that action deserves punishment in accordance with sound German sentiment but where such punishment, considering the elements of wrongdoing of that particular case, cannot be brought home on the strength of any other directly applicable penal regulation."

Those are your words, are they not?

A. Yes.

Q. And then you say in the final paragraph of the letter, "In the majority of the cases it will be offenses which have been committed by foreign nationals abroad against racial Germans." Is that correct?

A. Yes, it is.

Q. That is correct, and those are your words?

PRESIDING JUDGE BRAND: Will you answer audibly so that reporters may get it?

DEFENDANT LAUTZ: What the prosecutor stated just now is what I reported.

MR. KING: And then you asked for approval of your interpretation; is that correct? That is the very last sentence in the letter?

DEFENDANT LAUTZ: Yes. I had to ask for that because the decision lay with the Minister of Justice.

Q. Yes. Now, in subsequent cases that came before the People's Court in which you were required to file the indictment, you based the charges on the interpretation which was subsequently approved by the Reich Ministry of Justice, the interpretation which you ask here? Is that right?

A. From case to case the Minister of Justice afterward decided as to whether that procedure was to be adopted or not. He did not issue a general instruction or directive.

Q. Do I understand you correctly? Let me restate it. Did you mean to say that even after you asked for this interpretation it

was necessary in the future when cases came up involving these facts that the Minister of Justice give his approval before you filed your indictment? Is that correct?

A. The indictment was drafted, and the draft was submitted to the Minister of Justice, and he approved it or did not approve it.

Q. But the draft of the indictment was based on the law which you suggested be interpreted as we have discussed it. Then having drafted the indictment based on this interpretation you got approval or disapproval, as the case might be, from the Minister of Justice. Is that right?

A. Yes.

PRESIDING JUDGE BRAND: What was the answer?

MR. KING: The answer was yes, Your Honor.

* * * * * * *

EXTRACTS FROM THE TESTIMONY OF DEFENDANT BARNICKEL*

DIRECT EXAMINATION

* * * * * * *

DR. TIPP (counsel for defendant Barnickel): Witness, please describe further events.

DEFENDANT BARNICKEL: About the end of 1937—beginning of 1938, I was in Berlin again. I told the personnel Referent, who was a different official then, about my wishes for the position in Munich, but the case was not that far yet. To my great surprise, on 30 November 1938, I received the communication that, on 1 December 1938, I was to be appointed Reich prosecutor with the People's Court.

* * * * * * *

Q. When and how did you assume your new position?

A. As I have already explained, I received the formal appointment on 30 November 1938. The Minister granted me a few days to straighten out my affairs in Munich, and thus, I assumed office on 6 December 1938.

Q. What position did you hold in the beginning?

A. On 3 November 1938, the chief Reich prosecutor of the People's Court, Parey, had had a fatal accident. His permanent deputy, at that time the only Reich prosecutor, Parisius, was in

* Complete testimony is reproduced in the mimeographed transcript (26–28 Aug 1947), pages 7649–7752, 7780–7901.

the hospital seriously injured. On 1 December 1938, three new Reich prosecutors had been approved for that office. Of those, two were from the office proper, and I was the third one. Upon instruction by the minister, I was to be in charge of the office as a deputy because according to my age I was the oldest of the three Reich prosecutors there.

Q. Witness, in this connection, I should like to discuss a document submitted by the prosecution. It is Prosecution Exhibit 347, Document NG–548. The letter has the heading "Chief Reich Prosecutor with the People's Court" and is of 23 April 1942, and is directed to the Reich Minister of Justice. In this letter, another letter by the Reich Leader SS and Chief of the German Police of 13 December 1941 is quoted. The latter letter is directed to, and I quote, "The Chief Reich Prosecutor with the People's Court, attention: Senior Reich Prosecutor Dr. Barnickel, or deputy." You are therefore addressed as Chief Reich Prosecutor with the People's Court, Witness. Can you please explain how it may have come to that designation?

A. I cannot answer that question with absolute certainty because I do not happen to know why the office which sent that letter did it. It is, however, certain that I was never Chief Reich Prosecutor with the People's Court. I was only Reich prosecutor at all times, although, during the first 2 months, I deputized for the Chief Reich Prosecutor, but during the first few years of my activity I frequently received similar letters. The first few times, I actually opened them. Later, I sent them to the office for incoming mail unopened. I assumed at that time that some office of the Gestapo, by mistake, had entered my name as Chief Reich Prosecutor on their records because, in the beginning, I was in charge of the office as a deputy. But the main point seems to be the following. I can see from the letter which is addressed to me, that it is quite clear that I never had anything to do with the answer to that letter. I see that with absolute certainty from the contents of the letter.

Q. For how long after you assumed the office were you in charge of the affairs of the Chief Reich Prosecutor?

A. Until 1 February 1939.

Q. Did it happen frequently later that you had to deputize for the chief?

A. Yes, but not very frequently. The Chief Reich Prosecutor and his permanent deputy appointed by the Minister, Reich Prosecutor Parisius, of course, tried to arrange not to be absent at the same time. Only if that did happen, I, as the oldest Reich prose-

cutor, had to take care of affairs. I have to correct myself, that is to say, after Reich Prosecutor Parisius, I was the oldest. Since the end of 1943, I was no longer used to deputize. I was evacuated to Potsdam at that time and Reich Prosecutor Weyersberg was the deputy of the Chief Reich Prosecutor.

* * * * * * *

Q. * * * May I ask you now to direct your attention to Prosecution Exhibit 159, which we have already mentioned? That is the Prosecution Document NG–381.* It appears in document book 3–G, on page 22 of the German and page 19 of the English text. The subject of these proceedings is the trial of Oscar Beck, for undermining the military efficiency.

PRESIDING JUDGE BRAND: A correction, for the purposes of the record. Exhibit 159 is in document book 3–D, at page 17 of the English.

DR. TIPP: Thank you.

The indictment appears on page 2 of the document, and following pages. On page 4 there is the signature, "As deputy, Dr. Barnickel." That is to say, you signed that indictment. Apparently you did so when you were deputizing for the chief who was away. At any rate, the document does bear your signature. Would you please tell us why that indictment was filed with the People's Court?

DEFENDANT BARNICKEL: Because of the fact that I was so overburdened with work at the time, I cannot remember any details of the case. However, I can say for certain that the reason for filing the indictment with the People's Court was not—I am referring to the fact which has been mentioned here before—that Beck was of mixed descent, first degree. I think I have explained sufficiently my attitude to that question in general, but I shall revert to that subject later. That attitude of mine had remained the same for 10 years, and I did not change it in 1943. The fact that it was a Vienna Ortsgruppenleiter who denounced the man—that fact, too, is of no importance. I believe it is hardly necessary for me to mention this, but for my department, too, which submitted that case to me, it was of no importance either.

As I look at that indictment now, I am inclined to assume that we wanted to arrive at a basic decision. The novel element in the proceedings against Beck was the fact that he had criticized the employment of women. That was a measure which only started in the first weeks of 1943. It was designed to keep up production, and it had been ordered by the Reich and not by the Party. I

* Extracts from the official files in the Beck case are reproduced above in this section.

believe that all the belligerent countries had introduced measures of that kind.

According to the date when the indictment was filed, it is possible that this indictment of Beck was the first one of its kind. Not only the legal questions decide what the basic element of such a case is, but novel facts of a case also can constitute a basic element.

For the rest, ever since I had been acquainted with the Reich prosecutor's office, occasionally less significant cases, where one was not expecting a very serious sentence and certainly not the death sentence were indicted with the People's Court if they were of a certain importance for the whole country.

Q. Witness, you say, then, that you believe the indictment was filed with the People's Court because the case was important for the whole country and because it contained a novel element?

A. Yes, that is possible.

Q. Does the form of the indictment show that it was the intention to ask for the death sentence?

A. No, on no account. When the indictment was phrased, and in particular because of the legal provisions which were cited, in all that there is nothing to indicate that it was intended to ask for the death sentence. On the contrary, and I should like to refer to the enclosure, the letter which was sent with the indictment. It was written on 30 July 1943, to the presiding judge of the People's Court.

In the second paragraph of that letter, which is also signed by me, it is expressly pointed out that under article 2 of the law of 20 December 1934, prosecution under that law had been ordered. That law was the Insidious Acts Law, which has been mentioned here a great many times. I should think that is a proof for the fact that we considered the application of that law also possible, for otherwise it would have been stupid to make reference to it. The maximum penalty for violation of the Insidious Acts Law would have been a 5-year sentence. I think it is possible that not only the question of the employment of women was the cause for taking this case to the People's Court, but also the question of the application of the law in general.

Q. Witness, what was the senate with which your department cooperated in the field of undermining military efficiency?

A. It was the fourth senate, and the presiding judge was Dr. Koehler, whose name has been mentioned in a favorable context repeatedly here. May I state that in 1944 Dr. Koehler was transferred from the People's Court to Stettin, because Freisler did

not approve of him. The fourth senate dealt mainly with high treason cases. Later on it also had to deal with the undermining of military efficiency. However, when the distribution of work was changed again, it had to return those cases because there was dissatisfaction with the sentences that that senate had passed.

* * * * * * *

PRESIDING JUDGE BRAND: I wonder if you could tell me what was meant by the last phrase in that letter, where you say, "The prosecution under article II of the law of 20 December 1934 has been ordered as a precaution." The part, "the prosecution has ordered as a precaution," what did you mean by that?*

DEFENDANT BARNICKEL: Your Honor, by that I want to say that that passage points out that if sentence was not to be passed on the basis of undermining military efficiency, prosecution under the Insidious Acts Law would be made.

Well, that was a case of a measure which might be taken, Your Honor.

Q. I understand. Was it the practice to appoint defense counsel even in cases where the death penalty was not expected, in your court, in the People's Court?

A. Your Honor, at my time—I don't know what happened later—but at my time, every defendant who appeared before the People's Court had to have a defense counsel without exception. That had nothing to do with the death penalty.

PRESIDING JUDGE BRAND: Thank you.

DR. TIPP: Witness, may I repeat my question. I may ask you to tell us what were these general prerequisites for filing an indictment?

DEFENDANT BARNICKEL: Well, that question has been touched upon repeatedly here. There had to be sufficient suspicion that the defendant had committed the offense, that is to say, a certain probability was sufficient.

Q. In connection with the undermining of military efficiency particularly in this case, I think a further question is important. The question, what did one mean when one said the undermining of military efficiency in public?

A. According to the jurisdiction of the Supreme Reich Court and the Supreme Military Court, military efficiency was under-

* Presiding Judge Brand refers to defendant Barnickel's letter of 30 July 1943 to the Reich Chief Prosecutor at the People's Court in which he enclosed the indictment in the Beck case. This is reproduced earlier in this section as a part of Document NG-381, Prosecution Exhibit 159.

mined in public even if statements had been made in front of only one person, if the offender had to expect that that person would pass on his statements to an indefinite number of other persons.

Q. These two prerequisites, therefore in your opinion in the Beck case, did exist?

A. Yes.

Q. Now, one more question concerning the undermining of military efficiency cases in general. Were all those cases dealt with by your department.

A. To start with, yes; from the summer of 1943, however, certain categories of cases were transferred to Department I, which collaborated with Freisler's senate. According to the distribution plan of the People's Court, Freisler could also deal with certain cases from my department, at his senate.

Q. How long was it that your department dealt with those undermining of military efficiency cases?

A. Until 31 December 1943. Then they were transferred to another department.

* * * * * * *

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHAUG ON THE LOPATA CASE[1]

DIRECT EXAMINATION

* * * * * * *

DR. KOESSL (counsel for defendant Rothaug): The Lopata case was first tried by another court and not by the Special Court in Nuernberg.[2] Please tell us what was the first court that tried his case and whether that court was a Special Court.

DEFENDANT ROTHAUG: The case was tried for the first time on 28 April 1942, before the local court at Neumarkt in the Upper Palatinate. The local court was not a Special Court.

Q. What were the facts which were the subject of the proceedings against Lopata during the trial at Neumarkt?

A. The defendant had been charged only with having approached a woman in a way which was sexually offensive, although that woman again and again tried to get rid of him. He was also charged with irregular behavior, which, however, in the course of

[1] Other extracts from the testimony of defendant Rothaug appear in sections V C 1 A, V C 1 B, V D 2, and V F.

[2] Extracts from the official files in the Lopata case are contained in Document NG-337, Prosecution Exhibit 186, reproduced above in this section. The defendant Rothaug was presiding judge of the Special Court which sentenced Lopata to death upon a second trial in April 1942.

developments played no important part and that charge was dropped.

Q. Please tell us what was the personal description of the defendant which was given by the local court at Neumarkt?

A. In the judgment, it is pointed out that the defendant looked well groomed, but he was insolent, lazy, and he had been guilty of the offense with which he was charged in a way, and I quote, "Which showed an unheard of extent of shamelessness and insolence of which only a member of the Polish nation would be capable." However, that is a statement made by the local court at Neumarkt.

Q. Did the local court at Neumarkt have anything to do with the Special Court at Nuernberg?

A. Nothing. No.

Q. Was the judgment by the local court at Nuernberg upheld?

A. The judgment by the local court at Neumarkt was by decision of the Reich Supreme Court of 14 July 1942 annulled by way of a nullity plea, and the trial was transferred to the Special Court at Nuernberg.

Q. What was the criticism of the Supreme Reich Court in the judgment passed by the Neumarkt local court?

A. The Reich Supreme Court criticized the fact that the local court at Neumarkt, concerning certain generally known conditions which were connected with wartime conditions, although that had been obvious in the case in question, had not taken such conditions into consideration, and therefore apparently had ignored the fact that the offense with which the defendant had been charged also violated article IV of the law against public enemies. For that reason, it was necessary to refer the case to another court so that the case be examined from that point of view, and if that should be found right, so that article IV of the law against public enemies could be applied, if that were found applicable. Further reasons for the decision which are given are that the application of article IV of the law against public enemies would mean that a considerably higher penalty could be pronounced, and that for that reason the case would have to be tried again.

* * * * * * *

Q. In its opening statement the prosecution quoted the following sentence from the judgment: "The inferiority of the defendant lies in his character, and the reason for it evidently is that he

belongs to the subhuman race of the Poles." Is that quotation correct?

A. Well, there is a typing error here which rather distorts matters because actually it says in the judgment—it doesn't say "the subhuman race," but it means the subhumanity of [Polnisches Untermenschentum], and that is something essentially different. We have subhumanity in Germany and we have developed our own laws against that and when we speak of Polish subhumanity we do not mean the Polish people as such; that is what we would have meant if we had spoken of the subhuman Polish race, and for that idea and opinion there is a concrete reason.

In many cases we had found that among the Poles who had been brought to Germany there was a considerable number of highly criminal types from Poland. The agencies which dealt with getting labor from Poland did not select properly and thereby created a great danger. We discovered people who had been previously convicted for murder and had been sentenced to penitentiary for life, but who on account of the outbreak of war had been set free, and who had now come to Germany. That point of view played a part in considering all these questions. That is to say, we did not speak of the subhuman Polish race but we spoke of the subhumanity in Poland.

PRESIDING JUDGE BRAND: May I interrupt, please? The question of translation has arisen. The Tribunal would be glad to have a check made by the prosecution as to the original document and the proper translation of it. That will dispose of this entire matter.

MR. WOOLEYHAN: Yes, Your Honor.

DR. KOESSL: The originals of the files here—I don't know—probably the prosecution has the copy, and perhaps that copy also has the mistake.

PRESIDING JUDGE BRAND: It is a question of what the document says and it should be able to be ascertained with definiteness. The suggestion that the document may have used the wrong word is not satisfactory to us. We want to know what word was used in the original document.* Go ahead to something else and straighten that out afterward.

* At the first recess, the prosecution called Mr. Arnold Buchthal, one of the prosecution's research analysts, as an expert witness concerning the translation and meaning of the disputed words "Polnisches Untermenschentum." Until 1939, Buchthal had lived in Germany, Austria, and Switzerland; and German was his native language. He testified that the literal translation of "Polnisches Untermenschentum" was "Polish subhumanity;" that he had never heard the expression "Untermenschentum" used in Germany before 1933; that after 1933 the context in which the word was used was always political, referring to Jews, Czechs, Poles, or Communists. On cross-examination, Buchthal said that the word might have been used occasionally in the technical language of the criminologist, but certainly not frequently. (*Tr.* 7471–7474.)

DR. KOESSL: Witness, at the trial before the Special Court at Nuernberg, were any facts brought to light which were not mentioned by the judgment passed at Neumarkt?

DEFENDANT ROTHAUG: That is clearly evident from the judgment. In addition to the facts which had originally been established, a further fact had been established according to which the defendant had attacked the old people who were living on a lonely farm with a dung fork and had exerted so much pressure on them that the only way for them to save themselves was to unleash the dog.

When evaluating the character as a whole of the defendant, as the judgment shows, that fact was taken into account. That fact in the last analysis was decisive.

Q. Can you show that that point in particular was very decisive? Can you show us that by quoting a passage from the original file?

A. That is shown by our attitude to the clemency question. In our opinion on the clemency question we, without exception, repeated those facts which had been decisive for us in deciding on the sentence. We did not state other general points of view concerning the clemency plea because we didn't know them, and secondly, because we were of the view that they didn't affect us in any way. That brief opinion on the clemency question says—

> "The character of the defendant has been clearly described at the trial, in particular also the fact that the defendant, apart from the offense which in its execution was very grave, has also made himself guilty of violent behavior toward his employer."

In other words, it is made perfectly clear here that the last point of view was decisive for us.

PRESIDING JUDGE BRAND: May I ask you a question to which the answer, I think, could be brief? My notes show that the defendant was sentenced to death for violation of articles 2, 3, and 4 of the law or decree concerning Poles and Jews. Is there such a provision in your judgment? You needn't read it. Just tell me if that is in there.

DEFENDANT ROTHAUG: Yes.

PRESIDING JUDGE BRAND: Thank you.

DR. KOESSL: The witness Doebig said that the offense in his view was not designed to prove that the offender was a public enemy. Would you, therefore, please briefly summarize the points

which lead you to assume that a very serious offense had been committed?

DEFENDANT ROTHAUG: The justification for our sentence can be seen from the opinion given by the court, and that is before this Tribunal. I cannot say any more. All I can add is, that specifically for this case that is to say for the original case that had to be dealt with, that is to say, for molesting the woman in a sexual way, there was a decision from the Reich Supreme Court which stated an opinion specifically in regard to this question and discussed it from its basic angles, and that decision evidently was the cause for considering the death sentence at all.

With us a further point of view was added and it was that decision that was made available to the court.

* * * * * * *

PRESIDING JUDGE BRAND: I should like your professional opinion. Was the nullity plea* involved in the Lopata case? I don't remember at the moment.

MR. WOOLEYHAN: Yes, Your Honor.

PRESIDING JUDGE BRAND: What is your best, honest judgment as to whether or not if Lopata had been a racial German there would have been a nullity plea and a direction from the Reich supreme court to retry the case? What is your honest opinion about that?

DEFENDANT ROTHAUG: Mr. President, these two cases cannot be compared with each other because the Reich Supreme Court in this case stated its opinion on the basis that he was a Pole.

Q. Now, I am asking if Lopata had been a racial German, all other facts being the same as they were in the Lopata case, is it your judgment that the nullity plea would have been invoked and that the Reich Supreme Court would have ordered the case sent back to you for another trial? I should like your opinion on that.

A. Mr. President, this question is very interesting, but I cannot even imagine that possibility, even theoretically, because the very elements which are of the greatest importance could not be applied to a German.

PRESIDING JUDGE BRAND: That's all I wanted to know.

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* For the decree establishing the nullity plea and other material concerning its application, see section V C 1 b.

F. Handling of Religious Matters

TRANSLATION OF DOCUMENT NG-630
PROSECUTION EXHIBIT 428

LETTER FROM DEFENDANT SCHLEGELBERGER TO CHIEF PUBLIC PROSECUTORS AND SENIOR PUBLIC PROSECUTORS, 20 JULY 1935, CONCERNING THE "STRUGGLE AGAINST POLITICAL CATHOLICISM"

The Reich Minister of Justice
V a 25 399

Berlin W8, 20 July 1935
Wilhelmstrasse 65

[Illegible Stamp]
[Handwritten] 2 copies sent to [illegible]

To: Messrs. Chief Public Prosecutors and Senior Public Prosecutors

Subject: Struggle against political Catholicism

For your confidential information and notice, I enclose a copy of the Prussian Ministerpraesident's decree of 16 July 1935—St.M.I. 7905—to the Oberpraesidenten and Regierungspraesidenten, etc.

I decree it to be the duty of all prosecuting authorities to cooperate closely with the competent State Police and administrative authorities in taking action—with the deliberation necessary to avoid mistakes but also with the severity necessitated by the dangerous nature against all manifestations of the efforts of political Catholicism to undermine the unity of the State and create discord among the people, wherever they appear without regard for the person or rank of the perpetrator.

[Handwritten remarks on left margin illegible; illegible signature.]

For this purpose, the application of the following laws will be found particularly useful: Articles 130a, 131, 134a, 134b (as of 1 September 1935) Reich Criminal (Penal Law; further, articles 1 and 2 of the law against insidious attacks on the State and Party and for the protection of Party uniforms of 20 December 1934[1] (Law Gazette I, p. 1269); the decree of the Reichspraesident for the Protection of People and State of 28 February 1933[2] (Law Gazette I, p. 83); the law against the founding of new parties of 14 July 1933 (Law Gazette I, p. 479); and the law against public collections of 5 January 1934 (Law Gazette I, p. 1086).

The cases must be investigated with the utmost rapidity, so that the punishment will follow the crime as quickly as possible. The penalties called for at the trials shall be such as the national

[1] Document 1393-PS, Prosecution Exhibit 508, reproduced in section IV B.
[2] Reproduced as a part of Document NG-715, Prosecution Exhibit 112, on page 160.

sense of justice deems appropriate to the dangerous nature of these intrigues against the State and people and the unscrupulousness of the perpetrators.

A report must be made to me in quintuplicate in all cases where proceedings of this type are initiated. At the close of the investigation a concluding report on the incidents indicating the measures to be taken will be submitted to me. In case of an indictment, the bill of indictment, and later the sentence, will be submitted, each in quintuplicate. If the sentence imposed is made the subject of an appeal, a report must be made to me immediately, indicating the probable result.

This circular decree will be published in the next number of "Deutsche Justiz," together with an extract from the decree communicated below, issued by the Prussian Ministerpraesident Goering on 16 July 1935.

As deputy:
[Signed] DR. SCHLEGELBERGER

PARTIAL TRANSLATION OF DOCUMENT NG-1808
PROSECUTION EXHIBIT 557

EXTRACTS FROM THE OFFICIAL FILES IN THE CASE AGAINST LUITPOLD SCHOSSER, A CATHOLIC PRIEST, SENTENCED ON 19 DECEMBER 1942, UNDER THE LAW AGAINST INSIDIOUS ATTACKS ON STATE AND PARTY, BY A SPECIAL COURT HEADED BY DEFENDANT ROTHAUG

National Socialist German Workers Party
Kreisleitung Amberg-Sulzbach (Gau Bayrische Ostmark)
Bayreuth

Daily newspaper of the
district: Amberg-Sulzbacher
Zeitung
Office and Editor's Office Amberg
Regierungsstrasse 1
Phone No. 6
Amberg, 12 June 1942

Kreis Office
Amberg, Kaiser Wilhelmring 9
Telephones: 346 and 325
Banking accounts:
County Savings Bank Amberg, Account No. 1501
Municipal Savings Bank Amberg, Account No. 150
The Kreisleiter Dr. K./St.
Journal No. 1156/42
(to be quoted in replies)

To the Public Prosecutor at the Special Court, Nuernberg-Fuerth

[Stamp]

Received: 13 June 1942
Prosecutor's Office
Nuernberg-Fuerth 1c

Subject: Charge against the priest Luitpold Schosser, born at Burghausen/Lower Bavaria, 28 April 1909, at Vilseck since 27 March 1939

On 17 May 1942 the Polish farm laborer, Martin Strysow, died in hospital at Vilseck. The priest Schosser announced in church after the usual Sunday evening May devotion that the transportation to the cemetery and Last Sacrament of the Pole would take place immediately afterward. Induced by this announcement, about 50 people, mainly women and children, participated in the funeral procession and praying loudly, as usual, rendered last honors to the Pole. A large number of the population took offense at this incident.

By this action the priest Schosser has malevolently criticised the national political demands of the National Socialist State. Furthermore, he has debased the dignity of the German people in an incredible way and has caused a great number of fellow Germans to behave in an undignified manner.

Judging from the usual attitude of the priest Schosser it may be expected that after having been informed of the charges made against him, he will try to influence possible witnesses. Therefore, I request his immediate arrest.

Heil Hitler!

[Signed] DR. KOLB
Oberbereichsleiter
[Rank in Nazi Party Leadership Corps]

[Stamp]

National Socialist Workers Party
Kreis Amberg-Sulzbach

[Handwritten]

To the President of the Special Court with the request to issue a warrant of arrest for an offense against the law against insidious attacks on State and Party.
Nuernberg, 15 June 1942

[Signed] SCHROEDER
Chief Public Prosecutor

Secret State Police
State Police Office Regensburg

Regensburg, 18 June 1942
[Stamp]
Received: 19 June 1942
Public Prosecutor's Office
Nuernberg-Fuerth

B. No. 1854/42 II B 1.
With 1 file returned
To the Chief Public Prosecutor
as Chief of the Prosecuting Authority
at the Special Court,

Nuernberg

As I request you to gather from the enclosed reports, the case has already been dealt with here. The offense committed by Schosser was handled here in such a way that he was under police arrest from 1–15 June 1942. For that reason I have desisted from carrying out the warrant of arrest against Schosser for the time being. In case the warrant of arrest should nevertheless be executed, I request further information.

BY ORDER:

[Signed] ALT
[Stamp]

[handwritten]

I. Make note of dispatch.
II. With file.

Secret State Police
State Police Office
Regensburg
Received: 24 June 1942
No. 1854/42 B 1

[Handwritten] To the Secret State Police, State Police Office Regensburg, repeating my request of 15 June 1942.

Local Court
2 July 1942
Weiden (Oberpfalz)

[Stamp]
Nuernberg, 20 June 1942
Chief Public Prosecutor

[Signed] SCHROEDER

Arrest!

Very urgent

Copy

1 c Sg 948/42.

Received: 21 August 1942
District Court Nuernberg-Fuerth
Criminal Cases

St.

To the President of the Special Court,
Nuernberg,

With the request to return the files, and to suspend the warrant of arrest, and order the release of the accused.

Nuernberg, 21 August 1942
The Chief Public Prosecutor
as Chief of the Prosecuting Authority
at the Special Court

BY ORDER:

[Signed] HOFMANN

I. At the request of the Chief Public Prosecutor the warrant of arrest of the Pesident of the Special Court of 15 June 1942 has been revoked, article 126 Criminal Procedure.

II. Order for release!

To the office of the Special Court—give order by telephone to release the prisoner.

III. To the Chief Public Prosecutor—time of release from arrest—13.15 hours.

Nuernberg, 21 August 1942
The President of the Special Court

[Signed] DR. FERBER
Acting President

To II

Telephone conversation: Court Jail Weiden;
Telephone Charges: 3 Reichsmark

21 August 1942
Wi.

Received: 21 August 1942
Public Prosecutor's Office
Nuernberg-Fuerth

Certified.
Nuernberg, 27 August 1942
Public Prosecution Nuernberg-Fuerth

[Signed] HUEMMER, Chief Clerk
The Registrar

[Stamp]

Chief Public Prosecutor
Nuernberg-Fuerth

Files for cases concerning insidious attacks on State and Party
Sg No. /194

Verdict

In the name of the German People

The Special Court for the district of the Nuernberg Court of Appeal at the Nuernberg-Fuerth District Court rules in the criminal case, against—on account of—in public session as follows:

[Handwritten]

Schosser, Luitpold, born in Burghausen, 28 April 1909, single, Catholic priest at Vilseck, at present in detention pending trial is to be punished by imprisonment of 1 year and 3 months and costs on account of two compound offenses, namely misusing the pulpit, as well as [violation of] article 2, paragraph 1 of the law against insidious attacks on State and Party,[1] committed by attacks against the National Socialist Reich in the religious-political sphere.

The 3 months of police arrest and of detention pending trial will be taken into consideration.

[Signed] ROTHAUG
DR. GROS
GROBEN

TRANSLATION OF DOCUMENT NG-770
PROSECUTION EXHIBIT 291

CIRCULAR OF THE REICH MINISTER OF JUSTICE, SIGNED BY DEFENDANT ENGERT, TO THE ATTORNEYS GENERAL, 12 DECEMBER 1944, REDEFINING LIMITATIONS ON DIVINE SERVICES FOR PRISONERS[2]

The Reich Minister for Justice

Berlin W 8, 12 December 1944
Wilhelmstrasse 65

To the Attorneys General (except Prague)

Subject: Adjustments in the application of the execution of sentences and detention custody (administrative ordinance) of 29 September 1944 "Deutsche Justiz" [German Justice] page 270.

Copies to the independent institutions, the district court prisons and other court prisons for early distribution.

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[1] This law of 20 December 1934, Document 1393-PS, Prosecution Exhibit 508, is reproduced in section IV B.

[2] This document is discussed in extracts from the testimony of defendant Klemm, reproduced below in this section.

907802—51——60

There is reason to believe that the regulation under No. 4 of the Administrative Ordinance of 29 September 1944—"Deutsche Justiz", page 270—concerning adjustments due to the war in the application of penalties and detention custody, is being misinterpreted. The regulation that divine services for prisoners and persons in custody will no longer be held is to be interpreted from the context. As the title already indicates, the measures of the ordinance are due to the war. The preamble to the ordinance already defines the purpose of the adjustment of the application of the ordinance due to total war. This purpose also restricts the application of the regulation under No. 4. Divine services are only temporarily canceled and only then where they are incompatible with the demands of total war.

Divine services at the present time are incompatible with the demands of total war where and insofar as they necessitate time which is essential to work for the waging of total war. Nor are they compatible when and where the crowding of prisoners or detainees during divine service constitutes a danger in itself or mixing the congregation of the institution's church or in view of the small number and the age of the supervisory staff, it represents a danger to the institution's security and thereby continuous production.

Insofar, however, as the time needed for the requirements of total war is not interfered with by the hours of divine services and the maintenance of the institution's safety can be guaranteed, divine services may also be held in future especially at Christmas and other sacred holidays.

BY ORDER:

[Typed] ENGERT

Certified: [Signed] LORENZ
Clerk

[Stamp] Reich Ministry of Justice

EXTRACTS FROM THE TESTIMONY OF PROSECUTION WITNESS FATHER LUITPOLD SCHOSSER* CONCERNING HIS ARRESTS AND TRIAL

DIRECT EXAMINATION

MR. WOOLEYHAN: Witness, would you please state your full name and your profession?

WITNESS SCHOSSER: My name is Luitpold Schosser; I am a Catholic priest.

* Entire testimony is recorded in the mimeographed transcript (9 May 1947) pages 3021–3046.

Q. Father, where is your parish?

A. My present parish is at Wolfseck near Regensburg.

Q. Has that been your parish for some time in the past?

A. That has been my parish for 3 years and 3 months.

Q. Where was your parish before that?

A. Before my trial, my parish was at Vilseck.

Q. Father, where were you born and when?

A. I was born on 28 April 1909 at Bernhausen, in the Holledau [Central Bavaria].

Q. What education did you have, and where was it?

A. For 4 years I attended grammar school in my own home village Hadersbach. Then, for 9 years I went to the high school at Straubing. Then, for 5 years I attended the university at Innsbruck, and for 1 year the Theological Seminary at Regensburg. In 1934 I was consecrated priest. Then, I was assistant vicar in several places. At the end, I was at Vilseck. Then my trial started, and after my trial from 1 February 1944 I have been a priest at Wolfseck.

Q. Father, while you were a priest at Vilseck, were you ever arrested and imprisoned?

A. At Vilseck, I was arrested twice, and at Regensburg, I was arrested once, because after my arrest I was not allowed to go back to Vilseck.

Q. Would you please state the dates, so far as you remember, of each time that you were arrested and imprisoned?

A. Yes. For the first time I was arrested on 1 June 1942, and I was kept in prison for 14 days by the police. That warrant was filled in by the Gestapo. After I had been imprisoned for 2 weeks, I was released. In the meantime, a second warrant for my arrest was issued by the Special Court of Nuernberg, and on 1 July I was arrested again. Then, until 21 August—that is for 7 weeks, I was in custody pending trial at Weiden in the district court prison of Weiden. Then, again, I was released and a few days later another warrant for my arrest was issued again by the Special Court of Nuernberg. Then, I had been in prison until 18 December 1943. For the third time I was arrested, that was at Regensberg —and my arrest was made by the Gestapo.

So, altogether, I was arrested three times; twice at Vilseck and once at Regensberg.

Q. Father, at any time during any of these three arrests, did the police ever tell you who had signed the warrant for your arrest?

A. Yes, when I was arrested the second time, the police commissioner of Vilseck told me that the warrant was issued by Rothaug from the Special Court of Nuernberg.

Q. After you had been arrested, Father, and imprisoned those three times that you describe, you also mentioned a trial. Were you ever indicted and tried before a court?

A. My trial took place on 18 December, that is on 19 December 1942, and the trial took place before the Special Courts of Nuernberg at Amberg. The trial took place because of a [Heimtuecke] insidious attack, during a sermon which I had made 15 months before at Vilseck.

Q. Father, you state that you were tried on 19 December 1942, by the Special Court of Nuernberg, but that the trial took place in Amberg. Is that correct?

A. Yes, that is correct; it took place at Amberg, at the town hall.

Q. Would you please repeat again, so far as you know, the violation of law for which you were indicted and tried?

A. Well, the first arrest originated from the burial of a dead Pole who died at Vilseck and was sent over to the morgue from the hospital as was customary there with the dead. The dead Pole, as every other Catholic, was transported from the hospital to the morgue, therefore, the church had given him the sacrament in the morning. In the morning of this day he asked for a priest, and he was prepared for death. During the afternoon, then, he died. In the evening before we had our evening vespers—that was on a Sunday—the attendant of the morgue came to see me, and he informed me that I had to order the transport of this dead Pole from the hospital to the morgue and would have to take over the arrangements. I asked him whether it was permissible for me to do that, and he said, "Yes; the Magistrate has ordered that you do it." Therefore, I had no further doubts, and I went to the morgue, that is, to the hospital, and I ordered the transport which was sponsored by the church.

Before I made my sermon at the evening vespers, as is customary at every transport of the dead, I communicated to my parish people that later on a dead Pole would be transported from the hospital to the morgue, because the people want to know who is the dead, who is in the coffin in order to be able to know whether they have any obligation to attend the funeral or not.

Of course, as it was a Sunday, there were quite a number of people in the church, comparatively, and quite a number of them attended the funeral, because thus they had an opportunity to go to the cemetery, which was situated outside of our village.

Now, because of this communicating the fact to the people, I was charged mainly by the Special Court. They considered it an invitation, that is to say, that I intentionally invited the population to attend the transport of the dead Pole. That was the main charge made against me by the Special Court of Nuernberg.

They said that at this occasion, as the president said during the trial, I was said to have expressed religious feelings and used them intentionally in order to sabotage the directives of the State.

Q. Father, may I interrupt, please? You state that at the trial, the main charges, so far as you know, were this conducting of a funeral for the Pole and a sermon that you preached the previous year. Is that correct?

A. Well, the main charge in my trial was the sermon. That was the real reason for the trial, during the trial, the sermon was not so much dealt with but rather this whole matter with the Pole was dragged into the trial. In each detail it was talked about—just about this matter of having had the Pole transported. I was considered an insidious priest, and this was told to the public.

* * * * * * *

Q. Now Father, the sermon that you delivered on the occasion in 1941, to which the indictment referred, what text was that sermon?

A. Well, the text was the sermon of the seventh Sunday after Pentecost. It is read every year. It is in Chapter VII of Matthew. "Beware of false prophets who walk around in the cloak of lambs but who in their interior are roaring wolves. You will recognize them from their cloaks." That was the beginning of my sermon.

Q. Father, was this verse from Matthew the text of the sermon on that day every year?

A. Every year we use the same text.

Q. Now, Father, of the witnesses that were called against you —I believe you said there were four or five, which was it?

A. There were four witnesses from Vilseck and the Gestapo official Alt, but during the trial he didn't talk at all.

Q. Well, of those four witnesses that did speak at the trial for the prosecution, how many of them heard your sermon of the preceding year, on the seventh Sunday after Whitsuntide?

A. Two witnesses had heard my sermon. It was the wife of the Ortsgruppenleiter and the newspaper distributor Meyer Johann.

Q. What did the newspaper distributor say or testify about your sermon?

A. During the interrogation by the Gestapo official, he declared that my preaching had been aggressive; he said that my sermon was an incitement.

Q. Father, you said that during the Gestapo investigation, he said that your sermon was aggressive and inciting, but that during the trial he denied that. Is that true?

A. Yes, during the trial he denied that he had said that the sermon had been an inciting sermon. This expression "Hetzpredigt," [inciting sermon] he did not use. That is what he said during the trial.

Q. Describe, Father, the testimony of the other witness that had heard your sermon; namely, the wife of the mayor and Ortsgruppenleiter.

A. Well, the wife of the Ortsgruppenleiter had only referred, during the trial, to what she had told the Gestapo official, and the other witness, Kuffer, brought forward merely personal matters in order to paint me as an insidious priest.

Q. But this last witness that you speak of, Kuffer, had not heard your sermon, had he?

A. No, he had not heard my sermon.

Q. But the mayor's wife had, is that correct?

A. Yes, the wife of the Ortsgruppenleiter attended the sermon and heard it.

Q. Well, Father, at your trial did the mayor's wife testify or was the statement she had given the Gestapo only introduced?

A. No, the wife of the mayor only answered questions put to her by the presiding judge. She, herself didn't say much.

Q. During the trial, Father, so far as you remember having observed it, will you please describe Rothaug's conduct and words and statements from the bench.

A. Right after my trial, in the cell of my prison, I took some stenographic notes concerning the remarks made by the presiding judge, Dr. Rothaug, and on the strength of those stenographic notes which I have here on my table, I can make the following statement concerning the trial. First of all, the presiding judge referred to my education and there he became very personal right away and charged me with the fact that my whole theological

education was rather backward, and that it would have been much better if I had studied something other than theology. He said that I only observed the whole development of national socialism as a bystander looking from the window. During my trial, the Hitler Youth passed the town hall, and at that occasion the presiding judge made the remark, "those down there, the Hitler Youth, that is the real life." Later on, in the course of the trial, the presiding judge very often made ridiculing remarks concerning the Catholic religion, and made insidious remarks concerning the profession of priest. Some of these remarks, I can tell you literally, and they were the following: "You Catholics allege that only Catholics will reach heaven, all others will be in hell." That is an assumption which no Catholic will ever make. Then, he said, and this remark was repeated again and again, "Not water gives value to man, but rather the blood." And, of course, the water he referred to was the Catholic sacrificial water, or the water on the head—sanctifying water. For the National Socialist ideology has to be given to the child already with the milk of his mother; and there it appears my parents had failed to educate me in this direction. Those were merely personal remarks.

Q. Father, may I interrupt a moment. Are you saying that the presiding judge, Rothaug, made the remarks, such as you have just described, to you from the bench, during the trial?

A. Yes, from the bench, during the trial. These remarks, I may say that after all they were not only meant for me, myself, but for the whole profession of priesthood.

Q. Father, you have said that in your indictment, the main charge was one of malicious statements made during that sermon in 1941, but you also said that during your trial Rothaug said much more about the business of your giving a funeral service to the Pole. Can you give any facts to explain why you say that?

A. Yes. Special Court Judge Rothaug dragged two things mainly into this trial. First of all, the removal of crosses from the schools in the district of Vilseck, and then this transporting of the dead Pole from the hospital to the morgue. If I may add something concerning this matter of transferring the dead Pole; there again I can give you some more details.

Q. Yes, Father, I would be very interested in what Rothaug said about your transporting the dead Pole.

A. The whole courtroom was fully occupied. I, as well as the people attending the trial, was quite astonished especially by Rothaug going into the details concerning this Pole matter. He came back again and again on this matter in order to prove to me

that I really had made insidious statements; and that I had had insidious and bad intentions, and on this occasion Rothaug showed a terrible hatred against the Polish people.

* * * * * * *

Q. Father, after your trial was concluded, what sentence did you receive?

A. I was sentenced, on the grounds of insidious attacks, to 15 months of prison, and 3 months of custody pending trial were counted.

Q. Father, after the ceremony and sermon which you preached on the seventh Sunday after Whitsunday 1941, how long was it from then until your trial, approximately?

A. About 15 months.

Q. Then, for 15 months after you preached the sermon for which you were tried as having made insidious utterances, nothing was done to you by the way of trial; is that correct?

A. No, during these 15 months nothing happened.

Q. One moment, Father, please. Fifteen months after your sermon, during which nothing was done, you were tried, and part of the case was the funeral sermon you conducted for a Pole, is that correct?

A. May I ask you to repeat the question, please?

Q. Father, 15 months after your sermon, during your trial, your conduct of a funeral for a Pole was a part of the trial, wasn't it?

A. Yes, during the trial.

Q. Now, Father, when was this funeral for the Pole that you conducted?

A. That was on the third Sunday in the month of May. I think it must be about 17 May 1942.

Q. In other words, Father, the sermon that you preached, on which the main count of your indictment was based, was 15 months before your trial, and the Polish funeral was 2 or 3 months before your trial? Is that correct?

A. Well, the funeral of the Pole was in May 1942, and the trial took place in December 1942. That would be about 6 months.

MR. WOOLEYHAN: There is no further direct examination, Your Honor.

PRESIDING JUDGE MARSHALL: Does any defense counsel desire to cross-examine this witness?

DR. KOESSL (counsel for defendant Rothaug): I ask to examine the witness.

THE PRESIDENT: You may proceed.

CROSS-EXAMINATION

DR. KOESSL: Witness, for the first time you were arrested on 1 June 1942, is that correct?

A. Yes.

Q. You said before that you made the church sponsored transfer [to the cemetery] of the Pole, and that you were arrested because of that. Was this church sponsored transfer of Poles prohibited?

A. It was not prohibited for Poles, but I was charged with only the publicizing of this fact.

Q. I could not quite get that, unfortunately. May I ask you to repeat what you were charged with?

A. I was charged with the fact of having publicized this church sponsored transfer which is usual at Vilseck, and that I made it public. That was explained as if I had invited and even asked the population to attend the funeral.

Q. In other words, you were not charged with having transferred this Pole and sponsored it by the church, but rather, it was the fact that you had violated the State directives, is that correct?

A. Yes.

Q. The first point was dealt with only by the Gestapo?

A. Yes.

Q. In other words, Rothaug had nothing to do with that?

A. No, he had nothing to do with that.

Q. However, you were charged with other violations of State directives, were you not? Is that correct?

A. No, that is not correct. The Ortsgruppenleiter Stubenvoll had informed the Kreisleiter, Dr. Kolb, and he raised the point again because this sentence of 2 weeks was not enough for him, and that is the way this matter came to the Special Court in Nuernberg, and then it went on.

Q. Well, did this matter lead to a trial then?

A. No. As far as I know—

Q. Please go on.

A. As far as I know from my lawyer, this matter was diverted by Berlin, and that is why the second time, on 21 August, I was released again.

Q. But then there were other denunciations against you?

A. Yes, later on. After I had been released for the first time and when I was in custody pending trial for the second time, only then was this sermon brought to the knowledge of the [Nuernberg] Special Court.

Q. It seems that you were also denounced by the Ortsgruppenleiter for other activities.

A. Well, no, I was not denounced. I was only charged with them and reprimanded, but they had nothing to do with the court.

Q. Just a little bit slower, please.

A. At Vilseck, I only discharged my general duties as a priest.

Q. But your activities at school were talked about and other activities which were not compatible with State directives at that time?

A. Well, I have to object to that. That was only the opinion of Stubenvoll. Only in his opinion were those activities against the State. I never violated any State directives in that matter. I only stuck to my church directives.

Q. However, your youth organization and your school activity, what did they object to in those matters?

A. Well, for instance, as far as the pupils of the vocational school were concerned, I gathered them for education after the lessons. The Ortsgruppenleiter Stubenvoll didn't like that, and then he made quite bad and mean difficulties for me. He threatened that I would be charged. Furthermore, I gathered the adult youth every 3 or 4 weeks in order to have discussions and a little lecture. There again, Stubenvoll sent informers, in spite of the fact that he had no right whatsoever to intervene in church matters.

Q. You speak of intervening in church matters. Can you confirm that as a result of the centuries-old tension between church and state in Germany, there were penalties for the misuse of the priest's profession which were as old and which had been issued centuries ago?

A. I know only the "Pulpit Article," and that had existed for quite some time.* Otherwise, I don't know anything.

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* The reference is to Article 130a of the Reich Penal Code, which was inserted into the Code by the Law of 26 February 1876: "Imprudent Discussion of State Affairs by Ministers of Religion (Kanzelmissbrauch). 130a. A clergyman or other minister of religion who in the exercise of his calling or on the occasion of such exercise makes affairs of state a subject of his announcement or discussion in a manner endangering public peace either before a crowd or before several people assembled in a church or other place assigned for religious meetings, shall be punished by imprisonment or confinement in a fortress not to exceed 2 years. A similar punishment shall be imposed upon a clergyman or minister of religion who, in the exercise of his calling or on the occasion of such exercise, issues or distributes writings in which affairs of state are made the subject of announcement or discussion in a manner endangering public peace."

Q. Well do you know for instance, the Protizio of common law? You don't know that?

A. No.

Q. The Protizio.

A. No, I don't know that.

Q. But, you know that the "Pulpit Article" was issued during Bismarck's rule; that is 1871, is that correct?

A. Yes. Even during the trial, Rothaug made a remark about it to me.

* * * * * * *

Q. Now, on the strength of that sermon at that time, you gave as a basis, chapter 7 of the Matthew's Evangelical?

A. Yes.

Q. Was it the fact that this text was made the basis for this sermon which was objected to?

A. Well, that could not be objected to because I had no power over that. I had to take that text.

Q. Is it correct if I assume that, of course, the words which you joined to that chapter were objected to?

A. Well, yes. The whole sermon, as I said, was explained by the witness in a way as if I meant by the false prophets the leading personalities of Germany of that day.

Q. Did you mean them at that time?

A. I spoke in quite a general way, and I left to the people what they wanted to understand from my sermon.

Q. Well, did you mean the leading personalities? I would like to know that.

A. I spoke in a quite general way on these matters of ideology, and I left it to everybody. If I meant somebody then, of course, I meant, first of all, Rosenberg who actually was the man who was involved with the National Socialist ideology versus religion, by his book.

Q. In other words, the assumption of the public prosecutor was correct?

A. It was an assumption and they couldn't prove it.

* * * * * * *

Q. Now, witness, you have admitted that the newspaper dis-

tributor Geyer expressly stated that your sermon was very aggressive.

A. Yes, the witness Geyer in the minutes taken by the Gestapo had testified that, and they had written it down.

Q. Also, the wife of the Ortsgruppenleiter, according to your own testimony, had testified that in church she had objected to what you said?

A. Yes.

Q. Was the wife of the Ortsgruppenleiter a woman who went to church very often?

A. Yes, relatively she went rather often to church. But one gained the impression—and also the other people who went to church confirmed this—that she went to church because she wanted to hear everything that was said in church.

Q. This woman, did she go to church before the time her husband became an Ortsgruppenleiter?

A. Yes, also during that period already, Frau Stubenvoll went to church regularly.

Q. And now you assume that this woman suddenly went to church only as an informer?

A. That was the general opinion in the village; it was not only my opinion.

Q. You have admitted that when Rothaug questioned this woman he generally stuck to what she had testified before the Gestapo, that is, as a line for his questioning.

A. Yes.

Q. Furthermore, you said that he asked leading questions?

A. He submitted it to her in a way that she could only answer yes or no in a very easy way. That was the impression the public gained. My family was there partly.

Q. However, this woman had already told all that. How can you say that Rothaug put leading questions to that woman and told her what she was to say?

A. Because in her testimony she was rather uncertain.

Q. Why did she suddenly get uncertain in her answers if she had already told the Gestapo the very same things?

A. Between the questioning by the Gestapo in August and the questioning during the trial in December there was quite a period of time, and Frau Stubenvoll didn't have a good memory of what

she had stated at that time. This impression my defense counsel gained, also.

Q. In other words, the first statements of this woman were apparently under the impression of your sermons, weren't they?

A. Well, only what she may have stated to the Gestapo. During the trial, from her own knowledge, she didn't speak too much. She only answered.

Q. Did you ever see a witness who does anything else than answer questions?

A. Well, the first witness, Stubenvoll—he just spoke and he told and reported everything he knew against me though he didn't get any questions to that effect at all.

Q. But this man probably, on the strength of the Code of Criminal Procedure was summoned to explain what he knew. Can you remember that?

A. I cannot remember well whether he was summoned to do just that. He started to speak against me.

Q. Now, you mentioned the fact that Rothaug had alleged that in your tender youth your parents had forgotten to give you the education of a National Socialist.

A. At that time I was much older, but indirectly this came as a hint concerning my parents, and my brother confirmed that to me and the young lady who attended the trial, that he even hinted at my parents just when he spoke of education, of education from the tender youth onward.

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Q. Witness, the entire question of the burial of the Pole was mentioned only because, apparently, it was contained in the files, and there it was used as further evidence of your attitude of opposition to the State?

A. These files, however, had nothing to do with the actual matter charged in the trial.

Q. However, it was further evidence of your entire attitude toward the State at that time?

A. Yes, that is how the presiding judge interpreted it and also expressed it.

Q. How long did the whole trial take?

A. From about 8 o'clock until 1:30 in the afternoon.

DR. KOESSL: I have no further questions. Thank you.

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EXAMINATION BY THE TRIBUNAL

PRESIDING JUDGE MARSHALL: I understand that your testimony now is that the sermon referred to in your testimony was preached on the third Sunday in July of the year 1941. Is that correct?

WITNESS SCHOSSER: I can now tell you the exact date. It was 20 July 1941.

Q. I understand you to say that from the time of the preaching of that sermon a period of 15 months elapsed during which nothing happened. Is that correct?

A. Fifteen months passed until the trial. About a year later there was the denunciation because of this transfer of the Pole.

Q. About a year elapsed, then, before you were arrested, and then 3 or 4 months after that until the trial took place, is that correct?

A. Yes, that is how it was.

PRESIDING JUDGE MARSHALL: Very well.

MR. WOOLEYHAN: May the witness be excused, Your Honor?

PRESIDING JUDGE MARSHALL: The witness may be excused.

EXTRACTS FROM THE TESTIMONY OF DEFENDANT ROTHAUG CONCERNING THE CASE OF FATHER LUITPOLD SCHOSSER[1]

DIRECT EXAMINATION

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DR. KOESSL (counsel for defendant Rothaug): I want to talk to you about the Schosser case, S-c-h-o-s-s-e-r. The Schosser case is mentioned in the English transcript on page 1743 by the witness Ferber;[2] and in the English transcript on page 3021 through 3066 by the witness Schosser. Witness, in this case the main charge against you is that you displayed special initiative. In addition to that the charge is made repeatedly that Schosser was prosecuted because he buried a Pole. Between what proceedings does one have to distinguish when the name Schosser is mentioned?

DEFENDANT ROTHAUG: This is a case of two proceedings, in fact. The first case had to do with the funeral of a Pole, but I want

[1] Further extracts from the testimony of defendant Rothaug appear in section V C 1 a, V C 1 b, V D 2, and V E.

[2] Dr. Karl Ferber's testimony is recorded in the mimeographed transcript (31 Mar., 1, 3, 8 Apr. 1947), pages 1312–1315, 1319–1466, 1576–1630, 1665–1746. Ferber was a district court director (Landgerichtsdirektor) and associate judge of the Nuernberg Special Court. He was called a prosecution witness. Ferber referred to the case of a second Catholic Priest named Froehlich who had buried a Pole in Roding (Upper Palatinate), mimeographed transcript, pages 1352–1354, 1743–1744.

to state right now that naturally the funeral itself was not considered a punishable offense. That is the more recent case. Then, another proceeding is of importance here which has to do with the sermon on a Sunday in church. That case, the first case, in connection with the funeral of a Pole did not lead to a main trial or a sentence, but this sermon on the Sunday did. Those are the first things between which one has to distinguish, because in this connection the charge is made that I had started or initiated the second case after I had failed with the first one; and my aim is now to prove to the Court by submitting evidence, submitting documents, that I was not the initiator in this case, and in general, I object against that charge.

Q. Did you also deal with the first case that you find in the file before you? Look at page 6 of the file attached to the main file. It is the case SG–948, from 1942.

A. There are two cases, and it would probably be helpful to mention the file designations to avoid confusion. The first case—the case of the funeral of the Pole, if you want to call it that—has the file designation 1–C SG 948, from the year 1942.

Q. What was the cause for that case?

A. That case was initiated on the basis of a denunciation which the Kreisleiter of Amberg on 12 June 1942 sent to the public prosecutor at the Special Court Nuernberg-Fuerth. In this report it is set forth that, by the behavior of the accused Schosser in church, particularly by making an announcement about the funeral, and by guiding people to the cemetery, the German population to a far-reaching extent was caused to attend the funeral; and that that behavior was considered an offense against the measures which were prevailing at the time concerning the separation between Germans and Polish people.

Q. What did the senior public prosecutor do?

A. In this connection it may be necessary to point out that there was a definite regulation which I find in the official gazette for the diocese at Regensburg, published by the bishop's office, Regensburg. In this publication, periodical, is a reprint of a decree, an official decree, concerning the spiritual care of civilian workers of Polish nationality employed in Germany. The bishop's office reprints that decree by the Reich Defense Commissioner in the defense districts 7 and 13. Our area was in that district and this was published for the information of the priests. The decree deals in detail with everything that had to be done. Figure 5 is of importance. It says that the interment of Polish civilian workers, male or female, can be taken care of by German priests. Participation of the German population has to be reduced to the absolutely

necessary minimum. No sermon may be held. That decree contains eight sections. I do not know if the remainder is interesting to the Tribunal. I could just refer to them if it is desired.

Q. If the Court is interested, will you please refer to them.

PRESIDING JUDGE BRAND: You may.

DEFENDANT ROTHAUG: First, on figure 1, it is stated that participation of civilian workers of Polish nationality in the church services of the German population is prohibited. Then it is stipulated that church services for Polish workers, male or female, have to be conducted separately. Where there aren't enough Poles living, individual spiritual care is permitted, but under all circumstances it should be avoided that Poles and Germans should be together in the same room for that purpose. Services should only be conducted in the German or the Latin language. Publication of newspapers, periodicals, or Sunday magazines in the Polish language is prohibited. The priests had to restrict themselves just to the spiritual care of the Polish people. It ends with the words as follows: It is expected that the German priests should always be conscious of being Germans and of the duties arising from that fact and that offenses will be punishable.

DR. KOESSL: Was it made clear whether Schosser knew anything about that regulation?

DEFENDANT ROTHAUG: That, at first, could not be seen from the report received, but after he was interrogated, he referred to the fact that he had not known anything about all these circumstances and that that was what had got him into this trouble.

Q. Now, we want to find out what happened after that report was made.

A. It is first asserted here that I had commissioned Ferber, or that I had told Ferber that he should issue an arrest warrant, but Ferber had told me that he did not know what reasons to give for it and that subsequently I had handled the matter myself with a vicious remark and had issued the arrest warrant. The background history of that arrest warrant seems very dubious, but I don't think it necessary to enter into that. On 15 June 1942 I issued the arrest warrant and that arrest warrant was based upon article 2, paragraph 1 of the insidious acts law, and article 130a of the Penal Code. In the case of this article 130a of the Penal Code, we were concerned with the so-called Pulpit Article, the offense of abusing the pulpit. It is of importance that that article alone which would have supported the proceedings, is a regulation which has nothing to do with national socialism, but is an article which emanates from Bismarck's time, the time of the

"Kulturkampf" [cultural struggle] in Germany, and the then liberal democracy factions in Germany brought it about against clericalism. This concept is found in article 130a. The arrest as far as facts were concerned was not based upon the circumstances that Schosser conducted that funeral for the Pole, but because as one could assume, and certainly can assume today, but on his knowledge of the German regulations and provisions and on announcing the intended funeral, and the transfer of the body from the morgue to the cemetery in order to persuade the German population to a far-reaching extent to participate, and therefore, to indirectly demonstrate its opposition against the regulations of the State. The funeral itself is not a matter for the church, but a matter for the State for the government of Germany, and the clergymen are only permitted to participate in the funeral, and to perform the duties commensurate with religious custom, to say the prayers, and everything that belongs with it. But the funeral was actually carried out by the municipal office. The discussion of such a matter and the announcement, conscious of the fact that it would cause a disturbance among the population, that was against the provisions of article 130a; and if this is connected with the intention to demonstrate opposition against measures of the State, which was certainly the case here, then the prerequisites required by law are complied with, and I do not know of anything further to investigate; but if all these elements are there, I have the obligation to issue the arrest warrant, and on that basis I did.

Q. Now, the witness Schosser has pointed out that he had already been arrested by the Gestapo, and that at that time he had been punished; he had been sentenced to 14 days. Can you determine from the files whether you issued the warrant of arrest before you knew of the police measures against Schosser?

A. From the files it can be seen without doubt that when I issued the warrant of arrest, I did not know anything about the occurrences at the Gestapo office of Regensburg which found its climax in the protective custody imposed upon Schosser for 14 days. That can be seen from the following.

Q. When did you receive information about that from the Gestapo?

A. I was just going to say that because you have already asked me. On 15 June 1942 the prosecution sent the arrest warrant to the Secret State Police at Regensburg. Subsequently, on 18 June 1942 the Secret State Police Regensburg replied with the information that it did not want to carry out the arrest at that time because a police measure was imposed, that is to say, the protective custody for 14 days on Schosser and returned the files together

with the arrest warrant to the senior public prosecutor and that is the way he was informed in connection with that funeral. The Secret State Police already had taken measures. I was not informed about these facts, as can be seen from the file. Just the same, that arrest warrant was carried out, and that was justified.

PRESIDING JUDGE BRAND: May I ask you a question. Would you tell us in a few words the specific provision of the insidious acts law which was violated in this case? I don't understand that.

DEFENDANT ROTHAUG: That was article 2, section 1. I can read it if you think it is desirable; I can quote it if you think it is desirable.

PRESIDING JUDGE BRAND: I would like to hear that if it is brief; I haven't it before me.

DEFENDANT ROTHAUG: This is the provision. Schosser—

DR. KOESSL: Give the legal provisions, Witness.

DEFENDANT ROTHAUG: Yes, that is what it is. It is suspected that Schosser made vicious remarks in public, derogatory remarks about the leadership of the State, the NSDAP, its provisions and institutions—

Q. Witness, will you please read the insidious acts law itself—rather than—

A. —which are designed to undermine the confidence of the people in the leadership. In connection with that I want to mention that we always include the actual text of the law in the arrest warrant.

PRESIDING JUDGE BRAND: Give me the date of that law, please?

DR. KOESSL: The insidious acts law.

DEFENDANT ROTHAUG: The insidious acts law is of 20 December 1934; 20 December 1934.*

PRESIDING JUDGE BRAND: That is all.

DR. KOESSL: And now will you please tell us—

DEFENDANT ROTHAUG: The law speaks of statements, but the same applies to behavior which permitted a conclusion, that is to say an act which looked at on its own merits may be correct, but by the evaluation which it is given by others, may have the character of a malicious act. I have also explained that we were not informed about these matters. The defendant was arrested and was questioned before the local court in Weiden.

Q. Did he do anything about his arrest?

* The text of this law, Document 1393–PS, Prosecution Exhibit 508, is reproduced above in section IV B.

A. He filed a complaint against the arrest, he filed a complaint against the arrest warrant; a decision was made.

Q. About that appeal, did you have anything to do with that decision?

A. That decision was formally not correct, but substantially it is very interesting because by that decision the complaint against my arrest warrant was rejected; and rejected by the one person who now charges me with having issued that arrest warrant. That was signed—it happens to be signed by Mr. Ferber, who asserts that I had pulled a dirty deal with my arrest warrant.

Q. You yourself had nothing to do with that decision?

A. I had nothing to do with that decision; the case went on and was soon suspended after the defendant had been interrogated, and that was one thing we didn't know when we issued the arrest warrant, he explained that for quite some time he was in the army, and it was granted him that he might not have been as well informed about the entire atmosphere around the question of Poles in Germany as one would have expected otherwise. The case was suspended on 27 August 1942, with the reason that it could not be proved that the defendant intended to demonstrate his opposition against the measures of the State concerning Poles.

Q. You have been charged that because that case was not successful, you had initiated a second proceeding, the one concerning the sermon. Will you please, first state what the prosecution had decided already on 9 July 1942, that is to say, before the end of the first proceeding. You find it on page 12 of the files, a disposition made by the prosecution on 9 July.

A. That is the worst part of the charges which are raised against me in this connection. As I have said, I can refute it by documents, by just mentioning several documents in chronological order which will clarify the connections. In the file concerned with the funeral of the Pole, on page 12, 9 July 1942, there is a short disposition on the part of the prosecutor where he requests a list of previous connections and political record. Therefore, for that funeral case, one wanted to have the political record of Schosser from the Party. The prosecutor shouldn't have done that really, but he was new there, and he committed that blunder, and that was how the whole thing started. It was prohibited to request any political record of a clergyman because one considered—one knew generally that the clergy was against national socialism; that was no secret; but now in spite of that, the Party reacted upon that request and sent a certificate of that kind, not to me, but to the prosecutor who requested it.

* * * * * * *

Q. What was the course of the second case, the case of the sermon? In that case, serious charges were also made against you concerning the treatment of the clergyman Schosser. Will you briefly describe the course of those proceedings, and will you please state whether the part you took in that case justifies the charge of being the main instigator leveled against you?

A. In the further course of the proceedings that charge cannot be considered since the proceedings were already started when the case came before me. On 25 August 1942, I issued the arrest warrant. We did not go as far at that time as the confession or the statements made by Schosser in the trial would have permitted us to go. If we had assumed that his entire sermon from beginning to end was directed against the wolves in sheep's clothing, we could have characterized the case as one of high treason, and we would have had to pass it on for that reason to the competent authority. We only assumed that in the course of the sermon various doubtful statements had been made which had nothing to do with God the Father, and that was how it came to trial.

Nothing further happened. Investigations were carried out such as in every other case, and there was a defense counsel.

* * * * * * *

Q. Now we want to continue; where did the session take place in the second case?

A. In the town hall court at Amberg.

Q. What parts of the population attended that session?

A. All categories of people. The court room was right in the center of the town and when people had found out that there was something going on, they just came.

Q. What was the composition of these people, according to their denominations?

A. The great majority of the population was Catholic.

Q. Did you have to take certain considerations on account of that?

A. Of course. One had to avoid anything which could hurt the religious feelings of these people. Cases against clergymen required a great deal of caution and a great deal of tact so that no wrong impressions were made, because it was generally considered undesirable to make the impression, in any way, that it was intended to injure the religious feelings of these people.

Q. What, in brief, were the charges against Schosser and how did he defend himself against them?

A. The charges did not refer to the entire sermon, the subject of which was false prophets, but two basic thoughts were mentioned. For one, the thought that the leading individuals—meaning in the State—intended to take the Catholic faith from the people. In addition to that, the defendant also was charged with having attacked the principle prevailing in Germany of religious freedom. That was the charge.

Q. Schosser asserts that his sermon itself was really not the focus of interest; but that you had dealt emphatically with the matter of a funeral, and you had included that in the case. Is that correct?

A. The matter of the funeral was not the subject of the indictment so far as it was not considered a basis for any legal facts in connection with it, but it was merely mentioned in the course of the trial. It is correct that this matter was discussed in connection with the matters contained in the indictment, but not in the manner that it was the most important part of the trial. It was quite legally admissible to mention it, as I have mentioned.

Q. Can you prove, from the files, that the prosecution submitted the files concerning the sermon question to the court?

A. That can be seen from the file.

PRESIDING JUDGE BRAND: Is that file in evidence?

MR. WOOLEYHAN: No, Your Honor, it is not.

DR. KOESSL: The case was only discussed by the witness Schosser.

DEFENDANT ROTHAUG: By an order in the file SG 948 from the year 1942 (matter of the funeral), the prosecutor decided on 27 August 1942, under III, "Filed without subsidiary file", that the matter SD 1312 of 1942—that is the sermon matter—after that file had been returned, was to be attached. By way of that disposition, these files concerning the funeral were submitted by the prosecution as material evidence, together with the sermon file, with the consequence that I received that material and had to discuss it with the prosecution witness at the main trial. That was legally permitted at all times. The judge was authorized to touch upon matters which had become either the subject of amnesty, or where an acquittal had occurred, or on matters referring to cases that had been suspended, or where a sentence had been passed. He could touch upon all these matters in a different case and discuss them for the purposes of the case at hand. Whether that became the basis for an evaluation for that new trial—that, of course, could only evolve from that main trial and the discussions therein.

Q. What was the basic purpose of discussing that question on your part?

A. The fundamental purpose of discussing these matters was to specify the obligation that all individuals and all offices had to heed the measures and regulations issued by the State, and the final purpose was to establish what basic attitude the defendant himself had with regard to that problem.

* * * * * * *

Q. Schosser says you had attacked him on account of his profession, and you had attacked, in fact, the entire clerical profession. What was it about these alleged attacks?

A. That just isn't so. As was required for every case, the interrogation was a conversation between myself and the defendant and, in the course of that conversation, I went into the question that people, if they wanted to go to church, wanted to hear about heavenly matters and didn't want to hear anything about politics. If he wanted to deal with questions of that kind, he shouldn't have become a clergyman but a politician.

Q. In connection with the education of youth, you are supposed to have reproached him that in the house of his parents, he hadn't been educated in the National Socialistic sense.

A. That kind of a conversation would have been straight nonsense because Schosser was born in 1909 and, at that time, there was no such thing as national socialism. Consequently, I could not blame him.* * *.

PRESIDING JUDGE BRAND: We understand your answer.

DR. KOESSL: It is also asserted that you reproached him that the Catholics were saying that Protestants were going right to hell. Quite briefly, please.

DEFENDANT ROTHAUG: That again was an entirely different thought. I set forth that the German State has two great denominations and many others and can, therefore, be neither Catholic or Protestant but only absolutely neutral. It was, of course, up to him personally in his clerical field to speak for the accuracy of his opinion and his faith. If you are of the opinion that all those who are of a different denomination will go to hell, it is impossible for the State to share that opinion. As far as we are concerned, everybody will go right to heaven.

Q. Another question, quite briefly. Will you tell us what was said about Rosenberg?*

* Reference is made to Alfred Rosenberg who was tried and sentenced to death by the International Military Tribunal. See Trial of the Major War Criminals, *op. cit.*, Volumes I–XLII.

A. The name Rosenberg was brought in in the following manner. Schosser himself referred to it because his line of defense was that he had not intended to attack the Party by his statements but new [religious] ideas [neopaganism] and that he particularly intended to turn against Rosenberg with his statements. Thereupon, I told him that at any time it was his right to refute the thoughts which Rosenberg developed in his book, "Myths of the 20th Century," in his sermons and to prove that they were wrong, only he had to specify what he intended to refute and whom he intended to refute because that, of course, was the most important thing of the trial. He had to exclude any possibility that these things might be carried into the general political field. That was the basis for my thoughts.

Q. Under what provisions was Schosser sentenced?

A. On the basis of article 130a of the Criminal (Penal) Code and article 2 of the Insidious Acts Law,[1] that is to say, according to German law both provisions became applicable; as we would have said technically, there was a sort of a legal connection between the two laws.

Q. Would Schosser have been punishable if there hadn't been an Insidious Act Law?

A. Of course, on the basis of article 130a.

Q. As far as the facts are concerned, had the case Schosser been dealt with leniently or severely?

A. As far as the facts were concerned, it had been dealt with most leniently because the basis of suspicion was that the entire sermon of the false prophets and the roving wolves in all its structure and tendency was a political attack against the government. Schosser, when he was heard here as a witness, more or less admitted that. In our evaluation, however, we did not go that far, but we only referred to these two basic attacks.

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EXTRACT FROM THE TESTIMONY OF DEFENDANT KLEMM CONCERNING PROSECUTION EXHIBIT 291 AND LIMITATIONS ON DIVINE SERVICES[2]

DIRECT EXAMINATION

DR. SCHILF (counsel for defendant Klemm): The prosecution in this connection submitted another document, Prosecution Ex-

[1] The text of article 130a of the Reich Penal Code is reproduced in a footnote earlier in this section. The Insidious Acts Law of 20 December 1934, Document 1393–PS, Prosecution Exhibit 508, is reproduced in section IV B.

[2] Further extracts from the testimony of the defendant Klemm appear in sections V C 1 A, V C 3 B, V C 3 D, and V D 2.

hibit 291, that is Document NG–770.[1] It deals with the problem whether church services could be held in penal institutions. I ask you whether you had anything to do with that matter?

DEFENDANT KLEMM: Yes, and I remember it quite well because I had a rather hot argument with Thierack about that matter.[2] Thierack, without informing me, prohibited that any church services could be held in penal institutions. I found out about that directive through the *Deutsche Justiz*—the periodical for German Justice—of 1944, on page 270. I immediately went to Thierack and referred to ethical reasons, but he did not abstain from his intentions. Then I used stronger arguments. I told him that I knew from the period of my work in the Party Chancellery that Hitler himself had issued a strict order that during the war all measures which might cause struggles with the church should be abstained from. Thierack doubted that. I offered that I would get a written confirmation from the Party Chancellery about that. He forbade that I write to the Party Chancellery. I told him in the course of the conversation that I was quite sure what the outcome of that matter would be. The moment one bishop would turn to Hitler, Hitler on account of his basic attitude would disavow Thierack.

A short time later when letters were received from German bishops, from the Protestant side as well as from the Catholic side, I went to Thierack and he became rather thoughtful and agreed to rescind the former order. That happened in a very carefully stated form, but it actually occurred. Especially for that matter, I claim a certain amount of credit.

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[1] Reproduced above in this section.

[2] At this time the defendant Klemm was Under Secretary in the Reich Ministry of Justice.

VI. FINAL STATEMENTS OF THE DEFENDANTS*

PRESIDING JUDGE BRAND: The record will show that the defendants have already had the opportunity to testify at length under oath, and they are now accorded the privilege, in each instance, of making an unsworn statement for the benefit of the Tribunal.

We will hear the first defendant, Dr. Schlegelberger.

DEFENDANT SCHLEGELBERGER: These words of Pope Gregor VII are world-famous: "I loved justice and hated arbitrariness; therefore, I die in exile."

I feel confident that your judgment will save me from that fate. But I, too, in imprisonment, could not overcome the bitterness of being rewarded for my hard struggle for justice by this period of shame and misery. The charges and insults of the prosecutor do not apply to me. My life is not compatible with the intention of crime. The attempt to destroy the alleged myth around my person by showering abuse at a man who has aged honorably was bound to fail. The Goering affair has been cleared up as completely unexceptionable. The connection between it, my draft of a law, and my resignation is based on a freely invented malicious construction which lacks all foundation. In spite of my advanced age my defense was easy for me. All I had to do was to tell the Tribunal the truth. I have done so in the firm conviction that truth will be victorious and with the undaunted pride of a clear conscience.

PRESIDING JUDGE BRAND: The defendant Klemm may address the Court.

DEFENDANT KLEMM: The prosecution has endeavored to show that I am not worthy of credibility. In long winded arguments it endeavors to connect a very few apparently positive points by combinations which lack all foundation, both in factual and political respect. Distortions and arbitrary additions have to serve this purpose. In the case of Sonnenburg it is said that Hecker had stated that Hansen had said that Klemm did not feel comfortable in connection with this matter. Not a word to this effect is to be found in the transcript of Hecker's testimony. Although, in cross-examination, Hecker clearly could not maintain the agreement as he described it in his affidavit, the prosecution maintains the agreement, although its own witness, Eggensperger, denied it as well. And now another final example. Heydrich's directives to

* Tr. pp. 10587–10604, 18 October 1947.

his police agencies to take Jewish women into protective custody is presented by the prosecution as being an agreement with the judicial administration. There are many more examples. But please let me say only the following with regard to what the prosecution stated this morning. Due to the propaganda of the State, we were convinced at the outbreak of the war that justice was on our side. A dictatorship could not and does not permit its cards to be shown. And, finally, we are not here charged with crimes against peace. To what Mr. King said regarding Prosecution Exhibit 252,* let me state the following: The list of 17 January 1945, containing reports on death sentences, deals with a list of the Minister, for it contains doubtful cases, and from that I gathered that it could not be my list after I had also seen from the photostat that there were several dates on the top of the list. Even if both lists should be from 1945, the same applies as with regard to the lists on pages 154 through 157 in document book

* Document NG–414, Prosecution Exhibit 252, has not been reproduced in this volume because of its great length and because it has been impossible, in view of space limitations, to include any considerable amount of evidence concerning clemency matters—a topic frequently in issue in the Justice Case. The document in question is 142 pages in the original German and 162 pages in the English translation. It consists of file notes of the Reich Ministry of Justice concerning "Reports to the Minister of Justice," "Reports to the Under Secretary" (Staatssekretaer), and "Death Sentence Reports" for the following dates: 24 and 27 January 1944; 10, 22, and 29 February 1944; 8, 17, and 29 March 1944; 5, 18, and 26 April 1944; 3, 12, and 31 May 1944; 2, 8, 16, 21, and 30 June 1944; 2 and 17 August 1944; 22 and 29 September 1944; 5, 12, 19, and 27 October 1944; 10, 16, and 29 November 1944; 7, 15, and 21 December 1944; and 4, 10, 17, and 24 January 1945. The "Death Sentence Reports" list the names (usually only the family name) of persons sentenced to death, dividing the death sentences into "doubtful" and "clear cut" cases, and grouping the sentences mainly under the following categories: "high treason cases," "treason cases," and cases involving "undermining the military efficiency." On the reports a diagonal line was drawn indicating that the death sentence was confirmed. For example, the list of 17 January 1945, mentioned specifically by the defendant Klemm in his final statement, shows the following diagonal lines in the category "high treason cases." (For typographical reasons, the diagonal lines have here been indicated before the respective letter or figure, whereas on the original document, the diagonal lines were drawn through them.)

/a.	*doubtful*	
	Hauke	Death
	Ritter	Death
	Schellenberger	Death
	Giezelt	Death
/b.	*clear cut*	
	/1. Hoehn	Death
	Schultz	Death
	Seiffert	Death
	/2. Kroeger	Death
	Splenemann	Death
	Fuebinger	Death
	/3. Boecker	Death
	Kaess	Death
	/4. Luedtke	Death
	/5. Haitzmann	Death
	Bueschinger	Death
	Hauberger	Death

The document shows that between 24 January 1944 and 24 January 1945, death sentences of more than 2,500 persons were confirmed. The largest number confirmed appears on the report of 22 September 1944, 128 cases; and the smallest number appears on the report of 4 January 1945, 25 cases. The report for 17 January 1945, mentioned specifically by the defendant Klemm, shows that 49 death sentences were confirmed.

3–L, according to which separate reports were made to me on individual cases and to the Minister on death sentences. If the prosecution bases its case on the testimony of the witness Altmeyer, this testimony has been refuted with overwhelming clarity by the testimony of Hartmann, Franke, and Ehrhard, and the prosecution overlooks that, in his cross-examination, the witness Altmeyer, in particular had to deviate from his affidavit. The prosecution mentioned furthermore a case of theft from airmen where proceedings were quashed. I remember the case distinctly. An airplane had been destroyed, and from the wreck objects had been stolen which had already been partly destroyed by rain and fire. The proceedings were stopped because the subjective prerequisites of theft could not be proved. The prosecution has failed to show what this theft from a wrecked airplane had to do with lynching of aviators. All in all, the result of the statements of the prosecution is as follows: In this trial it was not only German justice of the past years that was indicted, but the continental legal system, a system in which for many decades the obedience to the law and the norm created by the State has been the only task of the jurist. Before 1933 I had been educated and trained in this school of thought. What legal and factual opportunities were open to me I used in favor of justice wherever I could do so. To revoke laws and norms which had existed for years was not in my competency.

PRESIDING JUDGE BRAND: The defendant Rothenberger may address the Tribunal.

DEFENDANT ROTHENBERGER: I was a National Socialist, and in that respect I distinguish myself from those who for 10 years and more were placed in leading positions in the Third Reich and today say that they were not National Socialists. When I realized that national socialism was destroying the very values for which I had lived and for which it had promised to work, I decided with all my energy to influence the development of national socialism in the sphere of justice. I did not want to be a hanger-on. It was not my way to content myself with tactical maneuvers or withdrawals, which gradually brought about an undermining of the administration of German justice. The struggle for the idea of the judiciary within the framework of a totalitarian state I made the focal point of my life. And, therefore, I consider myself to be under an obligation to declare today that the German judge and his judgment, since 1933, were subjected to excessive attacks from the Party and from the SS without being given any backing from the leadership of the Ministry. Here lie the causes for my actions. At the beginning, I believed that in a totalitarian state there could exist a free judiciary. In the course of time I realized that most

of the Party leaders, and in particular the SS leaders, found the very essence of the judiciary an obstacle in their way. I did not wish it to be true that there should be no way to save my Fatherland from such a dangerous development and therefore I clung to Hitler. In so doing I found myself in the company of many clever people in all spheres of human activity in Germany and abroad. As to whether my reform of the administration of justice has been rightly called by the prosecution a Nazi reform which—it is true—called itself National Socialist, but which aimed at excluding the influence of the SS and the Party from the administration of justice, and which contains not one word against Jews or foreigners, but on the contrary claimed the entire administration of penal justice, including that for foreigners and Jews, for the judiciary—with confidence I leave it to the Tribunal to decide that question.

I do not ignore today that my life work which has eaten up my nervous strength was bound to fail; nor do I ignore that my aims were, at times, in contradiction to the practice of life and also my own attitude, but is it not always like that in the life of human beings that just because there are such abuses and just because at times one's self is weak, one takes that very circumstance for a cause to set up postulates which serve as aim and direction, but which we cannot immediately, particularly in wartime, put into effect, since the power of conditions is stronger than ourselves. And how far the power of the SS and the Party had extended I realized as late as 1942 when I came to Berlin and got an insight into conditions in the Reich. That Hitler himself was a despot and that he coupled me together with a man who showed himself to be a tool, without any will of his own, of Himmler and Bormann, that was my tragic misfortune.

I had to experience one set-back after the other. At the very beginning of my work I was compromised in the whole of the Reich by the well known SD report of Himmler's in October 1942, which prophesied that I would soon resign, and the only positive point which kept me was the hope and the confidence of the German judges.

There are only two charges of the prosecution which they made in their final plea that I want to answer now. How can the prosecution from my speeches in Hamm and Lueneburg, of the latter of which the text does not even exist, conclude that I was in favor of exterminating the Jews? Both speeches exclusively relate to degenerate and incorrigible criminals. In the usage of the German language, they are antisocial elements and for those elements I demanded, according to another prosecution document, a judicial authority. And the second charge is that I am a liar. The Jewish

pogrom in 1938, they say, had been on quite a different scale in Hamburg from the way I had described it. As to how the Jewish question was handled in Hamburg you can see clearly not only from a prosecution document but also from the affidavit by the man whom the British, after the surrender, appointed Lord Mayor of Hamburg. I am speaking of Mayor Petersen who is half-Jewish himself.

That in my struggle I was placed in outward contact with wrong, that lay in the very nature of things. I assume responsibility for every action of my own. The consequences which are now borne by the whole German people justify the fact that former leading personalities also bear the consequences. But I am of the opinion that crimes which were committed by my greatest enemies behind my back cannot be held against me. As soon as I heard of them I drew the consequences.

After 16 months, in 1943, Himmler, Thierack, and Bormann finally made me unemployed. I was 47 years old at the time. Without overestimating the power of my personality, the road for the wishes of those men, concerning the administration of German justice, now lay open.

PRESIDING JUDGE BRAND: Defendant Lautz may now address the court.

DEFENDANT LAUTZ: At the beginning of the prosecution's oral presentation, the chief prosecutor emphasized that the roles which the defendants are assigned in these proceedings are new for them. That is true, as far as this refers to the position which we now have to hold before this Tribunal. Apart from that, we public prosecutors are quite familiar with the role of defendants in criminal proceedings. A man like myself who, in 25 long years, became acquainted with the fate of men in prisons, in courtrooms, in penal institutions, and on the way to the place of execution, knows very well the tragedy of this role and one who, under the official robe, has preserved a human heart, will the better recognize that not blind zeal for prosecution, but much rather wisdom coupled with human understanding are best designed to serve the aim of true judicial administration.

The German public prosecutors in their overwhelming majority recognized this also in the Third Reich. Therefore, none of the charges made against me here I feel to be more unjust than that, by filing malicious indictments, I had done injustice for the sake of injustice. I trust, however, that these proceedings have shown how unjust this charge is. The office of a public prosecutor is a very hard one. It is easier in peace than in wartime, but it became incredibly difficult during a war which is without example in

history and which has left our Fatherland—which also meant everything to us public prosecutors—in ruins.

PRESIDING JUDGE BRAND: Defendant Mettgenberg may address the Tribunal.

DEFENDANT METTGENBERG: Your Honors. Novel, alien, and unaccustomed as it was to the previous speaker, so it is to me the situation in which I have found myself for months as a prisoner in the dock; and that is what the prosecution said when this trial opened, novel, alien, and unaccustomed were to me many things in this trial which concludes today.

All the same I, for my part, have tried to make my contribution to the correct carrying out of these proceedings; with complete frankness I have described my past career, and I have given you my views concerning the points with which the prosecution has charged me. There is nothing I have to hide.

Now at the end of this trial the prosecution deemed it necessary, I believe without regard to the evidence, to ask of you that you should convict me for having committed war crimes. It may be that you will convict me for having committed war crimes. It may be that that is the duty of the prosecution. It is not for me to arrive at a judgment about that. The prosecution must take the responsibility for their motion.

My defense counsel has asked you to acquit me. I too ask you to acquit me, but Your Honors, I ask you for more than that. As far as I am informed, it is in accordance with your legal views to acquit a defendant if there is a reasonable doubt about his guilt. I am of the opinion, and please do not think me arrogant, that I may expect you to find that there is no reasonable doubt as to my innocence. Even after careful and conscientious examination, such as I have given to my own past, I believe I am justified in making this request.

PRESIDING JUDGE BRAND: The defendant von Ammon may address the Tribunal.

DEFENDANT VON AMMON: I have nothing to add to the statements made by me on 1 and 4 August under oath in the witness box.

PRESIDING JUDGE BRAND: Defendant Joel may address the Tribunal.

DEFENDANT JOEL: I wish to remain silent.

PRESIDING JUDGE BRAND: Defendant Rothaug may address the Tribunal.

DEFENDANT ROTHAUG: Prosecutor King in his final plea mentioned a death sentence passed by a French court against a presi-

dent of a court in Strasbourg. May I refer to the fact that this involves a so-called *in absentia* sentence in which the defendant had no opportunity for his own defense whatsoever, because at that time he was in a German internment camp and by sheer accident happened to read of it in a newspaper.

I served my country throughout my life and in whatever position I was assigned to, in faithfulness, with a pure heart, and without malice. Seen from my present position you might consider this wrong, and you could say I and all those who surrounded me should have been more suspicious of developments as they took place. This prognosis in retrospect is just as convincing as it is cheap. Nobody in our position at that time could be of the opinion that the State which we served could be accused of being altogether illegal and that the war that it waged was a war of aggression, as is demonstrated today to all the world. Therefore, it is no accident and no excuse that, apart from defending myself against the flood of personal defamations which I received from the circle of my previous friends and assistants, I am now anxious to prove to you that both in the service as a judge and prosecutor, I applied the laws of my country in the manner in which they were intended, to the best of my conscience and belief. We were guided by the practice of the Reich Supreme Court and went the same way which was taken by the remaining 60 to 80 Special Courts in the Reich. We were no specialists in crimes against humanity, and no proof has been furnished in any single case that, in any connection, we had applied an illegal method.

Thoughts of extermination were not represented in my sphere of work, nor did we ever hear anything to the effect that in the field of justice they played any part at all. We knew of shootings of people who had been sentenced only to prison terms. That was openly reported in the newspapers. Apart from that, these proceedings applied to four people who, under my presidency, had been sentenced to imprisonment—among them, the Eisenberger case mentioned here. But I myself only heard of the inner connections of these events when internal official files of the public prosecution became accessible to me here. We saw and judged the facts in a different light. The country was an area of warfare. I have experienced the terrors of Verdun. As far as misery is concerned, it cannot be compared with the effects of one single air raid, lasting 45 minutes, on the civilian life of this city. The principle of war which threatens life itself had been made the principle of life. We therefore understood, guided by this point of view, that the laws required harsh proceedings in the case of crimes which exploited conditions of war, and that habitual criminals, violent criminals, and saboteurs of all kinds, in view of the de-

creased security of the conditions as they existed in the country, had to be held down. If, on the other hand, we are told that thereby we had supported a war of aggression carried on by our government, then we can only say "we did not know that." Once war had come, the life and existence of millions of peoples was involved, and we derived therefrom the ethical justification for severity against individuals, which stood in no proportion to what was at stake. The logical calculation of war in regard to life is that hundreds of thousands of people are sacrificed to save the lives of millions, and this principle was transferred to the entire public life and in the field of criminal law, this was tied to the concept of guilt. And that was how our work, our activity, was understood. If today we are no longer understood, and if attempts are made today to judge our actions as criminal, this is not very surprising in view of a world which does not look too far below the surface of things. For the catastrophe has made all our actions appear in the destructive light of "in vain." This qualification which also has a demoralizing effect, disguises all connections which might speak in our favor in the question of humanity. This is the tragedy of our case, and we are convinced that Your Honors will not fail to see it.

PRESIDING JUDGE BRAND: Defendant Barnickel may address the Tribunal.

DEFENDANT BARNICKEL: May it please the Court. The great Frenchman Honoré de Balzac, for whom I have had a great respect since the days of my youth, puts into the mouth of one of his characters these words, "I believe justice to be a development of a divine idea which is suspended above the world." That idea, whether one shares it or not, is certainly very beautiful. It remains beautiful even if justice does not always reflect its divine origin. We jurists whom fate had condemned to work in the Third Reich—and I am by no means referring only to us who are here, I am referring to all of them—we know what was the matter with the administration of justice in the Third Reich. But in whatever way this administration of justice may have worked, I believe one must view it in connection with the fate of the German people. Professor Jahrreiss, to whom all of us in this trial listened with interest, once coined the phrase that for decades the German people had no longer known normal life. Every single one of us actually experienced that himself. If I may make it more clear from the example of my own life, I want to read a few sentences from my diary for the last time. This is an entry which I made on 9 June 1942, and I wrote it under the influence of a Swiss novel, the title of which is "Amadeus", and I quote:

"When I thought about it for longer as to what I liked so much about 'Amadeus', this occurred to me, it is peace, the peace in which these people live, and in which they can develop. Peace which, to us Germans, has become something quite strange because since 1914 we have not had it any more. Before that time we, too, lived in such an atmosphere, but since then we have always had war, or at least a pressure which was like war. From 1914 to 1918 there was a war on. In 1919 an intermediate phase set in. From 1920 to 1923 there was the inflation. From 1924 to 1927 there was the deflation. From 1928 to 1929 there was a brief recovery. From 1930 to 1932 there was a financial crisis and a continuous political crisis. From 1933 to 1939 the German people were molded into a new cast by force. From 1939 to 1942 there was war. From 1942? Still war!

"I am 57 years of age today—at that time—18 years of that were the years of my youth; 28 years were war years. For 11 years there was a real life. And these were the years of development—of immaturity—years of struggle, years of suffering and poverty. But in between there were also many happy hours."

That is how I looked at my life at the time. And it was similar for every average German citizen. Every normal German longed for peace, for peace which had become something quite strange to us, and every German has that longing deep in him, just as I myself—but it was not within his power to achieve that peace. We saw it merely like a ghost. But the same fate which individuals have, is the fate of the spiritual institutions of their nation. And the administration of justice, too, shared our fate; it, too, was hemmed in in war and political violence, which were foreign to its nature. No wonder that, at the end of that last period of 30 years, justice, too, had been wrecked, just as millions of people and their lives had been wrecked! Let us hope that from that destruction, new life and new culture will develop. For, after all, so far every generation has lived on the ruins which were left by its predecessors, and built its houses from those ruins. Let us hope that what we see in Germany at this moment is already part of reconstruction and no longer of destruction, and also, I hope, that we—as Balzac put it—one day again shall be able to believe that justice is the development of a divine thought which is suspended above the world!

PRESIDING JUDGE BRAND: Defendant Petersen may address the Tribunal.

DEFENDANT PETERSEN: Your Honors, World War I signified a deep cut in the history of the German people. There existed the great danger for Germany of being swamped from the East. It

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was in the hope to prevent this that I joined the NSDAP. Germany was to remain one bulwark against bolshevism, a pillar of Western culture. I once entertained the great hope that national socialism would contribute its part toward this end. I do not want to describe my disappointment; the way led past stations of terror. In all my actions I was guided by the ideal of fulfilling my duty and of serving my country. It was solely my conscience that formed the basis for my actions, irrespective of whether I was an officer, SA leader, State counsellor, or only an honorary associate judge of the People's Court. I have nothing further to add to this. My conscience is clear. Therefore, I am calmly expecting your verdict.

PRESIDING JUDGE BRAND: The defendant Nebelung may address the Tribunal.

DEFENDANT NEBELUNG: I was a German judge. I followed the laws of my country and my knowledge and my conscience in passing judgment. Germany has lost the war. If the law of the victors so demands of you—I do not believe it does—then you must condemn my actions. In this trial the tragedy of the office of the judge has been mentioned frequently. Is that anything special? Does not every soldier find himself in the same situation? I, too, have had that experience both as a soldier and as a judge, but not here in prison, not in the dock, but by the gun and on the bench. By that I want to say the tragedy does not lie in the consequences. I do know how to bear the consequences of a sentence, for I believe in the words of the German who was both a judge and a poet, Theodor Storm, "One man asks, 'What will happen next'? while the other merely asks, 'Is that right'? And that is how the free man is distinguished from the serf."

PRESIDING JUDGE BRAND: The defendant Cuhorst may address the Tribunal.

DEFENDANT CUHORST: Your Honors, I have to add the following brief words to the final plea of the defense counsel appointed on my behalf. Indictment and prosecution statements reveal that in these proceedings I am only *pars pro toto*. The prosecution with its evidence is unable to prove any charge which would actually apply to me. The prosecution in its final plea has failed to mention a whole series of charges in the indictment, and others for the same reason, namely, lack of evidence, it left in abeyance. In presenting its evidence the prosecution not only ignored my evidence but also its own, in part. What other reasons are there to explain that they submitted in the course of the cross-examination Document No. 983 [*NG–983, Pros. Ex. 570*], which reveals in an account of traveling expenses that on 21 March 1943 I was absent

for weeks in the East on an official journey, and at the same time had the witness Eberhard Schwarz testify with alleged full assurance that on 24 March 1943 I was in Stuttgart and presided over the case against the foreigner Englert. The prosecution has submitted the verdict in the case of Untermarchtal, but what they said in the indictment about its contents is not contained in the verdict, but just the contrary. This is the type of evidence submitted if facts are involved. Only documents, not arguments with many sources of error, can show the facts.

Justice, above all, penal justice, in Germany since 1918 was always considered an institution not in accordance with the times due to political attacks on its reputation, thus losing its reputation. In spite of early hopes, also after 1933 this development continued, and it still continues. Neither in 1937 did Guertner protect my predecessor, nor in 1944 did Thierack protect me. The many stages of this development pretended to have various good aims, but they actually had only the one effect—to destroy what we call justice. Contrary, for example, to the profession of a doctor, that of a penal judge creates only few friends. A man who is acquitted takes his acquittal for granted. The man who is sentenced, his defense counsel considers the verdict as unjust or too severe. Confusion caused in the transitional periods showed this in a particularly conspicuous form. In spite of this dangerous situation for a criminal judge now accused of being a criminal himself, no person ever convicted under my jurisdiction has testified against me. Only a judge who is a saint is free of errors. I never denied mine. The struggle for independence and against destructive influences of the time has not left me unscathed. They wanted to eliminate me from the Party and from my profession, and an unfree minister and his accomplices removed me from office. The prosecution witness against me was quite right who said: "He wanted to maintain independence and he did maintain it." Due to the collapse of my Fatherland, I am again involved in struggles. I am involved in an indictment against judges full of unexpected and excessive charges. From 1933 to 1944, one side spoke of me as if I were strange, suspiciously mild, unbearable, unsuitable for office, and detrimental to the Party and so on. Today the strong terms read as follows: Disgusting, exceptionally severe, convinced Nazi, and the like. Also in my prison cell which has been my fate for almost 1 year, though as a prisoner of war and an army officer I am subject to the Geneva Convention, I accept these reproaches quietly. I have sworn the oath to observe the law independently and to apply it irrespectively of the person involved. I have duly observed this, and let the consequences be whatever they may be. Either time will be able to bear judges who do not bend them-

selves or the time is already here which has quite different views. In handling these problems my own case is receding to the background. The decision concerning the basic questions of the entire problem of the judiciary brings the solution, also for me, of the question—Am I as a judge a criminal? Before all the world, and even where war opponents are concerned, a *judicium parium* can answer this tremendous question with one word only, namely, no.

PRESIDING JUDGE BRAND: The defendant Oeschey may address the Tribunal.

DEFENDANT OESCHEY: May it please the Court, what need be said in my case has been said by my defense counsel, and all that is left for me is to agree to his statements, to give you the assurance that I always acted in the belief and in the conviction that I was doing right, by obeying the law to which I was subjected and applying it in the manner in which my conscience told me to. And it is the truth that it was a matter of conscience for me not to misuse the law in a criminal way, but to apply it in accordance with the will of the legislator, and to grant the offender a proper trial and a just verdict. Therefore, my conscience knows that it is clear of the crimes with which I am charged.

PRESIDING JUDGE BRAND: The defendant Altstoetter may address the Tribunal.

DEFENDANT ALTSTOETTER: The charges which the prosecution has raised against me because of my alleged participation in war crimes and crimes against humanity and on account of my capacity as honorary SS leader, do not apply to me. My conscience is free of any guilt. I certainly do not propose to evade responsibility for my actions. On the contrary! These proceedings gave me the possibility to justify my actions before my people—by whom I stand even in these hard days—and before the entire world, that is, my actions during the past regime, and particularly so during the period of my activity in the Reich Ministry of Justice, and to prove that I always only served law and justice. For this reason I have done everything to give the best contribution possible in order to bring out the truth in this trial as far as I am concerned. As a witness in these proceedings I have testified to the truth to the best of my knowledge and belief.

The prosecution knows this very well from my own interrogations during preliminary proceedings and from the interrogations of many collaborators and aides who, however, were not called by the prosecution to appear as witnesses in court. The prosecution knows it also from documents which must be in its possession, but which were not submitted in evidence.

And, therefore, the fact hurts me all the more that in its final plea the prosecution designates me as not worthy of creditibility. I feel obliged toward myself and also toward my children to protest with all seriousness and with all emphasis against this charge of having lied. I do not have to fear truth. I hate nothing more than lies. I feel secure only under the protection of truth, for truth is the sister of justice. But justice on the part of the prosecution must be claimed by me even if here we are only experimental objects of international law as it is aspired to, and of an embryonic international justice.

Furthermore, I feel obliged to refer to the following, let the proceedings result as they may. There is the enormous danger that German justice was shown here in a picture which, even referring to the time between 1933 and 1945, is not identical with actual facts. I know justice in all its different phases and organizations, and I know that German administration of justice up to the very end was the best administration of the Reich, and I know above all that the German judges, even in hard times and particularly in these hardest times of all, did their duty for right and justice up to the very end. All that could be desired was that the courage which was shown among the German judiciary at those times would have been shown everywhere. Then the danger could never have arisen that here in this courtroom there might arise the danger of a false picture of the German judge.

VII. OPINION AND JUDGMENT

Military Tribunal III was established on 14 February 1947 under General Order No. 11, issued by command of the United States Military Governor for Germany. The indictment was filed with the Secretary General of Military Tribunals on 4 January 1947, and the case was assigned to Tribunal III for trial. A copy of the indictment in the German language was served upon each defendant at least 30 days before the commencement of the trial. The defendants were arraigned on 17 February 1947, each defendant entering a plea of "not guilty" to all charges preferred against him. German counsel selected by the defendants were approved by the Tribunal and have represented the respective defendants throughout the trial.

The presentation of evidence in support of the charges was commenced on 6 March 1947 and was followed by evidence for the defendants. The taking of evidence was concluded on 13 October 1947. Copies of the exhibits tendered by the prosecution were furnished in the German language to the defendants prior to the time of the reception of the exhibits in evidence. The Tribunal has heard the oral testimony of 138 witnesses. In addition it has received 641 documentary exhibits for the prosecution and 1,452 for defendants, many of them of considerable length. Some affidavits have been presented by the prosecution, but they are few in comparison with the hundreds offered by the defense.

Whenever possible, and in substantially all cases, applications of defense counsel for the production in open court of persons who had made affidavits in support of the prosecution have been granted and the affiants have appeared for cross-examination. Affiants for the defense were cross-examined orally by the prosecution in comparatively few cases.

The defendant Carl Westphal died before the commencement of the trial. On 22 August 1947, the Tribunal entered an order declaring a mistrial as to the defendant, Karl Engert, who has been able to attend court for only 2 days since 5 March 1947. The action was rendered necessary under the provisions of article IV (*d*) of Military Government Ordinance No. 7, and by reason of the serious and continuing illness of said defendant.

The trial was conducted in two languages with simultaneous translations of German into English and English into German throughout the proceedings.

Under Military Government Order of 14 February 1947, the following were designated as members of Military Tribunal III: Carrington T. Marshall, presiding judge; James T. Brand, judge; Mallory B. Blair, judge; Justin Woodward Harding, alternate judge. As thus constituted, the Tribunal entered upon trial of the case. On 21 June 1947, General Order No. 52 was issued by the Office of Military Government for Germany as follows:

"Pursuant to Military Government Ordinance No. 7

"1. Effective as of 19 June 1947, pursuant to Military Government Ordinance No. 7, 24 October 1946, entitled 'Organization and Powers of Certain Military Tribunals', JAMES T. BRAND is appointed Presiding Judge of Military Tribunal III, vice CARRINGTON T. MARSHALL, relieved because of illness.

"2. JUSTIN WOODWARD HARDING, Alternate Judge, is appointed Judge for Military Tribunal III.

"BY COMMAND OF GENERAL CLAY:

C. K. GAILEY
Brigadier General, GSC
Chief of Staff"

The trial has been continued before the Tribunal as thus reconstituted. The evidence has been submitted, final arguments of counsel have been concluded, and the Tribunal has heard a personal statement from each defendant who desired to address it.

In rendering this judgment it should be said that the case against the defendants is chiefly based upon captured German documents, the authenticity of which is unchallenged.

The indictment contains four counts, as follows:

(1) Conspiracy to commit war crimes and crimes against humanity. The charge embraces the period between January 1933 and April 1945.

(2) War crimes, to wit: violations of the laws and customs of war, alleged to have been committed between September 1939 and April 1945.

(3) Crimes against humanity as defined by Control Council Law No. 10, alleged to have been committed between September 1939 and April 1945.

(4) Membership of certain defendants in organizations which have been declared to be criminal by the judgment of the International Military Tribunal in the case against Goering, et al.

The sufficiency of count one of the indictment was challenged by the defendants upon jurisdictional grounds, and on 11 July 1947, the Tribunal made and entered the following order:

"Count one of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, willfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, article II. It is charged that the alleged crime was committed between January 1933 and April 1945.

"It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.

"Count one of the indictment, in addition to the separate charge of conspiracy, also alleged unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of count one from the indictment, but, in so far as count one charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.

"This ruling must not be construed as limiting the force or effect of article II, paragraph 2, of Control Council Law No. 10, or as denying to either prosecution or defense the right to offer in evidence any facts or circumstances occurring either before or after September 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."

THE JURISDICTIONAL ENACTMENTS

For convenient reference we have attached to this opinion copies of the London Agreement of 8 August 1945, with the Charter of the International Military Tribunal annexed thereto, Control Council Law No. 10, Military Government Ordinance No. 7, and the indictment, which are marked respectively Exhibits A, B, C, and D.*

* All the documents referred to are reproduced in the preface portion of this volume and are not reproduced as a part of this judgment. See Table of Contents.

The indictment alleges that the defendants committed crimes "as defined in Control Council Law No. 10, duly enacted by the Allied Control Council." We therefore turn to that law.

The Allied Control Council is composed of the authorized representatives of the four Powers: the United States, Great Britain, France, and the Soviet Union.

The preamble to Control Council Law No. 10 is in part as follows:

> "In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, * * * the Control Council enacts as follows:"

Article I reads in part as follows:

> "The Moscow Declaration of 30 October 1943 'Concerning Responsibility of Hitlerites for Committed Atrocities' and the London Agreement of 8 August 1945 'Concerning Prosecution and Punishment of Major War Criminals of the European Axis' are made integral parts of this Law. * * *"

The London Agreement, supra, provides that the Charter of the International Military Tribunal (hereinafter called the IMT Charter), "shall form an integral part of this agreement." (London Agreement, art. II). Thus, it appears that the indictment is drawn under and pursuant to the provisions of Control Council Law No. 10 (hereinafter called C. C. Law 10), that C. C. Law 10 expressly incorporates the London Agreement as a part thereof, and that the IMT Charter is a part of the London Agreement.

Article II of C.C. Law 10 defines acts, each of which "is recognized as a crime," namely, (*a*) crimes against peace, (*b*) war crimes, (*c*) crimes against humanity, (*d*) membership in criminal organizations. We are concerned here with categories (*b*), (*c*), and (*d*) only, each of which will receive later consideration.

The Procedural Ordinance

C. C. Law 10 provides that—

> "1. Each occupying authority, within its zone of occupation,
>
> "(*a*) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested * * *.

* * * * * * *

"(*d*) shall have the right to cause all persons so arrested and charged, * * * to be brought to trial before an appropriate tribunal. * * *

"2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. * * *"

Pursuant to the foregoing authority, Ordinance No. 7 was enacted by the Military Governor of the American Zone. It provides:

"Article I

"The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in article II of Control Council Law No. 10, including conspiracies to commit any such crimes. * * *

"Article II

"(*a*) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as 'Military Tribunals' shall be established hereunder."

The tribunals authorized by Ordinance No. 7 are dependent upon the substantive jurisdictional provisions of C. C. Law 10 and are thus based upon international authority and retain international characteristics. It is provided that the United States Military Governor may agree with other zone commanders for a joint trial. (Ordinance 7, art. II, par. (*c*).) The Chief of Counsel for War Crimes, United States, may invite others of the United Nations to participate in the prosecution. (Ordinance 7, art. III, par. (*b*).)

The Ordinance provides:

"Article X

"The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as

the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

The sentences authorized by Ordinance No. 7 are made definite only by reference to those provided for by C. C. Law 10. (Ordinance No. 7, Art. XVI).

As thus established the Tribunal is authorized and empowered to try and punish the major war criminals of the European Axis and "those German officers and men and members of the Nazi Party who have been responsible for, or have taken a consenting part in," or have aided, abetted, ordered, or have been connected with plans or enterprises involving the commission of the offenses defined in C.C. Law 10.

Source of Authority of C. C. Law 10

Having identified the instruments which purport to establish the jurisdiction of this Tribunal, we next consider the legal basis of those instruments. The unconditional surrender of Germany took place on 8 May 1945.[1] The surrender was preceded by the complete disintegration of the central government and was followed by the complete occupation of all of Germany. There were no opposing German forces in the field; the officials who during the war had exercised the powers of the Reich Government were either dead, in prison, or in hiding. On 5 June 1945 the Allied Powers announced that they "hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority," and declared that "there is no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers." The Four Powers further declared that they "will hereafter determine the boundaries of Germany or any part thereof and the status of Germany or of any area at present being a part of German territory." [2]

On 2 August 1945 at Berlin, President Truman, Generalissimo Stalin, and Prime Minister Attlee, as heads of the Allied Powers, entered into a written agreement setting forth the principles which were to govern Germany during the initial control period. Reference to that document will disclose the wide scope of author-

[1] Text is reproduced in "The Axis in Defeat," Department of State Publication No. 2423 (Government Printing Office, Washington, D. C.), pages 24 and 25.

[2] Ibid., pages 62 and 63.

ity and control which was assumed and exercised by the Allied Powers. They assumed "supreme authority" and declared that it was their purpose to accomplish complete demilitarization of Germany; to destroy the National Socialist Party, to prevent Nazi propaganda; to abolish all Nazi laws which "established discrimination on grounds of race, creed, or political opinion * * * whether legal, administrative, or otherwise"; to control education; to reorganize the judicial system in accordance with the principles of democracy and of equal rights; to accomplish the decentralization of the political structure. The agreement provided that "for the time being no central German government shall be established". In the economic field they assumed control of "German industry and all economic and financial international transactions".* Finally, the Allies reaffirmed their intention to bring the Nazi war criminals to swift and sure justice.

It is this fact of the complete disintegration of the government in Germany, followed by unconditional surrender and by occupation of the territory, which explains and justifies the assumption and exercise of supreme governmental power by the Allies. The same fact distinguishes the present occupation of Germany from the type of occupation which occurs when, in the course of actual warfare, an invading army enters and occupies the territory of another state, whose government is still in existence and is in receipt of international recognition, and whose armies, with those of its allies, are still in the field. In the latter case the occupying power is subject to the limitations imposed upon it by the Hague Convention and by the laws and customs of war. In the former case (the occupation of Germany) the Allied Powers were not subject to those limitations. By reason of the complete breakdown of government, industry, agriculture, and supply, they were under an imperative humanitarian duty of far wider scope to reorganize government and industry and to foster local democratic governmental agencies throughout the territory.

In support of the distinction made, we quote from two recent and scholarly articles in "The American Journal of International Law."

> "On the other hand, a distinction is clearly warranted between measures taken by the Allies prior to destruction of the German Government and those taken thereafter. Only the former need be tested by the Hague Regulations, which are inapplicable to the situation now prevailing in Germany. Disappearance of the German State as a belligerant entity, necessarily implied in the Declaration of Berlin of 5 June 1945, signifies

* Ibid, page 10 et seq.

that a true state of war—and hence *belligerent* occupation—no longer exists within the meaning of international law." [1]

"Through the subjugation of Germany the outcome of the war has been decided in the most definite manner possible. One of the prerogatives of the Allies resulting from the subjugation is the right to occupy German territory at their discretion. This occupation is, both legally and factually, fundamentally different from the belligerent occupation contemplated in the Hague Regulations, as can be seen from the following observations.

"The provisions of the Hague Regulations restricting the rights of an occupant refer to a belligerent who, favored by the changing fortunes of war, actually exercises military authority over enemy territory and thereby prevents the legitimate sovereign—who remains the legitimate sovereign—from exercising his full authority. The Regulations draw important legal conclusions from the fact that the legitimate sovereign may at any moment himself be favored by the changing fortunes of war, reconquer the territory, and put an end to the occupation. 'The occupation applies only to territory where such authority (i.e., the military authority of the hostile state) is established and can be exercised' (*Art. 42, 2*). In other words, the Hague Regulations think of an occupation which is a phase of an as yet undecided war. Until 7 May 1945, the Allies were belligerent occupants in the then occupied parts of Germany, and their rights and duties were circumscribed by the respective provisions of the Hague Regulations. As a result of the subjugation of Germany, the legal character of the occupation of German territory was drastically changed." [2]

The view expressed by the two authorities cited appears to have the support of the International Military Tribunal judgment in the case against Goering, et al. In that case the defendants contended that Germany was not bound by the rules of land warfare in occupied territory because Germany had completely subjugated those countries and incorporated them into the German Reich. The Tribunal refers to the "doctrine of subjugation, dependent as it is upon military conquest," and holds that it is unnecessary to decide whether the doctrine has any application where the subjugation is the result of the crime of aggressive war. The reason given is significant. The Tribunal said:

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[1] Alwyn V. Freeman, "War Crimes by Enemy Nationals Administering Justice in Occupied Territory," The American Journal of International Law, XLI, July 1947, 605.

[2] John H. E. Fried, "Transfer of Civilian Manpower from Occupied Territory," The American Journal of International Law, XL, April 1946, 326–327.

"The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after 1 September 1939."*

The clear implication from the foregoing is that the Rules of Land Warfare apply to the conduct of a belligerent in occupied territory so long as there is an army in the field attempting to restore the country to its true owner, but that those rules do not apply when belligerency is ended, there is no longer an army in the field, and, as in the case of Germany, subjugation has occurred by virtue of military conquest.

The views which we have expressed are supported by modern scholars of high standing in the field of international law. While they differ somewhat in theory as to the present legal status of Germany and concerning the situs of residual sovereignty, they appear to be in accord in recognizing that the powers and rights of the Allied Governments under existing conditions in Germany are not limited by the provisions of the Hague Regulations concerning land warfare. For reference see—

"The Legal Status of Germany According to the Declaration of Berlin," by Hans Kelsen, Professor of International Law, University of California, American Journal of International Law, 1945.

"Germany's Present Status," by F. A. Mann, Doctor of Law (Berlin) (London), paper read on 5 March 1947 before the Grotius Society in London, published in Sueddeutsche Juristen-Zeitung (Lawyers' Journal of Southern Germany), volume 2, No. 9, September 1947.

"The Influence of the Legal Position of Germany upon the War Crimes Trial," Dr. Hermann Mosler, Assistant Professor of the University of Bonn, published in Sueddeutsche Juristen-Zeitung, volume 2, No. 7, July 1947.

Article published in Neue Justiz (New Justice), by Dr. Alfons Steininger, Berlin, volume I, No. 7, July 1947, pages 146–150.

In an article by George A. Zinn, Minister of Justice of Hessen, entitled "Germany as the Problem of the Law of States," the author points out that if it be assumed that the present occupation of Germany constitutes "belligerent occupation" in the traditional sense, then all legal and constitutional changes brought about since 7 May 1945 would cease to be valid once the Allied troops were withdrawn and all Nazi laws would again and automatically become the law of Germany, a consummation devoutly to be avoided.

Both of the authorities first cited directly assert that the situation at the time of the unconditional surrender resulted in the transfer of sovereignty to the Allies. In this they are supported by the weighty opinion of Lord Wright, eminent jurist of the British

* Trial of the Major War Criminals, op. cit., judgment, volume I, page 254.

House of Lords and head of the United Nations War Crimes Commission. For our purposes, however, it is unnecessary to determine the present situs of "residual sovereignty." It is sufficient to hold that, by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty. We hold that the legal right of the four Powers to enact C. C. Law 10 is established and that the jurisdiction of this Tribunal to try persons charged as major war criminals of the European Axis must be conceded.

We have considered it proper to set forth our views concerning the nature and source of the authority of C. C. Law 10 in its aspect as substantive legislation. It would have been possible to treat that law as a binding rule regardless of the righteousness of its provisions, but its justification must ultimately depend upon accepted principles of justice and morality, and we are not content to treat the statute as a mere rule of thumb to be blindly applied. We shall shortly demonstrate that the IMT Charter and C. C. Law 10 provide for the punishment of crimes against humanity. As set forth in the indictment, the acts charged as crimes against humanity were committed before the occupation of Germany. They were described as racial persecutions by Nazi officials perpetrated upon German nationals. The crime of genocide is an illustration. We think that a tribunal charged with the duty of enforcing these rules will do well to consider, in determining the degree of punishment to be imposed, the moral principles which underlie the exercise of power. For that reason we have contrasted the situation when Germany was in belligerent occupation of portions of Poland, with the situation existing under the Four-Power occupation of Germany since the surrender. The occupation of Poland by Germany was in every sense belligerent occupation, precarious in character, while opposing armies were still in the field. The German occupation of Poland was subject to the limitations imposed by the Hague Convention and the laws and customs of land warfare. In view of these limitations we doubt if any person would contend that Germany, during that belligerent occupation, could lawfully have provided tribunals for the punishment of Polish officials who, before the occupation by Germany, had persecuted their own people, to wit: Polish nationals. Now the Four Powers are providing by C. C. Law 10 for the punishment of German officials who, before the occupation of Germany, passed and enforced laws for the persecution of German nationals upon racial grounds. It appears that it would be equally difficult to justify such action of the Four Powers if the situation here were the same as the situa-

tion which existed in Poland under German occupation and if consequently the limitations of the Hague Convention were applicable. For this reason it seems appropriate to point out the distinction between the two situations. As we have attempted to show, the moral and legal justification under principles of international law which authorizes the broader scope of authority under C. C. Law 10 is based on the fact that the Four Powers are not now in belligerent occupation or subject to the limitations set forth in the rules of land warfare. Rather, they have justly and legally assumed the broader task in Germany which they have solemnly defined and declared, to wit: the task of reorganizing the German Government and economy and of punishing persons who, prior to the occupation, were guilty of crimes against humanity committed against their own nationals. We have pointed out that this difference in the nature of the occupations is due to the unconditional surrender of Germany and the ensuing chaos which required the Four Powers to assume provisional supreme authority throughout the German Reich. We are not attempting to pass judicially upon a question which is solely within the jurisdiction of the political departments of the Four Powers. The fixing of the date of the formal end of the war and similar matters will, of course, be dependent upon the action of the political departments. We do not usurp their function. We merely inquire, in the course of litigation when the lives of men are dependent upon decisions which must be both legal and just, whether the great objectives announced by the Four Powers are themselves in harmony with the principles of international law and morality.

In declaring that the expressed determination of the victors to punish German officials who slaughtered their own nationals is in harmony with international principles of justice, we usurp no power; we only take judicial notice of the declarations already made by the chief executives of the United States and her former Allies. The fact that C. C. Law 10 on its face is limited to the punishment of German criminals does not transform this Tribunal into a German court. The fact that the four powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative, or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the Four occupying Powers.

Examination will disclose that C. C. Law 10 possesses a dual aspect. In its first aspect and on its face it purports to be a statute defining crimes and providing for the punishment of persons who violate its provisions. It is the legislative product of the only body

in existence having and exercising general lawmaking power throughout the Reich. The first International Military Tribunal in the case against Goering, et al., recognized similar provisions of the IMT Charter as binding legislative enactments. We quote:

> "The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."[1]
>
> "These provisions are binding upon the Tribunal *as the law to be applied to the case.*"[2] [Emphasis added.]

Since the IMT Charter and C. C. Law 10 are the products of legislative action by an international authority, it follows of necessity that there is no national constitution of any one state which could be invoked to invalidate the substantive provisions of such international legislation. It can scarcely be argued that a court which owes its existence and jurisdiction solely to the provisions of a given statute could assume to exercise that jurisdiction and then, in the exercise thereof, declare invalid the act to which it owes its existence. Except as an aid to construction, we cannot and need not go behind the statute. This was discussed authoritatively by the first International Military Tribunal in connection with the contention of defendants that the IMT Charter was invalid because it partook of the nature of *ex post facto* legislation. That Tribunal said: "The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and *it is, therefore, not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement.*"[3] [Emphasis added.]

As recently said by an American authority—

> "The Charter was, of course, binding upon the Tribunal in the same way that a constitutional statute would bind a domestic court."[4]

In its aspect as a statute defining crime and providing punishment the limited purpose of C. C. Law 10 is clearly set forth. It is an exercise of supreme legislative power in and for Germany. It does not purport to establish by legislative act any new crimes of international applicability. The London Agreement refers to the trial of "those German officers and men and members of the

[1] Ibid., p. 218.
[2] Ibid., p. 174.
[3] Ibid., p. 219.
[4] Herbert Wechsler, "The Issues of the Nuremberg Trial," Political Science Quarterly, LXII, No. 1, March 1947, 14.

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Nazi Party who have been responsible for * * * atrocities." C. C. Law 10 recites that it was enacted to establish a "uniform legal basis *in Germany*" for the prosecution of war criminals. [Emphasis added.]

Military Government Ordinance No. 7 was enacted pursuant to the powers of the Military Government for the United States Zone of Occupation "*within Germany.*" [Emphasis added.]

We concur in the view expressed by the first International Military Tribunal as quoted above, but we observe that the decision was supported on two grounds. The Tribunal in that case did not stop with the declaration that it was bound by the IMT Charter as an exercise of sovereign legislative power. The opinion went on to show that the IMT Charter was also "the expression of international law existing at the time of its creation." All of the war crimes and many, if not all, of the crimes against humanity as charged in the indictment in the case at bar were, as we shall show, violative of preexisting principles of international law. To the extent to which this is true, C. C. Law 10 may be deemed to be a codification rather than original substantive legislation. Insofar as C. C. Law 10 may be thought to go beyond established principles of international law, its authority, of course, rests upon the exercise of the "sovereign legislative power" of the countries to which the German Reich unconditionally surrendered.

We have discussed C. C. Law 10 in its first aspect as substantive legislation. We now consider its other aspect. Entirely aside from its character as substantive legislation, C. C. Law 10, together with Ordinance No. 7, provides procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilized world independently of any new substantive legislation. (*Ex parte Quirin,* 317 U.S. 1; 87 L. ed. 3; 63 S. Ct. 2.) International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.

It must be conceded that the circumstance which gives to principles of international conduct the dignity and authority of law is their general acceptance as such by civilized nations, which acceptance is manifested by international treaties, conventions, authoritative textbooks, practice, and judicial decisions.*

It does not, however, follow from the foregoing statements that general acceptance of a rule of international conduct must be manifested by express adoption thereof by all civilized states.

* Hackworth, "Digest of International Law", (Government Printing Office, Washington, 1940), volume 1, pages 1–4.

"The basis of the law, that is to say, what has given to some principles of general applicability the quality or character of law has been the acquiescence of the several independent states which were to be governed thereby." *

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"The requisite acquiescence on the part of individual states has not been reflected in formal or specific approval of every restriction which the acknowledged requirements of international justice have appeared, under the circumstances of the particular case, to dictate or imply. It has been rather a yielding to principle, and by implication, to logical applications thereof which have begotten deep-rooted and approved practices."

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"It should be observed, however, that acquiescence in a proposal may be inferred from the failure of interested states to make appropriate objection to practical applications of it. Thus it is that changes in the law may be wrought gradually and imperceptibly, like those which by process of accretion alter the course of a river and change an old boundary. Without conventional arrangement, and by practices manifesting a common and sharp deviation from rules once accepted as the law, the community of states may in fact modify that which governs its members."

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"States may through the medium of an international organization such as the League of Nations, itself the product of agreement, find it expedient to create and accept fresh restraints that ultimately win widest approval and acceptance as a part of the law of nations. The acts of the organization may thus in fact become sources of international law, at least in case the members thereof have by their general agreement clothed it with power to create and put into force fresh rules of restraint."

"But international law is progressive. The period of growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind. The experience of two great world wars within a quarter of a

* Hyde, "International Law", (2d rev. ed., Boston, Little, Brown & Co., 1945), volume 1, page 4.

century cannot fail to have deep repercussions on the senses of the peoples and their demand for an international law which reflects international justice. I am convinced that international law has progressed, as it is bound to progress if it is to be a living and operative force in these days of widening sense of humanity."[1]

For the reasons stated by Lord Wright, this growth by accretion has been greatly accelerated since the First World War.[2] The IMT Charter, the IMT judgment, and C. C. Law 10 are merely "great new cases in the book of international law." They constitute authoritative recognition of principles of individual penal responsibility in international affairs which, as we shall show, had been developing for many years. Surely C. C. Law 10, which was enacted by the authorized representatives of the four greatest Powers on earth, is entitled to judicial respect when it states, "Each of the following acts is *recognized* as a crime." [Emphasis added.] Surely the requisite international approval and acquiescence is established when 23 states, including all of the great powers, have approved the London Agreement and the IMT Charter without dissent from any state. Surely the IMT Charter must be deemed declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations. We quote:

"The General Assembly recognizes the obligation laid upon it by article 13, paragraph 1 (a) of the Charter, to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification;

"Takes note of the agreement for the establishment of an International Military Tribunal for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945, and of the Charter annexed thereto and of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946;

"Therefore—

"Affirms the principles of international law recognized by the Charter of the Nuernberg Tribunal and the judgment of the Tribunal;

"Directs the Committee on Codification of International Law established by the resolution of the General Assembly of

[1] Lord Wright, "War Crimes under International Law," The Law Quarterly Review, LXII, January 1946, 51.

[2] Hyde, op. cit., page 2.

* * * December 1946, to treat as a matter of primary importance plans for the formulation, in the text of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuernberg Tribunal and in the judgment of the Tribunal." [1]

Before the International Military Tribunal had convened for the trial of Goering, et al., the opinion had been expressed that through the process of accretion the provisions of the IMT Charter and consequently of C. C. Law 10 had already, in large measure, become incorporated into the body of international law. We quote:

"I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in classes (*a*), (*b*), and (*c*) are crimes for which there is properly individual responsibility; that they are not crimes because of the Agreement of the four Governments, but that the Governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the Court would not be a court of law but a manifestation of power. The principles which are declared in the Agreement are not laid down as an arbitrary direction to the Court but are intended to define and do, in my opinion, accurately define what is the existing international law on these matters." [2]

A similar view was expressed in the judgment of the International Military Tribunal. We quote:

"The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law." [3]

We are empowered to determine the guilt or innocence of persons accused of acts described as "war crimes" and "crimes against humanity" under rules of international law. At this point, in connection with cherished doctrines of national sovereignty, it is important to distinguish between the rules of common international law which are of universal and superior authority on the one hand, and the provisions for enforcement of those rules which are by no means universal on the other. As to the superior authority of international law, we quote:

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[1] Philip C. Jessup, "The Crime of Aggression and the Future of International Law," Political Science Quarterly, LXII (Mar 1947), No. 1, page 2, citing Journal of the United Nations, No. 58, Supp. A–A/P. V./55, page 485.

[2] Lord Wright, op. cit., page 41.

[3] Trial of the Major War Criminals, op cit., volume I, page 218.

"If there exists a body of international law, which states, from a sense of legal obligation do in fact observe in their relations with each other, and which they are unable individually to alter or destroy, that law must necessarily be regarded as the law of each political entity deemed to be a state, and as prevailing throughout places under its control. This is true although there be no local affirmative action indicating the adoption by the individual state of international law.

"International law, as the local law of each state, is necessarily superior to any administrative regulation or statute or public act at variance with it. There can be no conflict on an equal plane." *

This universality and superiority of international law does not necessarily imply universality of its enforcement. As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognized that tribunals may be established and punishment imposed by the state into whose hands the perpetrators fall. These rules of international law were recognized as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the state or in occupied territory, has been unquestioned. (*Ex parte Quirin, supra;* In re: Yamashita, 327 U.S. 1, 90 L. ed.) However, enforcement of international law has been traditionally subject to practical limitations. Within the territorial boundaries of a state having a recognized, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that state. The law is universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions. Thus, notwithstanding the paramount authority of the substantive rules of common international law, the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, be tried and punished by the state of which they were nationals, by the offended state if it can secure jurisdiction of the person, or by an international tribunal if of competent authorized jurisdiction.

Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. Nor is the apparent immunity from prosecution of

* Hyde, op cit., pages 16 and 17.

criminals in other states based on the absence there of the rules of international law which we enforce here. Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers.

Construction of C. C. Law 10 War Crimes and Crimes Against Humanity

We next approach the problem of the construction of C. C. Law 10, for whatever the scope of international common law may be, the power to enforce it in this case is defined and limited by the terms of the jurisdictional act.

The first penal provision of C. C. Law No. 10, with which we are concerned is as follows:

"Article II

"1.—Each of the following acts is recognized as a crime:

* * * * * * *

(*b*) *War Crimes.* Atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

Here we observe the controlling effect of common international law as such, for the statutes by which we are governed have adopted and incorporated the rules of international law as the rules by which war crimes are to be identified. This legislative practice by which the laws or customs of war are incorporated by reference into a statute is not unknown in the United States. (See cases cited in *Ex parte Quirin, supra.*)

The scope of inquiry as to war crimes is, of course, limited by the provisions, properly construed, of the IMT Charter and C. C. Law 10. In this particular, the two enactments are in substantial

harmony. Both indicate by inclusion and exclusion the intent that the term "war crimes" shall be employed to cover acts in violation of the laws and customs of war directed against non-Germans, and shall not include atrocities committed by Germans against their own nationals. It will be observed that article 6 of the IMT Charter enumerates as war crimes acts against prisoners of war, persons on the seas, hostages, wanton destruction of cities and the like, devastation not justified by military necessity, plunder of public or private property (obviously not property of Germany or Germans), and "ill-treatment or deportation to slave labor or for any other purpose of civilian population *of or in* occupied territory." [Emphasis added.] C. C. Law 10, *supra,* employs similar language. It reads—

> "* * * ill treatment or deportation to slave labour or for any other purpose, *of civilian population from occupied territory.*" [Emphasis added.]

This legislative intent becomes more manifest when we consider the provisions of the IMT Charter and of C. C. Law 10 which deal with crimes against humanity. Article 6 of the IMT Charter defines crimes against humanity, as follows:

> "* * * murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

C. C. Law 10 defines as criminal:

> "* * * Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

Obviously, these sections are not surplusage. They supplement the preceding sections on war crimes and include within their prohibition not only war crimes, but also acts not included within the preceding definitions of war crimes. In place of atrocities committed against civilians of or in or from occupied territory, these sections prohibit atrocities "against any civilian population." Again, persecutions on racial, religious, or political grounds are within our jurisdiction "whether or not in violation of the domestic laws of the country where perpetrated." We have already demonstrated that C. C. Law 10 is specifically directed to the

punishment of German criminals. It is therefore clear that the intent of the statute on crimes against humanity is to punish for persecutions and the like, whether in accord with or in violation of the domestic laws of the country where perpetrated, to wit: Germany. The intent was to provide that compliance with German law should be no defense. Article III of C. C. Law 10 clearly demonstrates that acts by Germans against German nationals may constitute crimes against humanity within the jurisdiction of this Tribunal to punish. That article provides that each occupying authority within its zone of occupation shall have the right to cause persons suspected of having committed a crime to be arrested and "(*d*) shall have the right to cause all persons so arrested * * * to be brought to trial * * *. Such Tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorized by the occupying authorities."

As recently asserted by General Telford Taylor before Tribunal IV, in the case of the United States *vs.* Flick, et al.:*

> "This constitutes an explicit recognition that acts committed by Germans against other Germans are punishable as crimes under Law No. 10, according to the definitions contained therein, since only such crimes may be tried by German courts, in the discretion of the occupying power. If the occupying power fails to authorize German courts to try crimes committed by Germans against other Germans (and in the American Zone of Occupation no such authorization has been given), then these cases are tried only before non-German tribunals, such as these military tribunals."

Our jurisdiction to try persons charged with crimes against humanity is limited in scope, both by definition and illustration, as appears from C. C. Law 10. It is not the isolated crime by a private German individual which is condemned, nor is it the isolated crime perpetrated by the German Reich through its officers against a private individual. It is significant that the enactment employs the words "against any civilian population" instead of "against any civilian individual." The provision is directed against offenses and inhumane acts and persecutions on political, racial, or religious grounds systematically organized and conducted by or with the approval of government.

The opinion of the first International Military Tribunal in the case against Goering, et al., lends support to our conclusion. That

* Case 5, Volume VI, this series.

opinion recognized the distinction between war crimes and crimes against humanity, and said:

> "* * * insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity." *

The evidence to be later reviewed establishes that certain inhumane acts charged in count three of the indictment were committed in execution of, and in connection with, aggressive war and were therefore crimes against humanity even under the provisions of the IMT Charter, but it must be noted that C. C. Law 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed, "in execution of, or in connection with, any crime within the jurisdiction of the tribunal", whereas in C. C. Law 10 the words last quoted are deliberately omitted from the definition.

THE EX POST FACTO PRINCIPLE

The defendants claim protection under the principle *nullum crimen sine lege,* though they withheld from others the benefit of that rule during the Hitler regime. Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed. By way of illustration, we observe that C. C. Law 10, article II, paragraph 1(*b*), *"War Crimes,"* has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal, after the manner of the common law, to determine the content of those rules under the impact of changing conditions.

Whatever view may be held as to the nature and source of our authority under C. C. Law 10 and under common international law, the *ex post facto* rule, properly understood, constitutes no legal nor moral barrier to prosecution in this case.

Under written constitutions the *ex post facto* rule condemns statutes which define as criminal, acts committed before the law was passed, but the *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world author-

* Trial of the Major War Criminals, op. cit., volume I, pages 254 and 255.

ity empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth. As applied in the field of international law, the principle *nullum crimen sine lege* received its true interpretation in the opinion of the IMT in the case versus Goering, et al. The question arose with reference to crimes against the peace, but the opinion expressed is equally applicable to war crimes and crimes against humanity. The Tribunal said:

> "In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." *

To the same effect we quote the distinguished statesman and international authority, Henry L. Stimson—

> "A mistaken appeal to this principle has been the cause of much confusion about the Nuremberg trial. It is argued that parts of the Tribunal's Charter, written in 1945, make crimes out of what before were activities beyond the scope of national and international law. Were this an exact statement of the situation we might well be concerned, but it is not. It rests on a misconception of the whole nature of the law of nations. International law is not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world. As such, it corresponds precisely to the common law of Anglo-American tradition. We can understand the law of Nuremberg only if we see it for what it is—a great new case in the book of international law, and not a formal enforcement of codified statutes. A look at the charges will show what I mean.

* * * * * * *

* Ibid., p. 219.

"It was the Nazi confidence that we would never chase and catch them, and not a misunderstanding of our opinion of them, that led them to commit their crimes. Our offense was thus that of the man who passed by on the other side. That we have finally recognized our negligence and named the criminals for what they are is a piece of righteousness too long delayed by fear." [1]

That the conception of retrospective legislation which prevails under constitutional provisions in the United States does not receive complete recognition in other enlightened legal systems is illustrated by the decision in Phillips *vs.* Eyre, L.R. 6 Q.B. 1 [27 (1870–71)] described by Lord Wright as "a case of great authority." We quote:

"In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which * * * the inconvenience and wrong, *summum jus summa injuria*."

We quote with approval the words of Sir David Maxwell-Fyfe:

"With regard to 'crimes against humanity', this at any rate is clear. The Nazis, when they persecuted and murdered countless Jews and political opponents in Germany, knew that what they were doing was wrong and that their actions were crimes which had been condemned by the criminal law of every civilized state. When these crimes were mixed with the preparation for aggressive war and later with the commission of war crimes in occupied territories, it cannot be a matter of complaint that a procedure is established for their punishment." [2]

Concerning the mooted *ex post facto* issue, Professor Wechsler of Columbia University writes:

"These are, indeed, the issues that are currently mooted. But there are elements in the debate that should lead us to be suspicious of the issues as they are drawn in these terms. For, most of those who mount the attack on one or another of these contentions hasten to assure us that their plea is not one of immunity for the defendants; they argue only that they should have been disposed of politically, that is, dispatched out of hand. This is a curious position indeed. A punitive enterprise launched on the basis of general rules, administered in an adversary

[1] The Nuremberg Trial: "Landmark in Law"; Foreign Affairs, January 1947, pages 180 and 184.

[2] Maxwell-Fyfe, foreword to "The Nuremberg Trial" (London, Penguin Books, 1947), by R. W. Cooper.

proceeding under a separation of prosecutive and adjudicative powers is, in the name of law and justice, asserted to be less desirable than an *ex parte* execution list or a drumhead court martial constituted in the immediate aftermath of the war. I state my view reservedly when I say that history will accept no conception of law, politics or justice that supports a submission in these terms."

Again, he says:

"There is, indeed, too large a disposition among the defenders of Nuremberg to look for stray tags of international pronouncements and reason therefrom that the law of Nuremberg was previously fully laid down. If the Kellogg-Briand Pact or a general conception of international obligation sufficed to authorize England, and would have authorized us, to declare war on Germany in defense of Poland—and in this enterprise to kill countless thousands of German soldiers and civilians—can it be possible that it failed to authorize punitive action against individual Germans judicially determined to be responsible for the Polish attack? To be sure, we would demand a more explicit authorization for punishment in domestic law, for we have adopted for the protection of individuals a prophylactic principle absolutely forbidding retroactivity that we can afford to carry to that extreme. International society, being less stable, can afford less luxury. We admit that in other respects. Why should we deny it here?" *

Many of the laws of the Weimar era which were enacted for the protection of human rights have never been repealed. Many acts constituting war crimes or crimes against humanity as defined in C. C. Law 10 were committed or permitted in direct violation also of the provisions of the German criminal law. It is true that this Tribunal can try no defendant merely because of a violation of the German penal code, but it is equally true that the rule against retrospective legislation, as a rule of justice and fair play, should be no defense if the act which he committed in violation of C. C. Law 10 was also known to him to be a punishable crime under his own domestic law.

As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would

* Wechsler, op. cit., pages 23–25.

be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C. C. Law 10 can assert that he did not know that he would be brought to account for his acts. Notice of intent to punish was repeatedly given by the only means available in international affairs, namely, the solemn warning of the governments of the states at war with Germany. Not only were the defendants warned of swift retribution by the express declaration of the Allies at Moscow of 30 October 1943. Long prior to the Second World War the principle of personal responsibility had been recognized.

> "The Council of the Conference of Paris of 1919 undertook, with the aid of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, to incorporate in the treaty of peace arrangements for the punishment of individuals charged with responsibility for certain offenses." [1]

That Commission on Responsibility of Authors of the War found that—

> "The war was carried on by the central empires, together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity." [2]

As its conclusion, the Commission solemnly declared:

> "All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution." [3]

The American members of that Commission, though in substantial accord with the finding, nevertheless expressed a reservation as to "the laws of humanity." The express wording of the London Charter and of C. C. Law 10 constitutes clear evidence of the fact that the position of the American Government is now in harmony with the Declaration of the Paris Commission concerning the "laws of humanity." We quote further from the report of the Paris Commission:

> "Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into

[1] Hyde, op. cit., volume III, page 2409.
[2] Ibid., pages 2409 and 2410.
[3] American Journal of International Law, Vol. 14 (1920), p. 117.

its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of cases." [1]

According to the Treaty of Versailles, article 228, the German Government itself "recognized the right to the Allied and associated powers to bring before military tribunals persons accused of offenses against the laws and customs of war. Such persons who might be found guilty were to be sentenced to punishments 'laid down by law'." [2] Some Germans were, in fact, tried for the commission of such crimes.

The foregoing considerations demonstrate that the principle *nullum crimen sine lege,* when properly understood and applied, constitutes no legal or moral barrier to prosecution in the case at bar.

CRIMES AGAINST HUMANITY AS VIOLATIVE OF INTERNATIONAL LAW

C. C. Law 10 is not limited to the punishment of persons guilty of violating the laws and customs of war in the narrow sense; furthermore, it can no longer be said that violations of the laws and customs of war are the only offenses recognized by common international law. The force of circumstance, the grim fact of world-wide interdependence, and the moral pressure of public opinion have resulted in international recognition that certain crimes against humanity committed by Nazi authority against German nationals constituted violations not alone of statute but also of common international law. We quote:

"If a state is unhampered in its activities that affect the interests of any other, it is due to the circumstance that the practice of nations has not established that the welfare of the international society is adversely affected thereby. Hence that society has not been incited or aroused to endeavor to impose restraints; and by its law none are imposed. The Covenant of the League of Nations takes exact cognizance of the situation in its reference to disputes 'which arise out of a matter which by international law is solely within the domestic jurisdiction' of a party thereto. It is that law which as a product of the acquiescence of states permits the particular activity of the individual state to be deemed a domestic one.

"In as much as changing estimates are to be anticipated, and as the evolution of thought in this regard appears to be constant and is perhaps now more obvious than at any time since the United States came into being, the circumstance that at any

[1] Hyde, op. cit., page 2412.
[2] Ibid., page 2414.

given period the solution of a particular question is by international law deemed to be solely within the control or jurisdiction of one state, gives frail assurance that it will always be so regarded."[1]

"The family of nations is not unconcerned with the life and experience of the private individual in his relationships with the state of which he is a national. Evidence of concern has become increasingly abundant since World War I, and is reflected in treaties through which that conflict was brought to a close, particularly in provisions designed to safeguard the racial, linguistic and religious minorities inhabiting the territories of certain states, and in the terms of part XIII of the Treaty of Versailles, of June 28, 1919, in respect to labour, as well as in article XXIII of that treaty embraced in the Covenant of the League of Nations."[2]

"The nature and extent of the latitude accorded a state in the treatment of its own nationals has been observed elsewhere. It has been seen that certain forms or degrees of harsh treatment of such individuals may be deemed to attain an international significance because of their direct and adverse effect upon the rights and interests of the outside world. For that reason it would be unscientific to declare at this day that tyrannical conduct, or massacres, or religious persecutions are wholly unrelated to the foreign relations of the territorial sovereign which is guilty of them. If it can be shown that such acts are immediately and necessarily injurious to the nationals of a particular foreign state, grounds for interference by it may be acknowledged. Again, the society of nations, acting collectively, may not unreasonably maintain that a state yielding to such excesses renders itself unfit to perform its international obligations, especially in so far as they pertain to the protection of foreign life and property within its domain.* The property of interference obviously demands in every case a convincing showing that there is in fact a causal connection between the harsh treatment complained of, and the outside state that essays to thwart it.

* "Since the World War of 1914–1918, there has developed in many quarters evidence of what might be called an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual state; and with that interest there has been manifest also an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace. See article XI of the Covenant of the League of Nations, United States Treaty, volume III, 3339." (Hyde, "International Law," 2d rev. ed., vol. I, pages 249–250.)

[1] Ibid., volume I, pages 7 and 8.
[2] Ibid., p. 38.

The international concern over the commission of crimes against humanity has been greatly intensified in recent years. The fact of such concern is not a recent phenomenon, however. England, France, and Russia intervened to end the atrocities in the Greco–Turkish warfare in 1827.[1]

President Van Buren, through his Secretary of State, intervened with the Sultan of Turkey in 1840 in behalf of the persecuted Jews of Damascus and Rhodes.[2]

The French intervened and by force undertook to check religious atrocities in Lebanon in 1861.[3]

Various nations directed protests to the governments of Russia and Rumania with respect to pogroms and atrocities against Jews. Similar protests were made to the government of Turkey on behalf of the persecuted Christian minorities. In 1872 the United States, Germany, and five other powers protested to Rumania; and in 1915, the German Government joined in a remonstrance to Turkey on account of similar persecutions.[4]

In 1902 the American Secretary of State, John Hay, addressed to Rumania a remonstrance "in the name of humanity" against Jewish persecutions, saying, "This government cannot be a tacit party to such international wrongs."

Again, in connection with the Kishenef [Kishinev] and other massacres in Russia in 1903, President Theodore Roosevelt stated:

> "* * * Nevertheless there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavor at least to show our disapproval of the deed and our sympathy with those who have suffered by it. The cases must be extreme in which such a course is justifiable. * * * The cases in which we could interfere by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. * * *" [5]

Concerning the American intervention in Cuba in 1898, President McKinley stated:

> "First. In the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries now existing there, and which the parties to the conflict are either unable or unwilling to stop or mitigate. It is no answer to say this is all in another country, belonging to another nation, and

[1] Oppenheim, "International Law", volume I, (3d ed.) (Longmans, Green & Co., London, 1920), page 229.

[2] State Department Publication No. 9, pages 153 and 154.

[3] Norman Bentwich, "The League of Nations and Racial Persecution in Germany," Problems of Peace and War, XIX, (London, 1934), page 75 and following.

[4] Ibid.

[5] President's Message to Congress, 1904. "The Works of Theodore Roosevelt, Presidential Addresses and State Papers", (P. F. Collier & Son, New York), volume III, pages 178 and 179.

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therefore none of our business. It is specially our duty, for it is right at our door." [1]

The same principle was recognized as early as 1878 by a learned German professor of law, who wrote:

"States are allowed to interfere in the name of international law if 'humanity rights' are violated to the detriment of any single race." [2]

Finally, we quote the words of Sir Hartley Shawcross, the British Chief Prosecutor at the trial of Goering, et al.:

"The rights of humanitarian intervention on behalf of the rights of man trampled upon by a state in a manner shocking the sense of mankind has long been considered to form part of the [recognized] law of nations. Here, too, the Charter merely develops a preexisting principle." [3]

We hold that crimes against humanity as defined in C. C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.

Thus, the statute is limited by construction to the type of criminal activity which prior to 1939 was and still is a matter of international concern. Whether or not such atrocities constitute technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperiled the peace of the world that they must be deemed to have become violations of international law. This principle was recognized although it was misapplied by the Third Reich. Hitler expressly justified his early acts of aggression against Czechoslovakia on the ground that the alleged persecution of racial Germans by the government of that country was a matter of international concern warranting intervention by Germany. Organized Czechoslovakian persecution of racial Germans in Sudetenland was a fiction supported by "framed" incidents, but the principle invoked by Hitler was the one which we have recognized, namely, that government organized racial persecutions are violations of international law.

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[1] President's Special Message of 11 April 1898. Hyde, op. cit., volume 1, page 259.

[2] J. Bluntschli, Professor of Law, Heidelberg University, in "Das Moderne Voelkerrecht der Civilisierten Staaten," (3d ed.) page 270 (1878). Professor Bluntschli was a Swiss national.

[3] Trial of the Major War Criminals, op. cit., volume III, page 92.

As the prime illustration of a crime against humanity under C. C. Law 10, which by reason of its magnitude and its international repercussions has been recognized as a violation of common international law, we cite "genocide" which will shortly receive our full consideration. A resolution recently adopted by the General Assembly of the United Nations is in part as follows:

> "Genocide is a denial of the right of existence of entire human groups, as homicide is a denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.
>
> "Many instances of such crimes of genocide have occurred when racial, religious, political, and other groups have been destroyed, entirely or in part.
>
> "The punishment of the crime of genocide is a matter of international concern.
>
> "The General Assembly therefore—
>
> "Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials, or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable; * * *."*

The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime is persuasive evidence of the fact. We approve and adopt its conclusions. Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.

The defendants contend that they should not be found guilty because they acted within the authority and by the command of German laws and decrees. Concerning crimes against humanity, C. C. Law 10 provides for punishment whether or not the acts were in violation of the domestic laws of the country where perpetrated (C. C. Law 10, art. II, par. 1(*c*)). That enactment also provides "the fact that any person acted pursuant to the order of his Government or of a superior does not free him from respon-

* Journal of the United Nations, No. 58, Supp. A–C/P. V./55, page 485; as cited in Political Science Quarterly (Mar 1947), volume LXII, No. 1, page 3.

sibility for a crime, but may be considered in mitigation." (C. C. Law 10, art. II, par. 4(*b*).)

The foregoing provisions constitute a sufficient, but not the entire, answer to the contention of the defendants. The argument that compliance with German law is a defense to the charge rests on a misconception of the basic theory which supports our entire proceedings. The Nuernberg Tribunals are not German courts. They are not enforcing German law. The charges are not based on violation by the defendants of German law. On the contrary, the jurisdiction of this Tribunal rests on international authority. It enforces the law as declared by the IMT Charter and C. C. Law 10, and within the limitations on the power conferred, it enforces international law as superior in authority to any German statute or decree. It is true, as defendants contend, that German courts under the Third Reich were required to follow German law (i.e., the expressed will of Hitler) even when it was contrary to international law. But no such limitation can be applied to this Tribunal. Here we have the paramount substantive law, plus a Tribunal authorized and required to apply it notwithstanding the inconsistent provisions of German local law. The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.

Frank recognition of the following facts is essential. The jurisdictional enactments of the Control Council, the form of the indictment, and the judicial procedure prescribed for this Tribunal are not governed by the familiar rules of American criminal law and procedure. This Tribunal, although composed of American judges schooled in the system and rules of the common law, is sitting by virtue of international authority and can carry with it only the broad principles of justice and fair play which underlie all civilized concepts of law and procedure.

No defendant is specifically charged in the indictment with the murder or abuse of any particular person. If he were, the indictment would, no doubt, name the alleged victim. Simple murder and isolated instances of atrocities do not constitute the gravamen of the charge. Defendants are charged with crimes of such

immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nation wide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist. The record is replete with evidence of specific criminal acts, but they are not the crimes charged in the indictment. They constitute evidence of the intentional participation of the defendants and serve as illustrations of the nature and effect of the greater crimes charged in the indictment. Thus it is that the apparent generality of the indictment was not only necessary but proper. No indictment couched in specific terms and in the manner of the common law could have encompassed within practicable limits the generality of the offense with which these defendants stand charged.

The prosecution has introduced evidence concerning acts which occurred before the outbreak of the war in 1939. Some such acts are relevant upon the charges contained in counts two, three, and four, but as stated by the prosecution, "None of these acts is charged as an independent offense in this particular indictment." We direct our consideration to the issue of guilt or innocence after the outbreak of the war in accordance with the specific limitations of time set forth in counts two, three, and four of the indictment. In measuring the conduct of the individual defendants by the standards of C. C. Law 10, we are also to be guided by article II, paragraph 2 of that law, which provides that a person "is deemed to have committed a crime as defined in paragraph 1 of this article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime * * *."

Before considering the progressive degeneration of the judicial system under Nazi rule, it should be observed that at least on paper the Germans had developed, under the Weimar republic, a civilized and enlightened system of jurisprudence. A few illustrations will suffice. The power of judicial appointment and the independence of the judges was jealously guarded by the individual states within the Reich. The following acts were declared criminal under the provisions of the German criminal code:

The acceptance of bribes or inducements by a judge, offered for the purpose of influencing his decision—Section 334.

Action by an official, who, in the conduct or decision of a case, deliberately makes himself guilty of diverting the law to the disadvantage of one of the parties—Section 336.

The securing of a confession by duress—Section 343.

The act of an official who, in the exercise of his duty in a criminal proceeding, knowingly causes any person to escape penalty provided by law—Section 346.

Action by a superior officer who intentionally induces * * * his subordinate to commit a punishable act in office, or knowingly connives at such a punishable offense on the part of his subordinate—Section 357.

In the Weimar constitution it was provided that "the generally accepted rules of international law are to be considered as binding, integral parts of the law of the German Reich." (Art. 4.)

The Constitution also guaranteed to all Germans—

Equality before the law (Art. 109);
Citizenship, the right of travel and emigration (Arts. 110, 111, and 112);
Freedom of person (Art. 114);
Freedom of speech, assembly, and association (Arts. 118, 123, and 124);
Right of just compensation for property expropriated (Art. 153);
Right of inheritance (Art. 154);

There were, however, in the Weimar constitution the germs of the disease from which it died. In article 48 of the constitution it was provided:

> "The Reich President may, if the public safety and order of the German Reich are considerably disturbed or endangered, take such measures as are necessary to restore public safety and order. If necessary, he may intervene with the help of the armed forces. For this purpose he may temporarily suspend, either partially or wholly, the fundamental rights established in articles 114, 115, 117, 118, 123, 124, and 153."

A review of the evidence will disclose that substantially every principle of justice which was enunciated in the above-mentioned laws and constitutional provisions was after 1933 violated by the Hitler regime.

The first step in the march toward absolutism was of necessity the assumption and consolidation of power. It was deemed essential that the government be authorized to make laws by decree, unhampered by the limitations of the Weimar republic, by the Reichstag, or by the independent action of the several German States (Laender). To accomplish this end on 28 February 1933 a decree was promulgated over the signature of President von Hindenburg, Chancellor Hitler, Reich Minister of the Interior Frick, and Reich Minister of Justice Guertner. Briefly stated, this decree expressly suspended the provisions of the Weimar constitution guaranteeing personal liberty, free speech, press, assembly, association, privacy of communication, freedom of search, and inviolability of property rights. The decree further provided

that the Reich government might, to restore public security, temporarily take over the powers of the highest State authority. It was declared in the preamble that the decree was passed "in virtue of article 48 (2) of the Weimar constitution." This is the article to which we previously referred and which authorized the Reichspraesident to suspend the very provisions which were in fact stricken down by the Hitler decree of 28 February. The decree was reinforced on 24 March 1933 by the act of an intimidated Reichstag. The enactment was subtly drawn to accomplish a double purpose. It provided that "laws decreed by the government may deviate from the constitution", but the act did not stop there; it also provided that "laws of the Reich can be decreed by the government apart from the procedure provided by the Constitution." We quote in part—

> "Article 1.—Laws of the Reich can be decreed, apart from the procedure provided by the constitution of the Reich, also by the government of the Reich. This also applies to the laws mentioned in articles 85, paragraph 2, and 87 of the constitution of the Reich.
>
> "Article 2.—The laws decreed by the government of the Reich may deviate from the constitution of the Reich as far as they do not concern the institution of the Reichstag and the Reich council as such. The rights of the Reichspraesident remain untouched.
>
> "Article 3.—Articles 68 through 77 of the constitution of the Reich do not apply to laws decreed by the government of the Reich."

Though the Enabling Act expressly repealed only a small portion of the constitution, nevertheless that portion which was repealed cleared the procedural way for the nullification of the rest if and when decrees should be promulgated by "the government." On 14 July 1933 a law was passed declaring the Nationalsozialistische Deutsche Arbeiterpartei (NSDAP) to be the only political party and making it a crime to maintain or form any other political party.* Thus, it was made doubly sure that any legislation thereafter enacted by the Reichstag would be in harmony with the will of the government.

Although the process by which the Hitler regime came into power was tainted with illegality and duress, nevertheless the power thus seized was later consolidated and the regime thereafter did receive the organized support of the German people and recognition by foreign powers. On 30 January 1934, more than 10 months after the enactment of the enabling act, and subsequent

* Trial of the Major War Criminals, op. cit., judgment, volume I, page 178.

to the Reichstag election of 12 November 1933, the Reichstag passed an act by unanimous vote providing that "the sovereign powers of the Laender are transferred to the Reich," and further providing that "the Reich government may issue new constitutional laws." The act was regularly signed by Reich President von Hindenburg, and by Reich Chancellor Hitler, and Minister Frick.[1] The provisions of the Enabling Act were renewed by acts of the Reichstag on 30 January 1937 and again on 30 January 1939.

On 14 June 1942, Dr. Lammers, Reich Minister and Chief of the Reich Chancellery, stated that they would "stress the fact that the Fuehrer himself and the Reich cabinet should not be eliminated from the powers of legislation."

The conduct of the defendants must be seen in a context of preparation for aggressive war, and must be interpreted as within the framework of the criminal law and judicial system of the Third Reich. We shall, therefore, next consider the legal and judicial process by which the entire judicial system was transformed into a tool for the propagation of the National Socialist ideology, the extermination of opposition thereto, and the advancement of plans for aggressive war and world conquest. Though the overt acts with which defendants are charged occurred after September 1939, the evidence now to be considered will make clear the conditions under which the defendant acted and will show knowledge, intent, and motive on their part, for in the period of preparation some of the defendants played a leading part in molding the judicial system which they later employed.

Beginning in 1933, there developed side by side two processes by which the Ministry of Justice and the courts were equipped for terroristic functions in support of the Nazi regime. By the first, the power of life and death was ever more broadly vested in the courts. By the second, the penal laws were extended in such inconclusive and indefinite terms as to vest in the judges the widest discretion in the choice of law to be applied, and in the construction of the chosen law in any given case. In 1933, by the law for the "Protection against Violent Political Acts," the death sentence was authorized, though not required, as to a number of crimes "whenever milder penalty has been prescribed hitherto." [2]

On 24 April 1934, the definition of high treason was greatly expanded and the death sentence was authorized, though not required, in numerous instances. The manner in which this law was applied renders it all-important. The following provisions,

[1] 1934 RGBl. I, p. 75.

[2] Law of 4 April 1933, 1933 RGBl. I, page 162.

among others, illustrate the scope of the amended law and the discretionary power of the judge:

"83. Whoever publicly incites to or solicits an undertaking of high treason shall be punished by confinement in a penitentiary not to exceed 10 years.

"Whoever prepares an undertaking of high treason in any other way shall be punished in like manner.

"The death penalty, or confinement in a penitentiary for life, or for not less than 2 years, shall be inflicted:

"(1) if the act was directed toward establishing or maintaining an organized combination for the preparation of high treason or

* * * * * * *

"(3) if the act was directed toward influencing the masses by making or distributing writings, recordings, or pictures, or by the installation of wireless telegraph or telephone, or

"(4) if the act was committed abroad or was committed in such a manner that the offender undertook to import writings, recordings, or pictures from abroad or for the purpose of distribution within the country."*

On 20 December 1934, the government promulgated the following enactment "Law on Treacherous Acts against State and Party and for the Protection of Party Uniforms," which provided in part as follows:

"Chapter 1. Article 1. (1) Unless heavier punishment is sanctioned under the authority of a law previously established, imprisonment not to exceed 2 years shall be imposed upon anybody deliberately making false or grievous statements, fit to injure the welfare or the prestige of the government of the Reich, the National Socialist Workers' Party, or its agencies. If such statements are made or circulated in public, imprisonment for not less than 3 months shall be imposed.

"Article 2. (1) Anyone who makes or circulates statements proving a malicious, baiting or low-minded attitude toward leading personalities of the State or the NSDAP, or toward orders issued by them or toward institutions created by them—fit to undermine the confidence of the people in its political leadership—shall be punished with imprisonment.

"(2) Statements of this kind which are not made in public shall warrant the same punishment—provided the offender figures on his statements eventually being circulated in public."

* Law of 24 April 1934, 1934 RGBl. I, page 341. Most of the laws and decrees mentioned herein are reproduced as parts of document NG–715, Prosecution Exhibit 112. (See footnote on p. 231.)

A decisive step was taken by the "Law to Change the Penal Code," which was promulgated on 28 June 1935 by Adolf Hitler as Fuehrer and Reich Chancellor, and by Dr. Guertner as Reich Minister of Justice. Article 2 of that enactment is as follows:

"Article 2. Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of a penal law and the sound concept of the people, shall be punished. If no specific penal law can be directly applied to this act, then it shall be punished according to the law whose underlying principle can be most readily applied to the act."

In substance, this edict constituted a complete repudiation of the rule that criminal statutes should be definite and certain and vested in the judge a wide discretion in which Party political ideology and influence were substituted for the control of law as the guide to judicial decision.

Section 90 (f) of the Penal Code, as enacted on 24 April 1934, provided:

"Whoever publicly, or as a German staying abroad, causes serious danger to the reputation of the German nation by an untrue or grossly inaccurate statement of a factual nature, shall be punished by confinement in a penitentiary."

The act was amended on 20 September 1944 as follows:

"In especially serious cases a German may be punished by death."[1]

By the act of 28 June 1935 it was provided:

"Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards, and banners, its insignia or decorations, or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment.

"The offense shall be prosecuted only upon order of the Reich Minister of Justice who shall issue such order in agreement with the Fuehrer's deputy."[2]

By the law of 28 June 1935 it was provided:

"If the main proceedings show that the defendant committed an act which deserves punishment according to the common sense of the people but which is not declared punishable by the law, then the court must investigate whether the underlying principle of a penal law applies to this act and whether justice

[1] 1944 RGBl. I, p. 225.
[2] 1935 RGBl. I, p. 839.

can be helped to triumph by the proper application of this penal law. (Article 2 of the Penal Code.)" [1]

A decree of 1 December 1936 provides in part as follows:

"Section 1. (1) A German citizen who consciously and unscrupulously, for his own gain or for other low motives, contrary to legal provisions smuggles property abroad or leaves property abroad and thus inflicts serious damage to German economy is to be punished by death. His property will be confiscated. The perpetrator is also punishable, if he commits the misdeed abroad." [2]

On 17 August 1938, more than a year before the invasion of Poland, a decree was promulgated against undermining German military efficiency. It provided in part:

"Section 5. (1) The following shall be guilty of undermining German military efficiency, and shall be punished by death:

"1. Whoever openly solicits or incites others to evade the fulfillment of compulsory military service in the German or an allied armed force, or otherwise openly seeks to paralyze or undermine the will of the German people or an allied nation to self-assertion by bearing arms; * * *." [3]

Under this law the death sentence was mandatory.

By the decree of 1 September 1939 the ears of the German people were stopped lest they hear the truth:

"Section 1.—Deliberate listening to foreign stations is prohibited. Violations are punishable by hard labor. In less severe cases there can be a sentence of imprisonment. The radio receivers used will be confiscated.

"Section 2.—Whoever deliberately spreads news from foreign radio stations which is designed to undermine German military efficiency will be punished by hard labor and in particularly severe cases by death." [4]

It is important to note that discretion as to penalty was vested in the court.

On 5 September 1939, by the Decree Against Public Enemies, it was provided that looting in liberated territory may be punished by hanging. The following additional provisions are of importance because of the arbitrary manner in which the instrument was construed and applied by the courts. The provisions are as follows:

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[1] 1935 RGBl. I, p. 844, art. 267a.
[2] 1936 RGBl. I, p. 999.
[3] 1939 RGBl. I, p. 1455.
[4] Ibid., p. 1683.

"Section 2.—Whoever commits a crime or offense against life, limb or property, taking advantage of air raid protection measures, is punishable by hard labor of up to 15 years or for life, and in particularly severe cases punishable by death.

"Section 3.—Whoever commits arson or any other crime of public danger, thereby undermining German military efficiency, will be punished by death.

"Section 4.—Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to 15 years or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable." [1]

On 25 November 1939 the death penalty was authorized as punishment for intentionally or negligently causing damage to war materials and the like, if it endangers the fighting power of the German armed forces. The death penalty was also authorized in case of anyone who "disturbs or imperils" the ordinary function of an enterprise essential to the defense of the Reich or to the supply of the population.[2]

On 5 December 1939 the death penalty was authorized for various crimes of violence and it was provided that "this decree is also applicable to crimes committed before it became valid".

On 4 September 1941 the Criminal Code was supplemented and changed to provide the death penalty for dangerous habitual criminals and sex criminals "if necessitated for the protection of the national community or by the desire for just expiation". The decree was signed by Adolf Hitler and by the defendant Dr. Schlegelberger in charge of the Reich Ministry of Justice.

By the decree of 5 May 1944, the judges were substantially freed from all restrictions as to the penalty to be invoked in criminal cases. That decree reads as follows:

"With regard to all offenders who are guilty of causing serious prejudice or seriously endangering the conduct of war, or the security of the Reich, through an intentional criminal act, a penalty may be imposed in excess of the regular penal limits up to the statutory maximum for a given type of punishment, or hard labor for a term or for life, or death, if the regular statutory maximum limits are insufficient for expiation of the act according to the sentiment of the people. The same shall also apply to all offenses committed by negligence by which one made himself guilty of a particularly grave prejudice or a par-

[1] Ibid., p. 1679.
[2] 1939 RGBl. I, p. 2319.

ticularly serious danger to the conduct of war, or to the security of the Reich." [1]

On 20 August 1942 Hitler issued the famous decree which marks the culmination of his systematic campaign to change the German judicial system into an instrumentality of the NSDAP. The decree was as follows:

"A strong administration of justice is necessary for the fulfillment of the tasks of the great German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice and to take all necessary measures in accordance with my directives and instructions made in agreement with the Reich Minister and Chief of the Reich Chancellery and the Leader of the Party Chancellery. He can hereby deviate from any existing law." [2]

The statutes which we have reviewed were merely steps in the process of increased severity of the criminal law and in the development of a loose concept concerning the definition of crime. The latter concept was especially evident in the statutes concerning the "sound sentiment of the people", crime by analogy, and undermining the military efficiency of the nation. In place of the control of law there was substituted the control of National Socialist ideology as a guide to judicial action.

The Draconic laws to which we have referred were upon their face, of general applicability. The discriminations on political, racial, and religious grounds are to be found not in the text, but in the application of the text.

But the Nazis were not content with statutes of a non-discriminatory nature even in view of the discriminatory manner in which they were enforced. Coincidentally with the development of these laws and decrees there arose another body of substantive law which expressly discriminated against minority groups both within and without the Reich, and which formed the basis for racial, religious, and political persecution on a vast scale. On 7 April 1933, a decree by the Reich government provided in part that—

"Article 2. Persons who, according to the Law for the Restoration of the Professional Civil Service of 7 April 1933,[3] are of non-Aryan descent, may be refused permission to practice law, even if there exists none of the reasons enumerated in the Regulations for Lawyers. The same rule applies in cases, as where a lawyer described in section 1, clause 2, wishes to be admitted to another court. * * *"

[1] 1944 RGBl. I, p. 115.
[2] 1942 RGBl. I, p. 535.
[3] 1933 RGBl. I, p. 175.

"Article 3. Persons who are active in the Communistic sense are excluded from the admission to the bar. Admissions already given have to be revoked." [1]

The act was implemented by the power of injunction. The fact that the license to practice law had been canceled was also stated as a ground for the cancellation of employment contracts and office leases.

On 15 September 1935, the Reichstag enacted the "Law for the Protection of German Blood and Honor." We quote—

"Article 1. (1) Marriages of Jews and citizens of German or related blood are prohibited. Marriages which are concluded nevertheless, are void even if they were concluded abroad in order to circumvent this law.

"(2) Only the district attorney can sue for nullification of marriage.

"Article 2. Sexual intercourse (except in marriage) between Jews and German nationals of German or German-related blood is forbidden."

By other laws, as amended from time to time, non-Aryans were almost completely expelled from public service. The number of non-Aryans in schools and higher institutions of learning was restricted.[2] Jews were excluded from the homestead law concerning peasantry.[3] Jewish religious communities were regulated.[4] Jews were excluded from certain industrial enterprises[5] and their rights as tenants were restricted.[6]

By the act of 2 November 1942 it was provided—

"Section 1. A Jew who has his domicile abroad cannot be a citizen of the Protectorate of Bohemia and Moravia. Domicile abroad is established if a Jew was abroad under circumstances which indicated that his tenure there is not of a temporary nature.

"Section 2. A Jew loses his citizenship status in the Protectorate if—

"(a) As of the effective date of this decree, he has an established domicile abroad;

"(b) At a date subsequent to the effective date of this decree, he establishes a domicile abroad."

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[1] Ibid., p. 188.
[2] 1933 RGBl. I, p. 225.
[3] Ibid., p. 685.
[4] 1938 RGBl. I, p. 338.
[5] Ibid., p. 1580.
[6] 1939 RGBl. I, p. 864.

And by act of 25 November 1941 it was provided—

"Section 3. (1) The property of the Jew who is losing his nationality under this amendment shall be forfeited for the benefit of the Reich at the moment he loses his nationality. The Reich further confiscates the property of Jews who are stateless at the moment this amendment becomes effective, and who were last of German nationality, if they have or take up their regular residence abroad.

(2) The property thus forfeited shall serve the furthering of all purposes in connection with the solution of the Jewish question.

* * * * * * *

"Section 8. (1) It is for the chief of the Security Police and the SD (of Reich Leader SS) to decide whether the conditions for confiscation of property are given.

(2) The administration and liquidation of the forfeited property is up to the Chief of the Regional Finance Office, Berlin." [1]

The decree of 4 December 1941 "concerning the organization and criminal jurisdiction against Poles and Jews in the Incorporated Eastern Territories",[2] marks perhaps the extreme limit to which the Nazi government carried its statutory and decretal persecution of racial and religious minorities, but it also introduces another element of great importance. We refer to the extension of German laws to occupied territory, to purportedly annexed territory, and to territory of the so-called protectorates. The decree provides—

"(1) Poles and Jews in the Incorporated Eastern Territories are to conduct themselves in conformity with the German laws and with the regulations introduced for them by the German authorities. They are to abstain from any conduct liable to prejudice the sovereignty of the German Reich or the prestige of the German people.

"(2) The death penalty shall be imposed on any Pole or Jew if he commits an act of violence against a German on account of his being of German blood.

"(3) A Pole or Jew shall be sentenced to death, or in less serious cases to imprisonment, if he manifests anti-German sentiments by malicious activities or incitement, particularly by making anti-German utterances, or by removing or defacing official notices of German authorities or offices, or if he, by his

[1] 1942 RGBl. I, p. 722.

[2] This decree was also known as the "decree concerning the administration of penal justice against Poles and Jews in the Incorporated Eastern Territories."

conduct, lowers or prejudices the prestige or the well being of the German Reich or the German people.

"(4) The death penalty, or in less serious cases imprisonment, shall be imposed on any Jew or Pole:

* * * * * * *

"3. If he urges or incites to disobedience to any decree or regulation issued by the German authorities;

"4. If he conspires to commit an act punishable under paragraphs (2), (3) and (4), subsections 1 to 3, or *if he seriously contemplates the carrying out of such an act,* or if he offers himself to commit such an act, or accepts such an offer, or if he obtains credible information of such act, or of the intention of committing it, and fails to notify the authorities or any person threatened thereby at a time when danger can still be averted. [Emphasis added.]

"II. Punishment shall also be imposed on Poles or Jews if they act contrary to German criminal law or commit any act for which they deserve punishment in accordance with the fundamental principles of German criminal law and in view of the interests of the State in the Incorporated Eastern Territories.

"III. * * * (2) The death sentence shall be imposed in all cases where it is prescribed by the law. Moreover, in these cases where the law does not provide for the death sentence, it may and shall be imposed if the offense points to particularly grave for other reasons; the death sentence may also be passed upon juvenile offenders.

* * * * * * *

"XIV. (1) The provisions contained in sections I–IV of this decree apply also to those Poles and Jews who on 1 September 1939 were domiciled or had their residence within the territory of the former Polish State, and who committed criminal offenses in any part of the German Reich other than the Incorporated Eastern Territories. * * *"

It will be observed that the title of the foregoing act refers to "Poles and Jews in the Incorporated Eastern Territories", but Article XIV makes the decree also applicable to acts by Poles and Jews within any part of the German Reich, if on 1 September 1939 they were domiciled within the former Polish State. This section was repeatedly employed by the courts in the prosecution of Poles.

There was promulgated a thirteenth regulation under the Reich citizenship law which illustrates the increasing severity by means

of which the government was attempting to reach a "solution of the Jewish problem" under the impulsion of the progressively adverse military situation. This regulation, under date of 1 July 1943, provides:

"Article 1. (1) Criminal actions committed by Jews shall be punished by the police.

"(2) The provision of the Polish penal laws of 4 December 1941 (RGBl. I, p. 759.) shall no longer apply to Jews.

"Article 2. (1) The property of a Jew shall be confiscated by the Reich after his death.

* * * * * * *

"Article 3. The Reich Minister of the Interior with the concurrence of the participating higher authorities of the Reich shall issue the legal and administrative provisions for the administration and enforcement of this regulation. In doing so he shall determine to what extent the provisions shall apply to Jewish nationals of foreign countries."

By Article 4 it was provided that in the Protectorate of Bohemia and Moravia the regulation shall apply where German administration and German courts have jurisdiction. (1943 RGBl. I, p. 372.)

Not only did the Nazis enact special discriminatory laws against Poles and Jews and political minorities; they also enacted discriminatory laws in favor of members of the Party. By the decree of 17 October 1939, it was provided that "for the area of the Greater German Reich, special jurisdiction in penal matters will be established for—

"1. Professional members of the Reich leadership of the SS.

"2. Professional members of the staffs of those Higher SS and Police Chiefs who possess the authority of issuing orders in those units which have been specially designated under numbers 3 to 6 below:

"3. Members of the SS units for special purposes;

"4. Members of the SS Death Head units (including their reinforcements);

"5. Members of the SS Junker schools;

"6. Members of police units for special purposes."

On 12 March 1938, the German Army invaded Austria. The methods employed "were those of an aggressor." * On the next day Austria was incorporated in the German Reich. As a result of the Munich pact of 29 September 1938, and of threatened invasion, Czechoslovakia was compelled to cede the Sudetenland to

* Trials of the Major War Criminals, op. cit., judgment, volume I, page 194.

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Germany,* and on 16 March 1939, Bohemia and Moravia were incorporated in the Reich as a protectorate. On 1 September 1939, Poland was invaded and thereafter occupied and, later on, Germany, by military force, occupied all or portions of Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, and Russia. These occupations and annexations furnished the motive for an extension into many areas outside the old Reich of the draconic and discriminatory German laws which had been put in force within the old Reich. By the act of 14 April 1939, it was provided:

"Article II, section 6 (2). Persons who are not German nationals are subject to German jurisdiction for offenses—

"(a) to which German criminal law applies,

"(b) if they are prosecuted under a private action provided the action has been brought by a German national.

* * * * * * *

"Section 7. German jurisdiction in the Protectorate of Bohemia and Moravia excludes jurisdiction by the courts of the Protectorate unless otherwise provided."

The decree of 5 September 1939 against public enemies, *supra*, was made "applicable in the Protectorate of Bohemia and Moravia and also for those persons who are not German citizens."

By a decree of 25 November 1939 concerning damage to war material, it is provided in part:

"Section 2. Whoever disturbs or imperils the ordinary function of an enterprise essential to the defense of the Reich or to the supply of the population in that he made a thing serving the enterprise completely or partially unusable or put it out of commission, shall be punished by hard labor or in especially serious cases by death.

* * * * * * *

"Section 6. In the Protectorate of Bohemia and Moravia the provisions of sections 1, 2, * * * and 5 of this decree are valid also for persons who are not nationals of the German state."

The "decree on the extension of the application of criminal law of 6 May 1940" provided in part:

[Article I, section 4] "German criminal law will be applied to the following crimes committed by a foreigner abroad, independently of the laws of the place of commitment:

* Ibid., p. 197.

"1. Crimes committed while holding a German governmental office, as a German soldier or as member of the Reich Labor Service (Reichsarbeitsdienst) or committed against a holder of a German office of the State or the Party, against a German soldier or a member of the Reich Labor Service, while on duty or relating to his duty;

"2. Actions constituting treason or high treason against Germany; * * *."

* * * * * * *

[Article II] "Paragraph 153. * * * A crime committed by a foreigner abroad will be prosecuted by the public prosecutor only if so demanded by the Reich Ministry of Justice. The public prosecutor may abstain from the prosecution of a crime if the same crime has already been punished abroad and if the punishment has been carried out and the sentence to be expected in Germany would, after deducting the time served abroad, not be heavy."

The act of 25 November 1941, *supra,* concerning the confiscation of Jewish property was made applicable in the Protectorate of Bohemia and Moravia and in the Incorporated Eastern Territories.* Of greatest significance in this category was the law against Poles and Jews already cited in another connection. The thirteenth regulation under the Reich Citizenship Law of 1 July 1943, *supra,* was also made applicable within the Protectorate of Bohemia and Moravia "where German administration and German courts have jurisdiction". It was also made applicable to Jews "who are citizens of the Protectorate". (Sec. 4.)

Thus far we have taken note of the substantive criminal law and its extension to occupied and annexed territories, but these laws were not self-executing. For the accomplishment of the ends of aggressive war, the elimination of political opposition and the extermination of Jews in all of Europe, it was deemed necessary to harness the Ministry of Justice and the entire court system for the enforcement of the penal laws in accordance with National Socialist ideology.

By decree of 21 March 1933 Special Courts were established within the district of every court of appeal. Their jurisdiction was rapidly extended. It included the trial of cases arising under the decree relating to the defense against insidious attacks against the government of the national revolution.

The decree of 21 March 1933 provided in part:

"Section 3. (1) The Special Courts shall also be competent

* 1941 RGBl. I, p. 722.

if a crime within their jurisdiction represents also another punishable deed.

"(2) If another punishable act is factually connected with a crime within the jurisdiction of the Special Courts, the proceedings on that other punishable deed against delinquents and participants may be referred to the Special Court by way of connection."

* * * * * * *

"Section 9. (1) No hearings relating to the warrant of arrest will be held.

* * * * * * *

"Section 10. For the defendant who has not yet chosen counsel, counsel has to be appointed at the time when the date for the trial is fixed.

"Section 11. A preliminary court investigation will not take place. * * *

"Section 12. * * * (4) The term of the summons (section 217 of the Code of Criminal Procedure) is 3 days. It can be shortened to 24 hours.

"Section 13. The Special Court can refuse any offer of evidence, if the court has come to the conviction that the evidence is not necessary for clearing up the case.

"Section 14. The Special Court has to pass sentence even if the trial results in showing the act of which the defendant is accused, as not being under the jurisdiction of the Special Court. This does not apply if the act constitutes a crime or offense under the jurisdiction of the Supreme Court or the courts of appeal; in this case the Special Court has to proceed according to section 270, paragraph 1–2 of the Code of Criminal Procedure.

"Section 16. (1) There is no legal appeal against decisions of the Special Courts.

"(2) Applications for a reopening of the trial are to be decided upon by the criminal chamber of the district court. The reopening of the trial in favor of the defendant will also take place if there are circumstances which point to the necessity of reexamining the case in the ordinary procedure. The stipulation of section 363 of the Code of Criminal Procedure remains unaffected. If the application for the reopening of the trial is

justified, the trial will be ordered to take place before the competent ordinary court."[1]

Special Courts were also vested with jurisdiction under the law for the protection against violent political acts of 4 April 1933 under which the death penalty was authorized.[2]

On 1 September 1939 the Special Courts were given jurisdiction under the law concerning listeners to foreign radio broadcasts, and the death sentence was authorized in certain cases.[3] On 5 September 1939 jurisdiction of the Special Court was extended to cases of looting, and the death sentence was authorized. Jurisdiction was also extended to cases of criminal acts exploiting the extraordinary conditions caused by the war. That act further provided:

[Article 5] "In all trials by Special Courts the verdict must be pronounced at once without observation of time limitations if the perpetrator is caught red-handed or if guilt is otherwise obvious".[4]

On 21 February 1940 the Special Courts were expressly given jurisdiction concerning—

[Article 13] "1. Crime and offenses committed under the law of 20 December 1934 concerning treacherous attacks against State and Party, and concerning protection of Party uniforms;

"2. Crimes under section 239a of the Reich Criminal Code and under the law of 22 June 1938 concerning highway robbery by means of highway traps;

"3. Crimes under the decree [1 September 1939] concerning extraordinary measures in regard to radio;

"4. Crimes and offenses under the war economy decree of 4 September 1939;

"5. Crimes under section 1 of the decree of 5 September 1939 against public enemies;

"6. Crimes under sections 1 and 2 of the decree of 5 December 1939 against violent criminals." [5]

The decree further provided:

[Article 14] (1) "The Special Court also has jurisdiction over other crimes and offenses, if the prosecution is of the opinion that immediate sentencing by the Special Court is indicated by the gravity or the outrageousness of the act, on

[1] 1933 RGBl. I, p. 136.
[2] Ibid., p. 162.
[3] 1939 RGBl. I, p. 1683.
[4] 1939 RGBl. I, p. 1679.
[5] 1940 RGBl. I, p. 405.

account of the thereby-aroused public sentiment or in consideration of serious threat to public order or security."

[Article 23] "(1) In all proceedings before a Special Court the sentence must be passed immediately without observation of any reprieves, if the delinquent was caught in the very act or if his guilt is self-evident otherwise.

"(2) In all other cases the term of summons shall be 24 hours. (Articles 217, 218 of the Reich Code of Criminal Procedure (Reichsstrafprozessordnung))."

[Article 25] "(1) The Special Court must hand down a decision in a case, even if the trial shows that the act with which the accused is charged is of such a nature that the Special Court is not competent to deal with it. If, however, the trial shows that the act comes under the jurisdiction of the People's Court, the Special Court refers the matter to the latter court, by decision; Article 270, section 2, of the Reich Code of Criminal Procedure is applicable accordingly.

[Article 26] "(1) There is no legal appeal against a decision of the Special Court."

[Article 34] "The chief public prosecutor may lodge a petition for nullification with the Supreme Court (Reichsgericht) against a final judgment of a judge of the criminal court of the Special Court, within 1 year from the date of its becoming final, if the judgment is not justified because of an erroneous application of law on the established facts.

[Article 35] "(1) The petition for nullification must be submitted in writing to the Supreme Court. This court will decide thereon by judgment based on a trial. With the consent of the chief public prosecutor it can also reach a decision without trial.

"2. The Supreme Court may order a postponement or an interruption of the execution. It may order arrest or internment even prior to the decision on the petition for nullification. The criminal senate (Strafsenat) composed of three members including the president, will decide thereon without a trial, with reservations as to the regulations of article 124, section 3 of the Reich Code of Criminal Procedure." *

The speed with which the Special Courts acted is of significance. In view of the congested dockets of the Special Courts, Freisler, acting for the Minister of Justice, ordered, "a Special Court is, as a rule, to be considered overloaded if a monthly average of more than forty new indictments has been filed with it."

On 4 December 1941, in the law against Poles and Jews, *supra*, it was provided:

* Id.

"IV. The State prosecutor shall prosecute a Pole or a Jew if he considers that punishment is in the public interest.

"V. (1) Poles and Jews shall be tried by a Special Court or by the district judge.

* * * * * * *

"VI. (1) Every sentence will be enforced without delay. The State prosecutor may, however, appeal from the sentence of a district judge to the court of appeal. The appeal has to be lodged within 2 weeks.

"(2) The right to lodge complaints which are to be heard by the court of appeal is reserved exclusively to the State prosecutor.

"VII. Poles and Jews cannot challenge a German judge on account of alleged partiality.

"VIII. * * * (2) During the preliminary inquiry, the State prosecutor may order the arrest and any other coercive measures permissible.

"IX. Poles and Jews are not sworn in as witnesses in criminal proceedings. If the unsworn deposition made by them before the court is found false, the provisions as prescribed for perjury and false statements shall be applied accordingly.

"X. (1) Only the State prosecutor may apply for the reopening of a case. In a case tried before a Special Court, the decision concerning an application for the reopening of the proceedings rests with this court.

"(2) The right to lodge a plea of nullity rests with the State prosecutor general. The decision on the plea rests with the court of appeal.

"XI. Poles and Jews are not entitled to act as prosecutors either in a principal or a subsidiary capacity.

"XII. The court and the State prosecutor shall conduct proceedings within their discretion and according to the principles of the German law of procedure. They may, however, deviate from the provisions of the German law on the organization of courts and on criminal procedure, whenever this may appear to them advisable for the rapid and more efficient conduct of proceedings.

* * * * * * *

"XV. Within the meaning of this decree, the term 'Poles' includes 'Schutzangehoerige' or those who are stateless." *

* 1941 RGBl. I, p. 759.

It will be noted that the procedural rules became progressively more summary and severe as the military situation became progressively more critical.

A major development in the Nazification of the judicial system appears in the establishment of the "People's Court" which was subdivided into a number of senates or departments. We quote:

"When the Supreme Court acquitted three of the four defendants charged with complicity in the Reichstag fire, its jurisdiction in cases of treason was thereafter taken away and given to a newly established 'People's Court' consisting of two judges and five officials of the Party." [1]

The act of 24 April 1934 which established the highly flexible definitions of high treason also provided new judicial machinery for enforcement.

"Article III, section 1. (1) For the trial of cases of high treason the People's Court is established.

"(2) Decisions of the People's Court are made by five members during the trial, by three members outside the trial. This includes the president. The president and one further member must be qualified judges. Several senates may be established." [2]

In section 3 (1) of article III it is provided that "the People's Court is competent for the investigation and decision in the first and last instance in cases of high treason * * *", and in other specified cases.

"Article III, section 3. (2) The People's Court is also competent in such cases where crimes or offenses subject to its competence constitute at the same time another punishable act.

"(3) If another punishable act is in factual connection with a crime or offense subject to the jurisdiction of the People's Court, the trial against the perpetrators and participants of the other punishable act may be brought before the People's Court by way of combination of the respective cases."

* * * * * * *

"[Article III] section 5. (2) Against the decisions of the People's Court no appeal is permitted."

On 1 December 1936, the jurisdiction of the People's Court was extended to include violation of the law against economic sabotage. (*supra.*)

On 14 April 1939, the system was extended to Bohemia and Moravia. We quote:

[1] Trial of the Major War Criminals, op. cit., volume I, page 179.
[2] 1934 RGBl. I, p. 341.

"[Section 1] (2) Furthermore, the Supreme Reich Court and the People's Court will carry out jurisdiction for the Protectorate Bohemia and Moravia." [1]

The extent of jurisdiction was defined as follows:

"Section 6. (1) German nationals are subject to German jurisdiction in the Protectorate of Bohemia and Moravia.

"(2) Persons who are not German nationals are subject to German jurisdiction for offenses—

"*1.* to which German criminal law applies,

"*2.* if they are prosecuted under a private action provided the action has been brought by a German national.

* * * * * * *

"Section 7. German jurisdiction in the Protectorate of Bohemia and Moravia excludes jurisdiction by the courts of the Protectorate unless otherwise provided.

"Section 8. The German courts in the Protectorate of Bohemia and Moravia administer justice in the name of the German people." [2]

By the law of 16 September 1939, provision was made for extraordinary appeal against final judgments. We quote in part:

"Article 2, section 3. (1) Against legally valid sentences in criminal proceedings the senior Reich prosecutor at the Reich Supreme Court can file an appeal within one year after they have been pronounced, if, because of serious misgiving, concerning the justness of the sentence, he considers a new trial and a new decision in the cases necessary.

"(2) On the basis of the appeal, the Special Penal Senate of the Reich Supreme Court will try the cases a second time.

"(3) If the first sentence was passed by the People's Court, the appeal is to be filed by the senior Reich prosecutor at the People's Court, and the second trial is to be held by the Special Senate of the People's Court. The same applies to the sentences of courts of appeal in cases which the senior Reich prosecutor at the People's Court had transferred to the public prosecutor attached to the court of appeals, or which the People's Court had transferred for trial and sentencing to the courts of appeal.

* * * * * * *

"Section 5. (1) The Special Senate of the People's Court consists of the president and of four members." [3]

[1] 1939 RGBl. I, p. 752.
[2] Id.
[3] Ibid., p. 1841.

On 21 February 1940 the jurisdiction of the People's Court was redefined and again extended to cover high treason, treason, severe cases of damaging war material, failure to report an intended crime, crimes under section 5 (1) of the decree of 28 February 1933 concerning protection of people and State; crimes of economic sabotage, crime of undermining German military efficiency, and others.

On 6 May 1940 a broad decree was issued concerning the jurisdiction of German courts for the "territory of the Greater German Reich." That decree provided:

"German criminal law will be applied to the crime of a German national, no matter whether it is committed in Germany or abroad. For a crime committed abroad, which according to the laws of the place of commitment is not punishable, German criminal law will not be applied, unless such action would constitute a crime according to the sound sentiment for justice of the German people on account of the particular conditions prevailing at the place of commitment." *

* * * * * * *

"Paragraph 4. German criminal law will be applied also in case of crimes committed by a foreigner in Germany.

"German criminal law will be applied to crimes committed by a foreigner abroad, if they are punishable according to the penal code of the territory where they are committed, or if such territory is not subject to any jurisdiction and if—

"1. the criminal has obtained German nationality after the crime, or

"2. the crime is directed against the German people or a German national, or

"3. the criminal is apprehended in Germany and is not extradited, although the nature of his crime would permit an extradition.

"German criminal law will be applied to the following crimes committed by a foreigner abroad, independently of the laws of the place of commitment:

"1. Crimes committed while holding a German governmental office, as a German soldier or as a member of the Reich Labor Service (Reichsarbeitsdienst) or committed against a holder of a German office or the State or the Party, against a German soldier or a member of the Reich Labor Service, while on duty or relating to his duty;

"2. Actions constituting treason or high treason against Germany," and in other special cases.

* 1940 RGBl. I, p. 754.

Certain additional provisions intimately affecting the rights of accused persons deserve special mention.

"Section 10. For the defendant, who has not yet chosen counsel, counsel has to be appointed at the time when the date for the trial is fixed.

"Section 11. A preliminary court investigation will not take place. * * *" [1]

By a decree of the Reich Minister of Justice, Dr. Thierack, on 13 December 1944, it was provided:

"Article 2, paragraph 12. Limited admittance of defense counsel.

"(1) In any one criminal case, several lawyers or professional representatives may not act side by side as chosen counsel for one defendant.

"(2) The rules about obligatory representation by defense counsel do not apply. The presiding judge appoints a defense counsel for the whole or part of the proceedings if the difficulty of the material or legal problems require assistance by a defense counsel, or if the defendant, in due consideration of his personality, is unable to defend himself personally. * * *" [2]

On 16 February 1934 it was provided that:

"Article 2. The president of the Reich has the prerogatives for *nulle prosequi* and clemency (formerly held by the States).

"Amnesties can be promulgated only by Reich law." [3]

This centralization of the clemency powers marks a radical departure from the system which prevailed prior to 1933 and was the means by which the will of Hitler became a dominating force in the Ministry of Justice and in the courts. Other provisions are as follows:

"Even if the judgment has been contested only by the defendant or his legal representative, or by the prosecution in his favor, it can be changed against the interests of the defendant.[4]

"In penal matters for which the People's Court, the superior district court, or the court of assizes are competent, preexamination is conducted upon application of the prosecution, if, after due consideration, the prosecution thinks it necessary.

"In other penal matters as well, preexamination takes place on application of the prosecution. The prosecution should make

[1] 1933 RGBl. I, p. 136.
[2] 1944 RGBl. I, p. 339.
[3] 1934 RGBl. I, p. 91.
[4] [Article 1, 4, b] Law of 28 June 1935; 1935 RGBl. I, page 844.

such an application only if unusual circumstances make it necessary to have a judge conduct such preexamination." [1]

An illuminating comment on the law is made by a German text writer.

"A criminal case on which verdict has been passed must not again become the subject of another criminal proceeding. This exclusive effect pertains to the subject of the case both as regards the crime and the criminal. * * * According to the findings of the German supreme court and to the prevailing theory in accord with these findings, the effect of *ne bis in idem* includes the history of the case submitted to the court for verdict. * * * This theory, however, leads to unbearable consequences. In order to avoid these unbearable consequences some courts, recently, have permitted the breach of the principle against double jeopardy in exceptional cases where jeopardy of a second trial is necessitated by the sound sense of justice. * * *" [2]

On 21 March 1942 Adolf Hitler promulgated a decree regarding the simplification of the administration of justice. We quote the following excerpts:

"In penal cases, * * * the formal opening of the main proceeding must be eliminated. * * * (Sec. I.)

"Indictments and judicial decisions must be more tersely written by restricting them to the absolutely necessary. (Sec. II.)

"The cooperation of professional associate judges in judicial decisions must be restricted. (Sec. III.)

"I commission the Reich Minister of Justice, in agreement with the Reich Minister and Chief of the Reich Chancellery and with the Chief of the Party Chancellery, to issue the legal provisions necessary for the execution of this decree. I empower the Reich Minister of Justice to make the necessary administrative provisions and to decide any doubtful questions by administrative means. (Sec. VI.)"

On 13 August 1942 a decree was issued by the defendant Schlegelberger as Reich Minister of Justice in charge of the Ministry—

"Article 4. * * * Decisions by the criminal court, the Special Court, and the criminal senate of the circuit courts of appeal may be made solely by the president or his regular deputy, if he considers the cooperation of his associates dispensable in view of the simplicity of the nature and the legal status of the case, and if the public prosecutor agrees.

[1] Ibid., article 4, 1, a.

[2] "German Criminal Procedure," by Heinrich Henkel, (Hamburg 1943) pages 440–442.

"Article 5. Main proceeding without public prosecutor—In the proceeding before the district judge, the public prosecutor may renounce his participation in the main proceeding.

"Article 7 (2). The validity of an objection is decided on by the president of the deciding court. The admissibility of an appeal is decided on by the president of the court of appeal (Berufungsstrafkammer); he is also authorized to bring about a decision of the court. These decisions are not subject to any proof, and are incontestable.

"Article 7 (3). Further objections will not be admitted."

We have already quoted at length from the decree of 4 December 1941 concerning the organization of criminal jurisdiction against Poles and Jews in the Incorporated Eastern Territories. That decree also contained provisions for the establishment of martial law from which we quote:

"Article XIII (1). Subject to the consent of the Reich Minister of the Interior and the Reich Minister of Justice, the Reich governor may, until further notice, enforce martial law in the Incorporated Eastern Territories, either in the whole area under his jurisdiction or in parts thereof, upon Poles and Jews guilty of grave excesses against the Germans or of other offenses which seriously endanger the German work of reconstruction.

"(2) The courts established under martial law impose the death sentence. They may, however, dispense with punishment and refer the case to the Secret State Police (Gestapo)."

A final step in the development of summary criminal procedure was taken on 15 February 1945 by a decree of the Reich Minister of Justice, Dr. Thierack. The decree provided:

"II. 1. The court martial consists of a judge of a criminal court as president and of a member of the political leader corps, or of a leader of another structural division of the NSDAP and an officer of the Wehrmacht, the Waffen SS, or the police, as associate judges. * * *

"III. 1. The courts martial have jurisdiction for all kinds of crimes endangering the German fighting power or undermining the people's military efficiency. * * *

"IV. 1. The sentence of the court martial will be either death, acquittal, or commitment to the regular court. The consent of the Reich defense commissar is required. He gives orders for the time, place, and kind of execution. * * * "*

* 1945 RGBl. I, p. 30.

Pursuant to a decree of the Fuehrer of 16 March 1939, the defendant Schlegelberger, as Reich Minister of Justice in charge, together with the Minister of the Interior and the Chief of the Armed Forces, Keitel, issued a decree which reads in part as follows:

"Section 1. In case of direct attack by a non-German citizen against the SS or the German Police or against any of their members, the Reich Leader of the SS and the Chief of the German Police in the Reich Ministry of the Interior may establish the jurisdiction of a combined SS court and police court, by declaring that special interests of parts of the SS or of the Police require that judgment be given by an SS and police court.

"This declaration shall be sent to the Reich Protector of Bohemia and Moravia. The SS and police court, which shall have jurisdiction in individual cases, shall be specified by the Reich Leader of the SS and Chief of the German Police in the Reich Ministry of the Interior.

"Section 2. If the offense directly injures the interests of the armed forces, the Reich Leader of the SS and chief of the German Police in the Reich Ministry of the Interior, and the chief of the Supreme Command of the Armed Forces shall reach an agreement as to whether the case shall be prosecuted by an SS and police court or by a military court.[1]

"Article II. Exemption of the Reich court from being bound to precedent sentence: The Reich Court as the highest German tribunal must consider it its duty to effect an interpretation of the law which takes into account the change of ideology and of legal concepts which the new State has brought about. In order to be able to accomplish this task without having to show consideration for the jurisdiction of the past brought about by other ideology and other legal concepts, it is ruled as follows:

"When a decision is made about a legal question, the Reich Court can deviate from a decision laid down before this law went into effect." [2]

THE LAW IN ACTION

We pass now from the foregoing incomplete summary of Nazi legislation to a consideration of the law in action, and of the influence of the "Fuehrer principle" as it affected the officials of the Ministry of Justice, prosecutors, and judges. Two basic principles controlled conduct within the Ministry of Justice. The first concerned the absolute power of Hitler in person or by delegated authority to enact, enforce, and adjudicate law. The second con-

[1] 1942 RGBl. I, p. 475.

[2] Law of 28 June 1935; 1935 RGBl. I, p. 844.

cerned the incontestability of such law. Both principles were expounded by the learned Professor Jahrreiss, a witness for all of the defendants. Concerning the first principle, Dr. Jahrreiss said:

"If now in the European meaning one asks about legal restrictions, and first of all one asks about restrictions of the German law, one will have to say that restrictions under German law did not exist for Hitler. He was *legibus solutus* in the same meaning in which Louis XIV claimed that for himself in France. Anybody who said something different expresses a wish that does not describe the actual legal facts."

Concerning the second principle, Jahrreiss supported the opinion of Gerhard Anschuetz, "crown jurist of the Weimar Republic", who holds that if German laws were enacted by regular procedure, judicial authorities were without power to challenge them on constitutional or ethical grounds. Under the Nazi system, and even prior thereto, German judges were also bound to apply German law even when in violation of the principles of international law. As stated by Professor Jahrreiss:

"To express it differently, whether the law has been passed by the State in such a way that it was inconsistent with international law on purpose or not, that could not play any part at all; and that was the legal state of affairs, regrettable as it may be."

This, however, is not to deny the superior authority of international law. Again we quote a statement of extraordinary candor by Professor Jahrreiss:

"On the other hand, certainly there were legal restrictions for Hitler under international law. * * * He was bound by international law. Therefore, he could commit acts violating international law. Therefore, he could issue orders violating international law to the Germans."

The conclusion to be drawn from the evidence presented by the defendants themselves is clear: In German legal theory Hitler's law was a shield to those who acted under it, but before a tribunal authorized to enforce international law, Hitler's decrees were a protection neither to the Fuehrer himself nor to his subordinates, if in violation of the law of the community of nations.

In German legal theory, Hitler was not only the supreme legislator, he was also the supreme judge. On 26 April 1942 Hitler addressed the Reichstag in part as follows:

"I do expect one thing: That the nation gives me the right to intervene immediately and to take action myself wherever a person has failed to render unqualified obedience. * * *"

"I therefore ask the German Reichstag to confirm expressly that I have the legal right to keep everybody to his duty and

to cashier or remove from office or position without regard for his person, or his established rights, whoever, in my view and according to my considered opinion, has failed to do his duty."

"* * * From now on, I shall intervene in these cases and remove from office those judges who evidently do not understand the demand of the hour."

On the same day the Greater German Reichstag resolved in part as follows:

"* * * the Fuehrer must have all the rights postulated by him which serve to further or achieve victory. Therefore—without being bound by existing legal regulations—in his capacity as leader of the nation, Supreme Commander of the Armed Forces, governmental chief and supreme executive chief, as supreme justice*, and leader of the Party—the Fuehrer must be in a position to force with all means at his disposal every German, if necessary, whether he be common soldier or officer, low or high official or judge, leading or subordinate official of the Party, worker or employee, to fulfill his duties. In case of violation of these duties, the Fuehrer is entitled after conscientious examination, regardless of so-called well-deserved rights, to mete out due punishment, and to remove the offender from his post, rank and position, without introducing prescribed procedures."

The assumption by Hitler of supreme governmental power in all departments did not represent a new development based on the emergency of war. The declaration of the Reichstag was only an echo of Hitler's declaration of 13 July 1934. After the mass murders of that date (the Roehm purge) which were committed by Hitler's express orders, he said:

"Whenever someone reproaches me with not having used the ordinary court for their sentencing, I can only say: 'In this hour I am responsible for the fate of the German nation and hence the supreme law lord* of the German people.' "

The conception of Hitler as the supreme judge was supported by the defendant Rothenberger. We quote (*NG–075, Pros. Ex. 27*):

"However, something entirely different has occurred; with the Fuehrer a man has risen within the German people who awakens the oldest, long forgotten times. Here is a man who in his position represents the ideal of the judge in its perfect sense, and the German people elected him for their judge—first of all, of course, as 'judge' over their fate in general, but also as 'supreme magistrate* and judge.' "

* The three expressions "supreme justice," "supreme law lord" and "supreme magistrate" are three different translations of the German term "Oberster Gerichtsherr."

In the same document the defendant Rothenberger expounded the National Socialist theory of judicial independence. He said:

"Upon the fact that the judge can use his own discretion is founded the magic of the word 'judge.' "

He asserted that "every private and Party official must abstain from all interference or influence upon the judgment," but this statement appears to be mere window-dressing, for after his assertion that a judge "must judge like the Fuehrer", he said:

"In order to guarantee this, a direct liaison officer without any intermediate agency must be established between the Fuehrer and the German judge, that is, also in the form of a judge, the supreme judge in Germany, the 'Judge of the Fuehrer'. He is to convey to the German judge the will of the Fuehrer by authentic explanation of the laws and regulations. At the same time he must upon the request of the judge give binding information in current trials concerning fundamental political, economic, or legal problems which cannot be surveyed by the individual judge."

Thus, it becomes clear that the Nazi theory of the judicial independence was based upon the supreme independence of the Fuehrer, which was to be channelized through the proposed liaison officer from Fuehrer to judge.

On 13 November 1934, Goering, in an address before the Academy of German Law, expressed similar sentiments concerning the position of Hitler.

"Gentlemen, for the German nation this matter was settled by the words of the judge in this hour, the Fuehrer, who stated that in this hour of uttermost danger he alone, the Fuehrer elected by the people, was the supreme and only judge of the German nation."

The defendant Schlegelberger, on 10 March 1936 said:

"It should be emphasized, however, that in the sphere of the law, also, it is the Fuehrer and he alone who sets the pace of development."

To the same effect we quote Reich Minister of Justice Dr. Thierack, who, on 5 January 1943 said:

"So also with us the conviction has grown in these 10 years in which the Fuehrer has led the German people that the Fuehrer is the chief justice and the supreme judge of the German people."

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On 17 February 1943 the defendant Under Secretary Dr. Rothenberger summed up his legal philosophy with the words (*NG–415, Pros. Ex. 26*) :

"The judge is on principle bound by the law. The laws are the orders of the Fuehrer."

As will be seen, the foregoing pronouncement by the leaders in the field of Nazi jurisprudence were not mere idle theories. Hitler did, in fact, exercise the right assumed by him to act as supreme judge, and in that capacity in many instances he controlled the decision of the individual criminal cases.

The evidence demonstrates that Hitler and his top-ranking associates were by no means content with the issuance of general directives for the guidance of the judicial process. They tenaciously insisted upon the right to interfere in individual criminal sentences. In discussing the right to refuse confirmation of sentences imposed by criminal courts, Martin Bormann, as Chief of the Party Chancellery, wrote to Dr. Lammers, Chief of the Reich Chancellery, as follows (*NG–102, Pros. Ex. 75*) :

"When the Fuehrer has expressly requested the right of direct interference over all formal legal provisions, this is emphasizing the very importance of the modification of a judicial sentence."

The Ministry of Justice was acutely conscious of the interference by Hitler in the administration of criminal law. On 10 March 1941 Schlegelberger wrote to Reich Minister Lammers in part as follows (*NG–152, Pros. Ex. 63*) :

"It has come to my knowledge that just recently a number of sentences passed have roused the strong disapproval of the Fuehrer. I do not know exactly which sentences are concerned, but I have ascertained for myself that now and then sentences are pronounced, which are quite untenable. In such cases I shall act with the utmost energy and decision. It is, however, of vital importance for justice and its standing in the Reich, that the head of the Ministry of Justice should know to which sentences the Fuehrer objects, * * *."

On the same date Schlegelberger wrote to Hitler in part as follows (*NG–152, Pros. Ex. 63*) :

"In the course of the verdicts pronounced daily, there are still judgments which do not entirely comply with the necessary requirements. In such cases I will take the necessary steps. * * *

"Apart from this it is *desirable to educate the judges more and more to a correct way of thinking, conscious of the national destiny.* For this purpose it would be invaluable, if you, my Fuehrer, could let me know if a verdict does not meet with your approval. The judges are responsible to you, my Fuehrer; they are conscious of this responsibility, and are firmly resolved to discharge their duties accordingly. * * * Heil, my Fuehrer!" [Emphasis added.]

Hitler not only complied with the foregoing request, but proceeded beyond it. Upon his personal orders persons who had been sentenced to prison terms were turned over to the Gestapo for execution. We quote briefly from the testimony of Dr. Hans Gramm, who for many years was personal Referent to the defendant Schlegelberger, and who testified in his behalf.

"Q. Do you know anything about transfers of condemned persons to the police, or to the Gestapo?

"A. I know that it frequently occurred that Hitler gave orders to the police to call for people who had been sentenced to prison terms. To be sure, it was an order from Hitler directed to the police to the effect that the police had to take such and such a man into their custody. These orders had rather short limits. As a rule, there was only a time limit of 24 hours before execution by the police, after which the police had to report that it had been executed. These transfers, as far as I can remember, took place only during the war." (*Tr. pp. 4717–4718.*)

This procedure was well-known in the Ministry of Justice. Gramm was informed by the defendant Schlegelberger that the previous Reich Minister of Justice, Dr. Guertner, had protested to Dr. Lammers against this procedure and had received the reply—

"That the courts could not stand up to the special requirements of the war, and that therefore these transfers would have to continue."

The only net result of the protest was that "from that time on in every individual case when such a transfer had been ordered, the Ministry of Justice was informed about that."

The witness, Dr. Lammers, former Chief of the Reich Chancellery, whose hostility toward the prosecution and evasiveness were obvious, conceded that the practice was continued under Schlegelberger, though Lammers stated that Schlegelberger never agreed to it.

By reference to case histories we will illustrate three different methods by which Hitler, through the Ministry of Justice, imposed

his will in disregard of judicial proceedings. One, Schlitt, had been sentenced to a prison term, as a result of which Schlegelberger received a telephone call from Hitler protesting the sentence. In response the defendant Schlegelberger on 24 March 1942 wrote in part as follows (*NG–152, Pros. Ex. 63*) :

"I entirely agree with your demand, my Fuehrer, for very severe punishment for crime, and I assure you that the judges honestly wish to comply with your demand. Constant instructions in order to strengthen them in this intention and the increase of threats of legal punishment have resulted in a considerable decrease of the number of sentences to which objections have been made from this point of view, out of a total annual number of more than 300,000.

"I shall continue to try to reduce this number still more, and if necessary, I shall not shrink from personal measures, as before.

"In the criminal case against the building technician, Ewald Schlitt, from Wilhelmshaven, I have applied through the public prosecutor for an extraordinary plea for nullification against the sentence, at the special senate of the Reich Court. I will inform you of the verdict of the special senate immediately it has been given."

On 6 May 1942, Schlegelberger informed Hitler (*NG–102, Pros. Ex. 75*) that the 10-year sentence against Schlitt was "quashed within 10 days;" and that "Schlitt was sentenced to death and executed at once."

In the case against Anton Scharff, the sentence of 10 years' penal servitude had been imposed. Thereupon, on 25 May 1941, Bormann wrote to Dr. Lammers (*NG–611, Pros. Ex. 64*): "The Fuehrer believes this sentence entirely incomprehensible * * *. The Fuehrer requests that you inform State Secretary Schlegelberger again of his point of view."

On 28 June 1941, defendant Schlegelberger wrote Dr. Lammers (*NG–611, Pros. Ex. 64*): "I am very obliged to the Fuehrer for informing me, on my request, of his conception of atonements of black-out crimes in reference to the sentence of the Munich Special Court against Anton Scharff.

"I shall reinstruct the presidents of the courts of appeal and the chief public prosecutors of this conception of the Fuehrer as soon as possible."

As a final illustration of a general practice, we refer to the case of the Jew Luftgas, who had been sentenced to 2½ years imprisonment for hoarding eggs. On 25 October 1941, Lammers notified Schlegelberger: "The Fuehrer wishes that Luftgas be sentenced

to death." On 29 October 1941, Schlegelberger wrote Lammers: "* * * I have handed over to the Gestapo for the purpose of execution the Jew Markus Luftgas who had been sentenced to 2½ years of imprisonment * * *".

Although Hitler's personal intervention in criminal cases was a matter of common occurrence, his chief control over the judiciary was exercised by the delegation of his power to the Reich Minister of Justice, who on 20 August 1942 was expressly authorized "to deviate from any existing law."

Among those of the Ministry of Justice who joined in the constant pressure upon the judges in favor of more severe or more discriminatory administration of justice, we find Thierack, Schlegelberger, Klemm, Rothenberger, and Joel. Neither the threat of removal nor the sporadic control of criminal justice in individual cases was sufficient to satisfy the requirements of the Ministry of Justice. As stated by the defendant Rothaug, "only during 1942, after Thierack took over the Ministry, the 'guidance' of justice was begun. * * * There was an attempt to guide the administration of justice uniformly from above."

In September 1942 Thierack commenced the systematic distribution to the German judges of Richterbriefe. The first letter to the judges under date of 1 October 1942 called their attention to the fact that Hitler was the supreme judge and that "leadership and judgeship have related characters." We quote (*NG–298, Pros. Ex. 81*):

> "A corps of judges like this will not slavishly use the crutches of law. It will not anxiously search for support by the law, but, with a satisfaction in its responsibility, it will find within the limits of the law the decision which is the most satisfactory for the life of the community."

In the Judges' Letters Thierack discussed particular decisions which had been made in the various courts and which failed to conform to National Socialist ideology. As an illustration of the type of guidance which was furnished by the Ministry of Justice to the German judiciary, we cite a few instances from the Richterbriefe.

A letter to the judges of 1 October 1942 discusses a case decided in a district court on 24 November 1941. A special coffee ration had been distributed to the population of a certain town. A number of Jews applied for the coffee ration, but did not receive it, being "excluded from the distribution *per se*". The food authorities imposed fines upon the Jews for making the unsuccessful application. In 500 cases the Jews appealed to the court and the judge informed the food authorities that the imposition of a fine could

not be upheld for legal reasons, one of which was the statute of limitations. In deciding favorably to the Jews, the court wrote a lengthy opinion stating that the interpretation on the part of the food authorities was absolutely incompatible with the established facts. We quote, without comment, the discussion of the Reich Minister of Justice concerning the manner in which the case was decided (*NG–298, Pros. Ex. 81*) :

> "The ruling of the district court, in form and content matter, borders on embarrassing a German administrative authority to the advantage of Jewry. The judge should have asked himself the question: What is the reaction of the Jew to this 20-page long ruling, which certifies that he and the 500 other Jews are right and that he won over a German authority, and does not devote one word to the reaction of our own people to this insolent and arrogant conduct of the Jews. Even if the judge was convinced that the food office had arrived at a wrong judgment of the legal position, and if he could not make up his mind to wait with his decision until the question, if necessary, was clarified by the higher authorities, he should have chosen a form for his ruling which under any circumstances avoided harming the prestige of the food office and thus putting the Jew expressly in the right toward it."

One of the Richterbriefe also discusses the case of a Jew who, after the "Aryanization of his firm," attempted to get funds transferred to Holland without a permit. He also attempted to conceal some of his assets. Concerning this case the judges of Germany received the following "guidance" (*NG–298, Pros. Ex. 81*) :

> "The court applies the same criteria for the award of punishment as it would if it were dealing with a German fellow citizen as defendant. This cannot be sanctioned. The Jew is the enemy of the German people, who has plotted, stirred up, and prolonged this war. In doing so, he has brought unspeakable misery upon our people.
>
> "Not only is he of a different race, but he is also of inferior race. Justice, which must not measure different matters by the same standard, demands that just this racial aspect must be considered in the award of punishment."

Space does not permit the citation of other instances of this form of perverted political guidance of the courts. Notwithstanding solemn protestations on the part of the minister that the independence of the judge was not to be affected, the evidence satisfies us beyond a reasonable doubt that the purpose of the judicial guidance was sinister and was known to be such by the Ministry of Justice and by the judges who received the directions.

If the letters [the Judges' Letters] had been written in good faith with the honest purpose of aiding independent judges in the performance of their duties, there would have been no occasion for the carefully guarded secrecy with which the letters were distributed. A letter of 17 November 1942 instructs the judges that the letters are to be "carefully locked up to avoid that they get into the hands of unauthorized persons. The receivers are subject to official secrecy as far as the contents of the judges' letters are concerned."

In a letter of 17 November 1942 Thierack instructs the judges that "in cases where judges and prosecutors are suspected of political unreliability they are to be excluded in a suitable manner from the list of subscribers to the Judges' Letters."

Not being content with regimenting the judges and chief prosecutors and making them subservient to the National Socialist administration of justice, Dr. Thierack next took up the regimentation of the lawyers. On 11 March 1943 he wrote to the various judges and prosecutors announcing the proposed distribution of confidential lawyers' letters. An examination of those letters convinces the Tribunal that the actual, though undeclared purpose, was to suggest to defense counsel that they avoid any criticism of National Socialist justice and refrain from too much ardor in the defense of persons charged with political crimes.

Not only did Thierack exert direct influence upon the judges, but he employed as his representative the most sinister, brutal, and bloody judge in the entire German judicial system. In a letter to Freisler, president of the People's Court, Thierack said that the judgment of the People's Court must be "in harmony with the leadership of the State". He urges Freisler to have every charge submitted to him and to recognize the cases in which it was necessary "in confidential and convincing discussion with the judge competent for the verdict to emphasize what is necessary from the point of view of the State." He continues:

> "As a general rule, the judge of the People's Court must get used to regarding the ideas and intentions of the State leadership as the primary factor and the individual fate which depends on him as only a secondary factor. * * *"

He continues:

> "I will try to illustrate this with individual cases.
>
> "1. If a Jew—and a leading Jew at that—is charged with high treason—even if he is only an accomplice therein, he has behind him the hate and the will of Jewry to exterminate the German people. As a rule this will therefore be *high treason* and must be punished by the death penalty."

He concludes with the following admonition to Freisler, which appears to have been wholly unnecessary:

"In case you should ever be in doubt as to which line to follow or which political necessities to take into consideration, please address yourself to me in all confidence."

It will be recalled that on 26 April 1942 Hitler stated that he would remove from office "those judges who evidently do not understand the demand of the hour." The effect of this pronouncement upon such judges as still retained ideals of judicial independence can scarcely be overestimated. The defendant Rothenberger stated it was "absolutely crushing."

In a private letter to his brother, the defendant Oeschey expressed his view of the situation created by Hitler's interference in the following words:

"After the well known Fuehrer speech things developed in a frightful manner. I was never a supporter of the stubborn doctrine of the independence of the judge which granted the judge within the frame of the law the position of a public servant, only subordinated to his conscience but otherwise 'neutral', that is, politically completely independent. * * * Now it is an absurdity to tell the judge in an individual case which is subject to his decision how he has to decide. Such a system would make the judge superfluous; such things have now come to pass. Naturally it was not done in an open manner; but even the most camouflaged form could not hide the fact that a directive was to be given. Thereby the office of judge is naturally abolished and the proceedings in a trial become a farce. I will not discuss who bears the guilt of such a development."

The threat alone of the removal was sufficient to impair the independence of the judges, but the evidence discloses that measures were actually carried out for the removal or transfer of judges who proved unsatisfactory from the Party standpoint. On 29 March 1941 Schlegelberger received a letter from the chief of the Reich Chancellery protesting against the sentence which had been imposed against the Polish farmhand Wojciesk. The court at Lueneburg had recognized some extenuating circumstances in the case. Schlegelberger was advised as follows:

"The Fuehrer urges you immediately to take the steps necessary to preclude repetition in other courts of the view of the Lueneberg court."

On 1 April 1941 Schlegelberger wrote to the Chief of the Reich Chancellery informing him that "by means of a circular with the order for immediate transmittal to all judges and public prosecutors, I brought the mistake in the viewpoint as it is shown in this

passage of the court's statement to the knowledge of the penal justice without delay. I consider it impossible that such an incident will occur again."

Schlegelberger ordered the responsible president of the appellate court and the judges concerned in the case to report to him on the next day, and on the third day of April 1941 he advised as follows:

"* * * I beg to inform you that the presiding judge of the criminal division which passed the sentence in the case of the Polish farmhand Wolay Wojciesk, is no longer chairman, and the two associate judges have been replaced by other associate judges."

There is substantial evidence to the effect that the witness Ostermeier, who was a judge on the Special Court in Nuernberg, was removed from his office because of his lenient attitude in criminal cases.

In a letter addressed to the Chief of the Reich Chancellery and to the head of the Party Chancellery on 20 October 1942, Thierack discussed the necessity of the removal or the transfer of officials in the Ministry of Justice who are "not suited for the new tasks" and adds that it may become necessary "in some particular cases to transfer or retire such judges as cannot be kept in their present positions." He therefore asked approval "so that in urgent cases judges and officials of the Reich administration of justice may be transferred by me to other positions * * * or may be retired by me."

On 3 March 1942 Bormann gave his approval in general terms to Thierack's proposal. A like approval was given by Dr. Lammers on 13 November 1942.

In connection with the discussion of removals, we find a list of proposed staff reductions in which seventy-five judges and prosecutors are named. Among the reasons stated for reduction we find the following: persons of Jewish ancestry, 4; persons having a Jewish wife, 4; lack of cooperation with Party, 4; religious grounds, 1; not a Party member, 20; pro-Jewish or pro-Pole, 4.

The conception of the national leadership of the Reich concerning the function of the law under the influence of the Party ideology must also be briefly noted.

On 22 July 1942 Reich Minister Dr. Goebbels addressed the members of the People's Court. The speech was reported in part as follows (*NG–417, Pros. Ex. 23*):

"While making his decisions the judge had to proceed less from the law than from the basic idea that the offender was to

be eliminated from the community. During a war it was not so much a matter of whether a judgment was just or unjust but only whether the decision was expedient. The State must ward off its internal foes in the most efficient way and wipe them out entirely. The idea that the judge must be convinced of the defendant's guilt must be discarded completely. The purpose of the administration of the law was not in the first place retaliation or even improvement but maintenance of the State. One must not proceed from the law but from the resolution that the man must be wiped out."

On 14 September 1935 Hans Frank, Reichsleiter of the Nazi Party and president of the Academy of German law, said (*NG–777, Pros. Ex. 19*):

"By means of the law of 18 June 1935, the liberalist foundation of the old penal code 'no penalty without a law' was definitely abandoned and replaced by the postulate, 'no crime without punishment', which corresponds to our conception of the law.

"In the future, criminal behavior, even if it does not fall under formal penal precepts, will receive the deserved punishment if such behavior is considered punishable according to the healthy feelings of the people."

This is the Hans Frank (since hanged) who at his trial testified concerning the racial persecution in which he had participated. He said:

"A thousand years will pass and this guilt of Germany will still not be erased."

On 10 March 1936 the defendant Schlegelberger said (*NG–538, Pros. Ex. 21*):

"In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also to be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto."

Reich Minister Thierack on 5 January 1943 said (*NG–275, Pros Ex. 25*):

"The inner law of the guardian of justice is national socialism; the written law is only to be an aid to the interpretation of National Socialist ideas."

In the words of the defendant Rothenberger the project was "to 'organize' Europe anew and to create a new world philosophy." Again, he said (*NG–075, Pros. Ex. 27*) :

> "* * * this reaction of 'antagonism toward law' is justified because the *present moment* absolutely demands a rigid restriction of the power of law. He who is striding gigantically toward a new world order cannot move in the limitation of an orderly administration of justice."

Strangely enough we find the Nazi judicial system condemned by a judge who in practice was its most fanatical adherent. The defendant Rothaug testified as follows:

> "As of every other civil servant, of the judge there was demanded not only obedience but also loyalty and an inner connection with the doctrine of the State. The change-over of the judiciary to that different intellectual level was attempted *via* the political factor of the administration of justice, and that was when things came to grief; and it was then that the notorious 'back door' which I have mentioned, took effect."

After discussing the extraordinary legal remedies by which final judgments in criminal cases were set aside by means of the nullification plea and the extraordinary objection, Rothaug said:

> "As far as that went no objections could be made. What was more dangerous was the influence by means of Judges' Letters and the guidance of jurisdiction."

To the domination by Hitler and the political "guidance" of the Ministry of Justice must be added the direct pressure of Party functionaries and police officials. The record is replete with testimony of specific instances of interference in the administration of justice by officials of Party and police. But for the demonstration of the viciousness and universality of the practice it is only necessary to cite the words of the defendants themselves.

The defendant Rothenberger describes the manner in which the "administration of justice was burdened by the Party and by the SS", and referred in his testimony to the "thousand little Hitlers who every day jeopardized the independence of the individual judge."

The defendant Schlegelberger spoke with more caution:

> "If in a trial, testimonials of political conduct were submitted for the characterization of the accused, it has to be left to the judge's dexterity to avoid conflict with the department which furnishes the testimonial of political conduct."

The defendant Lautz testified concerning attempted interference

with his duties by the SS. We have already quoted the opinion of the defendant Oeschey as expressed in a letter to his brother.

A reliable witness, Dr. Hanns Anschuetz, testified:

> "After the issuance of the German Civil Service Code, strong pressure was brought to bear upon all officials, including judges, to join the NSDAP, or not to reject requests to join; otherwise there existed the danger that they might be retired or dismissed. But once a Party member, a judge was under Party discipline and Party jurisdiction, which dominated his entire life as official and as private person."

The witness Wilhelm Oehlicker, formerly a justice official and at present judge in Hamburg, testified, that, "the longer the war proceeded, in my opinion the more and more they (Party officials) tried to interfere with the courts and influence the courts directly."

The final degradation of the judiciary is disclosed in a secret communication by Ministerial Director Letz of the Reich Ministry of Justice to Dr. Vollmer, also a ministerial director in the department. Not only were the judges "guided" and at times coerced; they were spied upon. We quote:

> "Moreover, I know from documents, which the minister produces from time to time out of his private files, that the Security Service takes up special problems of the administration of justice with thoroughness and makes summarized situation reports about them. As far as I am informed, a member of the Security Service is attached to each judicial authority. This member is obliged to give information under the seal of secrecy. This procedure is secret and the person who gives the information is not named. In this way we get, so to say, anonymous reports. Reasons given for this procedure are of State political interest. As long as the direct interests of the State security are concerned, nothing can be said against it, especially in wartime."

In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office. If the evidence cited *supra* does not demonstrate the utter destruction of judicial independence and impartiality, then we "never writ nor no man ever proved." The function of the Nazi courts was judicial only

in a limited sense. They more closely resembled administrative tribunals acting under directives from above in a quasi-judicial manner.

In operation the Nazi system forced the judges into one of two categories. In the first we find the judges who still retained ideals of judicial independence and who administered justice with a measure of impartiality and moderation. Judgments which they rendered were set aside by the employment of the nullity plea and the extraordinary objection. The defendants they sentenced were frequently transferred to the Gestapo on completion of prison terms and were then shot or sent to concentration camps. The judges themselves were threatened and criticized and sometimes removed from office. In the other category were the judges who with fanatical zeal enforced the will of the Party with such severity that they experienced no difficulties and little interference from party officials. To this group the defendants Rothaug and Oeschey belonged.

We turn to a consideration and classification of the evidence. The prosecution has introduced captured documents in great number which establish the Draconic character of the Nazi criminal laws and prove that the death penalty was imposed by courts in thousands of cases. Cases in which the extreme penalty was imposed may in large measure be classified in the following groups:

1. Cases against habitual criminals.

2. Cases of looting in the devastated areas of Germany; committed after air raids and under cover of black-out.

3. Crimes against the war economy—rationing, hoarding, and the like.

4. Crimes amounting to an undermining of the defensive strength of the nation; defeatist remarks, criticisms of Hitler, and the like.

5. Crimes of treason and high treason.

6. Crimes of various types committed by Poles, Jews, and other foreigners.

7. Crimes committed under the Nacht und Nebel program, and similar procedures.

Consideration will next be given to the first four groups as above set forth. The Tribunal is keenly aware of the danger of incorporating in the judgment as law its own moral convictions or even those of the Anglo-American legal world. This we will not do. We may and do condemn the Draconic laws and express abhorrence at the limitations imposed by the Nazi regime upon freedom of speech and action, but the question still remains unanswered:

"Do those Draconic laws or the decisions rendered under them constitute war crimes or crimes against humanity?"

Concerning the punishment of habitual criminals, we think the answer is clear. In many civilized states statutory provisions require the courts to impose sentences of life imprisonment upon proof of conviction of three or more felonies. We are unable to say in one breath that life imprisonment for habitual criminals is a salutary and reasonable punishment in America in peace times, but that the imposition of the death penalty was a crime against humanity in Germany when the nation was in the throes of war. The same considerations apply largely in the case of looting. Every nation recognizes the absolute necessity of more stringent enforcement of the criminal law in times of great emergency. Anyone who has seen the utter devastation of the great cities of Germany must realize that the safety of the civilian population demanded that the werewolves who roamed the streets of the burning cities, robbing the dead, and plundering the ruined homes should be severely punished. The same considerations apply, though in a lesser degree, to prosecutions to hoarders and violators of war economy decrees.

Questions of far greater difficulty are involved when we consider the cases involving punishment for undermining military efficiency. The limitations on freedom of speech which were imposed in the enforcement of these laws are revolting to our sense of justice. A court would have no hesitation in condemning them under any free constitution, including that of the Weimar republic, if the limitations were applied in time of peace; but even under the protection of the Constitution of the United States a citizen is not wholly free to attack the Government or to interfere with its military aims in time of war. In the face of a real and present danger, freedom of speech may be somewhat restricted even in America. Can we then say that in the throes of total war and in the presence of impending disaster those officials who enforced these savage laws in a last desperate effort to stave off defeat were guilty of crimes against humanity?

It is persuasively urged that the fact that Germany was waging a criminal war of aggression colors all of these acts with the dye of criminality. To those who planned the war of aggression and who were charged with and were guilty of the crime against the peace as defined in the IMT Charter, this argument is conclusive, but these defendants are not charged with crimes against the peace nor has it been proven here that they knew that the war which they were supporting on the home front was based upon a criminal conspiracy or was *per se* a violation of international law. The lying propaganda of Hitler and Goebbels concealed even

from many public officials the criminal plans of the inner circle of aggressors. If we should adopt the view that by reason of the fact that the war was a criminal war of aggression every act which would have been legal in a defensive war was illegal in this one, we would be forced to the conclusion that every soldier who marched under orders into occupied territory or who fought in the homeland was a criminal and a murderer. The rules of land warfare upon which the prosecution has relied would not be the measure of conduct and the pronouncement of guilt in any case would become a mere formality. In the opinion of the Tribunal the territory occupied and annexed by Germany after September 1939 never became a part of Germany, but for that conclusion we need not rest upon the doctrine that the invasion was a crime against the peace. Such purported annexations in the course of hostilities while armies are in the field are provisional only, and dependent upon the final successful outcome of the war. If the war succeeds, no one questions the validity of the annexation. If it fails, the attempt to annex becomes abortive. In view of our clear duty to move with caution in the recently charted field of international affairs, we conclude that the domestic laws and judgments in Germany which limited free speech in the emergency of war cannot be condemned as crimes against humanity merely by invoking the doctrine of aggressive war. All of the laws to which we have referred could be and were applied in a discriminatory manner and in the case of many, the Ministry of Justice and the courts enforced them by arbitrary and brutal means, shocking to the conscience of mankind and punishable here. We merely hold that under the particular facts of this case we cannot convict any defendant merely because of the fact, without more, that laws of the first four types were passed or enforced.

A different situation is presented when we consider the cases which fall within types 5, 6, and 7.

TREASON AND HIGH TREASON

We have expressed the opinion that the purported annexation of territory in the East which occurred in the course of war and while opposing armies were still in the field was invalid and that in point of law such territory never became a part of the Reich, but merely remained in German military control under belligerent occupancy. On 27 October 1939 the Polish Ambassador at Washington informed the Secretary of State that the German Reich had decreed the annexation of part of the territory of the Polish republic. In acknowledging the receipt of this information, Secretary Hull stated that he had "taken note of the Polish government's declaration that it considers this act as illegal and therefore

null and void." [1] The foregoing fact alone demonstrates that the Polish Government was still in existence and was recognized by the Government of the United States. Sir Arnold D. McNair expressed a principle which we believe to be incontestable in the following words:

> "A purported incorporation of occupied territory by a military occupant into his own kingdom during the war is illegal and ought not to receive any recognition. * * *" [2]

We recognize that in territory under belligerent occupation the military authorities of the occupant may, under the laws and customs of war, punish local residents who engage in fifth column activities hostile to the occupant. It must be conceded that the right to punish such activities depends upon the specific acts charged and not upon the name by which these acts are described. It must also be conceded that Poles who voluntarily entered the Alt [old] Reich could, under the laws of war, be punished for the violation of nondiscriminatory German penal statutes.

These considerations, however, do not justify the action of the Reich prosecutors who in numerous cases charged Poles with high treason under the following circumstances: Poles were charged with attempting to escape from the Reich. The indictments in these cases alleged that the defendants were guilty of attempting, by violence or threat of violence, to detach from the Reich territory belonging to the Reich, contrary to the express provisions of section 80 of the law of 24 April 1934. The territory which defendants were charged with attempting to detach from the Reich consisted of portions of Poland, which the Reich had illegally attempted to annex. If the theory of the German prosecutors in these cases were carried to its logical conclusion it would mean that every Polish soldier from the occupied territories fighting for the restoration to Poland of territory belonging to it would be guilty of high treason against the Reich and on capture, could be shot. The theory of the Reich prosecutors carries with it its own refutation.

Prosecution in these cases represented an unwarrantable extention of the concept of high treason, which constituted in our opinion a war crime and a crime against humanity. The wrong done in such prosecutions was not merely in misnaming the offense of attempting to escape from the Reich; the wrong was in falsely naming the act high treason and thereby invoking the death penalty for a minor offense.

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[1] Department of State Bulletin, 4 November 1939, page 458, cited in Hyde's International Law, Volume 1 (2d rev. ed.), page 391.

[2] "Legal Effects of War" (2d ed.) (Cambridge, 1940), footnote on page 320.

C. C. Law 10, article II, paragraph 1(*d*), provides:

"1. Each of the following acts is recognized as a crime:

* * * * * * *

"(*d*) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal."

Article 9 of the IMT Charter provides:

"At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization."

Article 10 of the IMT Charter is as follows:

"In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

Concerning the effect of the last quoted section, we quote from the opinion of the IMT in the case of United States, et al., *vs.* Goering, et al., as follows:

"Article 10 of the Charter makes clear that the declaration of criminality against an accused organization is final and cannot be challenged in any subsequent criminal proceeding against a member of the organization." *

We quote further from the opinion in that case:

"In effect, therefore, a member of an organization which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."

* * * * * * *

"A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal

* Trial of the Major War Criminals, op cit., volume I, page 255.

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purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by article 6 of the Charter as members of the organization. Membership alone is not enough to come within the scope of these declarations." [1]

The Tribunal in that case recommended uniformity of treatment so far as practicable in the administration of this law, recognizing, however, that discretion in sentencing is vested in the courts. Certain groups of the Leadership Corps, the SS, the Gestapo, the SD, were declared to be criminal organizations by the judgment of the first International Military Tribunal. The test to be applied in determining the guilt of individual members of a criminal organization is repeatedly stated in the opinion of the First International Military Tribunal. The test is as follows: Those members of an organization which has been declared criminal "who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by article 6 of the Charter, or who were personally implicated as members of the organization in the commission of such crimes" are declared punishable.

Certain categories of the Leadership Corps are defined in the First International Military Tribunal judgment as criminal organizations. We quote:

"The Gauleiter, the Kreisleiter, and the Ortsgruppenleiter participated, to one degree or another, in these criminal programs. The Reichsleitung as the staff organization of the Party is also responsible for these criminal programs as well as the heads of the various staff organizations of the Gauleiter and Kreisleiter. The decision of the Tribunal on these staff organizations includes only the Amtsleiter who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organizations attached to the Leadership Corps other than the Amtsleiter referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration." [2]

[1] Ibid., p. 256.
[2] Ibid., p. 261.

In like manner certain categories of the SD were defined as criminal organizations. Again, we quote:

"In dealing with the SD the Tribunal includes Aemter III, VI, and VII of the RSHA, and all other members of the SD, including all local representatives and agents, honorary or otherwise, whether they were technically members of the SS or not, but not including honorary informers who were not members of the SS and members of the Abwehr who were transferred to the SD." [1]

In like manner certain categories of the SS were declared to constitute criminal organizations:

"In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf-Verbaende, and the members of any of the different police forces who were members of the SS. The Tribunal does not include the so-called SS riding units." [2]

C. C. Law 10 provides that we are bound by the findings as to the criminal nature of these groups or organizations. However, it should be added that the criminality of these groups and organizations is also established by the evidence which has been received in the pending case. Certain of the defendants are charged in the indictment with membership in the following groups or organizations which have been declared and are now found to be criminal, to wit: The Leadership Corps, the SD, and the SS. In passing upon these charges against the respective defendants, the Tribunal will apply the tests of criminality set forth above.

CRIMES UNDER THE NIGHT AND FOG DECREE [NACHT UND NEBEL ERLASS]

Paragraph 13 of count two of the indictment charges in substance that the Ministry of Justice participated with the OKW and the Gestapo in the execution of the Hitler decree of Night and Fog whereby civilians of occupied countries accused of alleged crimes in resistance activities against German occupying forces were spirited away for secret trial by special courts of the Ministry of Justice within the Reich; that the victim's whereabouts, trial, and subsequent disposition were kept completely secret, thus serving the dual purpose of terrorizing the victim's relatives and associates and barring recourse to evidence, witnesses, or counsel for defense. If the accused was acquitted, or if convicted, after serving his sentence, he was handed over to the Gestapo for

[1] Ibid., pp. 267–268.
[2] Ibid., p. 273.

"protective custody" for the duration of the war. These proceedings resulted in the torture, ill treatment, and murder of thousands of persons. These crimes and offenses are alleged to be war crimes in violation of certain established international rules and customs of warfare and as recognized in C. C. Law 10.

Paragraph 25 of count three of the indictment incorporates by reference paragraph 13 of count two of the indictment and alleges that the same acts, offenses, and crimes are crimes against humanity as defined by C. C. Law 10. The same facts were introduced to prove both the war crimes and crimes against humanity and the evidence will be so considered by us.

Paragraph 13 of count two of the indictment which particularly describes the Hitler NN plan or scheme, charges the defendants Altstoetter, von Ammon, Engert, Joel, Klemm, Mettgenberg, and Schlegelberger with "special responsibility for and participation in these crimes", which are alleged to be war crimes.

Paragraph 8 of count two of the indictment charges all of the defendants with having committed the war crimes set forth in paragraphs 9 to 18 inclusive of count two, in that they were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of atrocities and offenses against persons, including but not limited to murder, illegal imprisonment, brutalities, atrocities, transportation of civilians, and other inhumane acts which were set out in paragraphs 9 to 18 inclusive of the indictment as war crimes against the civilian population in occupied territories.

Paragraph 20 of count three of the indictment charges all of the defendants with having committed the same acts as contained in paragraph 8 of count two as being crimes against humanity. Paragraphs 21 to 30 inclusive of count three refer to and adopt the facts alleged in paragraphs 9 to 18 inclusive of count two, and thus all defendants are charged with having committed crimes against humanity upon the same allegations of facts as are contained in paragraphs 9 to 18 inclusive of count two.

In the foregoing manner all of the defendants are charged with having participated in the execution or carrying out of the Hitler NN decree and procedure either as war crimes or as crimes against humanity, and all defendants are charged with having committed numerous other acts which constitute war crimes and crimes against humanity against the civilian population of occupied countries during the war period between 1 September 1939 and April 1945.

The Night and Fog decree arose as the plan or scheme of Hitler to combat so-called resistance movements in occupied terri-

tories. Its enforcement brought about a systematic rule of violence, brutality, outrage, and terror against the civilian populations of territories overrun and occupied by the Nazi armed forces. The IMT treated the crimes committed under the Night and Fog decree as war crimes and found as follows:

"The territories occupied by Germany were administered in violation of the laws of war. The evidence is quite overwhelming of a systematic rule of violence, brutality, and terror. On 7 December 1941 Hitler issued the directive since known as the 'Nacht und Nebel Erlass' (Night and Fog decree), under which persons who committed offenses against the Reich or the German forces in occupied territories, except where the death sentence was certain, were to be taken secretly to Germany and handed over to the SIPO and SD for trial and punishment in Germany. This decree was signed by the defendant Keitel. After these civilians arrived in Germany, no word of them was permitted to reach the country from which they came, or their relatives; even in cases when they died awaiting trial the families were not informed, the purpose being to create anxiety in the minds of the families of the arrested person. Hitler's purpose in issuing this decree was stated by the defendant Keitel in a covering letter, dated 12 December 1941, to be as follows:

" 'Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany.'

* * * * * * *

"The brutal suppression of all opposition to the German occupation was not confined to severe measures against suspected members of resistance movements themselves, but was also extended to their families." [1]

The Tribunal also found that:

"One of the most notorious means of terrorizing the people in occupied territories was the use of the concentration camps." [2]

Reference is here made to the detailed description by the IMT judgment of the manner of operation of concentration camps and to the apalling cruelties and horrors found to have been committed therein. Such concentration camps were used extensively for the NN prisoners in the execution of the Night and Fog decree as will be later shown.

[1] Ibid., pp. 232–233.
[2] Ibid., p. 234.

The IMT further found that the manner of arrest and imprisonment of Night and Fog prisoners before they were transferred to Germany was illegal, as follows:

> "The local units of the Security Police and SD continued their work in the occupied territories after they had ceased to be an area of operations. The Security Police and SD engaged in widespread arrests of the civilian population of these occupied countries, imprisoned many of them under inhumane conditions, and subjected them to brutal third degree methods, and sent many of them to concentration camps. Local units of the Security Police and SD were also involved in the shooting of hostages, the imprisonment of relatives, the execution of persons charged as terrorists and saboteurs without a trial, and the enforcement of the Nacht und Nebel decree under which persons charged with a type of offenses believed to endanger the security of the occupying forces were either executed within a week or secretly removed to Germany without being permitted to communicate with their family and friends." *

The foregoing quotations from the IMT judgment will suffice to show the illegality and cruelty of the entire NN plan or scheme. The transfer of NN prisoners to Germany and the enforcement of the plan or scheme did not cleanse it of its iniquity or render it legal in any respect.

The evidence herein adduced sustains the foregoing findings and conclusions of the IMT. In fact the same documents, or copies thereof, referred to and quoted from in the IMT judgment were introduced in evidence in this case. In addition, a large number of captured documents and oral testimony were introduced showing the origin and purpose of the Night and Fog plan or scheme, and showing without dispute that certain of the defendants with full knowledge of the illegality of the plan or scheme under international law of war and with full knowledge of the intended terrorism, cruelty, and other inhumane principles of the plan or scheme became either a principal, or aided and abetted, or took a consenting part in, or were connected with the execution of the illegal, cruel, and inhumane plan or scheme.

Hitler's decree was signed by Keitel on 7 December 1941 and was enclosed in Keitel's covering letter of 12 December 1941, which was referred to and quoted from in the IMT judgment. The Hitler decree states that since the opening of the Russian campaign Communist and anti-German elements have increased their assaults against the Reich and the occupation power in the occupied territories and that the most severe measures should be

* Ibid., p. 266.

directed against these malefactors "to intimidate them". The decree further declares in substance (*1733–PS, Pros. Ex. 303*):

"1. Criminal acts committed by non-German civilians directed against the Reich or occupation forces endangering their safety or striking power should require the application of the death penalty in principle.

"2. Such criminal acts will be tried in occupied territories only when it appears probable that the death sentence will be passed and carried out without delay. Otherwise the offenders will be carried to Germany.

"3. Offenders taken to Germany are subject to court martial procedures there only in case that particular military concern should require it. German and foreign agencies will declare upon inquiries of such offenders that the state of the proceedings would not allow further information.

"4. Commanders in chief in occupied territories and the justiciaries within their jurisdiction will be held personally responsible for the execution of this decree.

"5. The chief of the OKW will decide in which of the occupied territories this decree will be applied. He is authorized to furnish explanations and further information and to issue directives for its execution."

In addition to the Hitler decree there were also enclosed in Keitel's letter of 12 December 1941 the "First Decree" of directives concerning the prosecution of crimes against the Reich or occupation power in occupied territories under the Hitler decree. This first Decree was signed by Keitel and was marked "Secret." It contains seven sections relating to the crimes intended to be prosecuted under the Hitler decree and the manner and place of trials and execution of sentences. Section I of the first decree declares that the directive will be as a rule applicable in cases of: (*671–PS, Pros. Ex. 304.*)

1. Assault with intent to kill.
2. Espionage.
3. Sabotage.
4. Communist activity.
5. Crimes likely to disturb the peace.
6. Favoritism toward the enemy, the following means: Smuggling of men and women; the attempt to enlist in an enemy army; and the support of members of the enemy army (parachutists, etc.).
7. Illegal possession of arms.

Section II of the secret decree declares that the culprits are not to be tried in occupied territories unless it is probable that a death sentence will be pronounced, and it must be possible to carry out the execution of the death sentence at once; in general, a week after the capture of the culprit. It further states:

"Special political scruples against the immediate execution of the death sentence should not exist."

Section III of the first directive declares that the judge in agreement with the intelligence office of the Wehrmacht decides whether the condition for a trial in occupied territories exists.

Section IV declares that the culprits who are to be taken to Germany will be subjected there to military court proceedings if the OKW or the superior commanding officer declares decisions according to section III (above) that special military reasons require the military proceedings. In such instances the culprits are to be designated "prisoners of the Wehrmacht" to the Secret Field Police. If such declaration is not made, the order that the culprit is to be taken to Germany will be treated as transferring according to the intentions of the decree.

Section V declares that "the judicial proceedings in Germany will be carried out under strictest exclusion of the public because of the danger for the State's security. Foreign witnesses may be questioned at the main proceedings only with the permission of the Wehrmacht."

Section VI of the first decree declares that former decrees concerning the situation in Norway and concerning Communists and rebel movements in the occupied territories are superseded by these directives and executive order.

Section VII of the secret decree declares that the directives will become effective 3 weeks after they are signed and that the directives will be applied in all occupied territories with the exception of Denmark until further notice. The orders issued for the newly occupied Eastern territories are not affected by these directives. The order was expressly made effective in Norway, Holland, France, Bohemia, Moravia, and the Ukraine occupied areas. In actual operation, Belgium and all other of the western occupied countries came within the decree.

The Hitler decree was sent to the Reich Minister of Justice on 12 December 1941 endorsed for the attention of defendant Schlegelberger. On the same day (12 December 1941) Keitel informed other ministries of Hitler's decree, directing that all such information proceedings were to be conducted in absolute secrecy.

On 16 December 1941, officials of the Ministry of Justice (Schaefer and Grau, associates of defendant Mettgenberg in

Department III) drafted a proposed order for the execution of the Hitler NN decree by the Ministry of Justice, the courts, and the Reich prosecution. This was forwarded to General Lehmann, head of the OKW legal department for his approval.

Other correspondence took place between the Reich Ministry of Justice and the OKW relating to the final draft of the Night and Fog order. This correspondence occurred between 16 December and 25 December 1941. It related to the reservation of the competency of the Ministry of Justice or Under Secretary of State Freisler in the execution of the Hitler decree. These reservations were incorporated in a circular decree dated 6 February 1942, supplementing NN regulations as follows (*NG–232, Pros. Ex. 308*):

"Circular Decree:

"On the execution of the executive decree of 6 February 1942, relating to the directives issued by the Fuehrer and Supreme Commander of the Wehrmacht for the prosecution of criminal acts against the Reich or the occupation power in the occupied territories.

"For the further execution of the directives mentioned before I ordain:

"1. Competent for the handling of the cases transferred to ordinary courts including their eventual retrial are: the Special Court and the chief prosecutor in Cologne as far as they originate from the occupied Belgian and Netherland territories, the Special Court and the chief prosecutor in Dortmund; as far as they originate from the occupied Norwegian territories, the Special Court and the chief prosecutor in Kiel; for the rest, the Special Court and the attorney general at the county court, Berlin. In special cases I reserve for myself the decision of competence for each individual case.

"2. The chief prosecutor will inform me of the indictment, the intended plea, and the sentence as well as of his intention to refrain from any accusation in a specific case.

"3. The choice of a defense counsel will require the agreement of the presiding judge who makes his decision only with the consent of the prosecutor. The agreement may be withdrawn.

"4. Warrants of arrests will be suspended only with my consent. If such is intended, the prosecutor will report to me beforehand. He will furthermore ask for my decision before using foreign evidence or before agreeing to its being used by the tribunal.

"5. Inquiries concerning the accused person or the pending trial from other sources than those Wehrmacht and police agencies dealing with the case will be answered by merely stating that * * * is arrested and the state of the trial does not allow further information."

This supplementary decree was signed for Dr. Freisler by chief secretary of the ministerial office.

The letter of the same Dr. Freisler to Minister of Justice Thierack dated 14 October 1942, shows that in accordance with his promise to Thierack he had conducted preliminary proceedings through Reich departmental officials and with Lehmann, Chief of the Legal Division of the OKW, concerning the matter of the Ministry of Justice taking over the Night and Fog proceedings under the Hitler decree. Such top secret negotiations had lasted for several months. The last conference was held on 7 February 1942. On that day the final decree was drafted, approved, and was "the decree of 7 February 1942, signed by Schlegelberger" as Acting Minister of Justice. Defendant Schlegelberger testified that he signed the decree. He thereby brought about the enforcement by the Ministry of Justice, the courts, and the prosecutors of a systematic rule of violence, brutality, outrage, and terror against the civilian population of territories overrun by the Nazi armed forces resulting in the ill-treatment, death, or imprisonment of thousands of civilians of occupied territories.

The taking over of the enforcement of the Hitler NN decree was based solely upon the afore-mentioned secret agreement, plan, or scheme. All of the defendants who entered into the plan or scheme, or who took part in enforcing or carrying it out knew that its enforcement violated international law of war. They also knew, which was evident from the language of the decree, that it was a hard, cruel, and inhumane plan or scheme and was intended to serve as a terroristic measure in aid of the military operations and the waging of war by the Nazi regime. We will at this point let some of those who originated the plan or scheme or who took part in its execution relate its history and its illegal, cruel, and inhumane purposes.

Rudolf Lehmann, who was Chief of the Legal Division of the OKW, testified concerning the Nacht und Nebel Decree of 7 December 1941. He stated that even before the beginning of the war and more particularly after the beginning of the war, there was a controversy between Hitler and his generals on the one part and between Hitler and the Gestapo on the other part as to the part which should be performed by the military department of justice. He testified:

"Hitler held it against the administration of justice by the armed forces and within the armed forces that they did not sufficiently support his manner of conducting the war."

He further testified that Hitler had—

"Used the expression that the military justice indeed sabotaged his conduct of war. These reproaches first emanated from the Polish campaign. There the military justice—the justice administration of the armed forces—was reprimanded that it had not acted sufficiently severe against members of bands. The next reprimands of that kind occurred during the French campaign."

Lehmann further testified that Keitel had passed on to him a directive which he had received from Hitler in October of 1941. This directive was quite long in which Hitler referred to the resistance movement in France, which he stated was a tremendous danger for the German troops and that new means would have to be found to combat this danger.

There was therefore a discussion of the resistance movement. The army was opposed to the plan because it involved them in violations of international law of war. It was then suggested in the discussion that the Gestapo should be given that power. But even in this Hitler's ideas were overruled. It was at this point that he, Lehmann, suggested that the matters—

"Should continue to be dealt with by judges, and since the aversion of Hitler against the armed forces justice was known, it could be assumed that he would still prefer civilian courts than us."

Lehmann further testified that Hitler—

"Attributed a higher political reliability to civilian justice later because later he took all political criminal cases away from us and gave it to civilian justice."

At this point Lehmann discussed the matter with Under Secretary Freisler because Freisler dealt with the criminal cases in the Ministry. He was told by Freisler that the matter would have to be taken up with Schlegelberger. Lehmann further testified:

"I discussed with him the proposition that the cases which the military courts in France would not keep should be taken over and dealt with by and tried by the civilian justice administration. I can only say that Freisler told me that first he had to think it over; and secondly, he had to discuss it with Under Secretary Schlegelberger who was at that time in charge of the Ministry. * * * Freisler told me that he had to ask the man who was in charge of the Ministry, the acting minister * * * for permission and authority on behalf of the

Ministry of Justice to try the Nacht und Nebel cases. * * * As I was informed about the routine in the Ministry, Schlegelberger, who was then acting Minister of Justice, was in my opinion the only person who could consent to take over these Nacht und Nebel cases by the Ministry of Justice."

Lehmann further testified:

"I have stated that * * * the plan had to be rejected for manifold reasons—for reasons of international law, for reasons of justice, and policy of justice, and primarily, because I said the administration of justice should never do anything secretly. I put to him, 'What kind of suspicion would have to arise against our administration of justice if these people, inhabitants of other countries, brought to Germany, would disappear without a trace'? In my mind, and in the minds of all others concerned, everything revolted against this particular part of the plan, which seemed to us to have much more grave consequence than the question of who should, in the end, deal with it. That was also the opinion of the leading jurists of the armed forces * * *."

Defendant Mettgenberg held the position of Ministerialdirigent in Departments III and IV of the Reich Ministry of Justice. In Department III, for penal legislation, he dealt with international law, formulating secret, general, and circular directives. He handled Night and Fog cases and knew the purpose and procedure used in such cases, and that the decree was based upon the Fuehrer's order of 7 December 1941 to the OKW. In his affidavit Mettgenberg states (*NG–696, Pros. Ex. 336*):

"The 'Night and Fog' section within my subdivision, was headed by Ministerial Counsellor von Ammon. This matter was added to my subdivision because of its international character. I know, of course, that a Fuehrer decree to the OKW was the basis for this 'Night and Fog' procedure and that an agreement had been reached between the OKW and the Gestapo, that the OKW had also established relations with the Minister of Justice and that the handling of this matter was regulated accordingly.

"I was not present at the original discussion with Freisler, in which the 'Night and Fog' matters were first discussed on the basis of the Fuehrer decree. If I had been present at this discussion, and if I had had an occasion to present my opinion, I would, at any rate, have spoken against the taking over of the 'Night and Fog' matters by the justice administration. It went against my training as a public servant to have the administration of justice misused for things which were bound to be incompatible with its basic principles.

"Whenever Mr. von Ammon had doubts concerning the handling of individual cases, we talked these questions over together, and when they had major importance, referred them to higher officials for decision. When he had no doubts, he could decide all matters himself. We got these cases originally from the Wehrmacht and later from the Gestapo. The distribution of these cases to the competent Special Courts or to the People's Court, von Ammon decided independently. Von Ammon also had to review the indictments and sentences and to obtain the minister's decision concerning the execution of death sentences. The question posed by the exclusion of foreign means of evidence was a legal problem of the first order. Since it had been prescribed from above, the Ministry of Justice had no freedom of disposition in this matter. This is another one of the reasons why we should not have taken over these things."

Defendant von Ammon was ministerial councillor in Mettgenberg's subdivision in charge of the Night and Fog matters. The two acted together on doubtful matters and referred difficult questions to competent officials in the Reich Ministry of Justice and the Party Chancellery, since both of these offices had to give their "agreement" in cases of malicious attacks upon the Reich or Nazi Party, or in Night and Fog cases, which came originally from the Wehrmacht, and later from the Gestapo, and jurisdiction of which were assigned to Special Courts at several places in Germany and to the People's Court at Berlin by defendant von Ammon. In his affidavit he states (*NG–486, Pros. Ex. 337*) :

"The decree of 7 February 1942, signed by Schlegelberger, contained, among others, the following provisions: Foreign witnesses could be heard in these special cases only with the approval of the public prosecutor, since it was to be avoided that the fate of NN prisoners became known outside of Germany.

"The presiding judges of the courts concerned had to notify the public prosecutor if they intended to deviate from their notion for a sentence. Freisler noted in this connection that this constituted the utmost limit of what could be asked of the courts. The special nature of this procedure made it necessary to make such provisions.

"Later, when Thierack entered the Reich Ministry of Justice, he changed the decree in such a manner that the courts no longer had to declare their dissenting views to the public prosecutor, but that the acquitted NN prisoners or those who had served their sentences had to be handed over by the court authorities to the Gestapo for protective custody. Under Secretary of State Schlegelberger himself was not present at the conference, but Under State Secretary Freisler left the con-

ference briefly in order to secure the signature of Schlegelberger.

"I must admit that, in dealing with these matters, I did not particularly feel at ease. It was my intention to get the best out of this thing and to emphasize humanitarian considerations as much as possible in these hard measures. I have seen from the first Nuernberg trials that the court has declared the 'Night and Fog' decree as being against international law and that Keitel, too, declared that he had been aware of the illegal nature of this decree. Freisler, though, represented it to us in such a manner as to create the impression that the decree was very hard but altogether admissible."

Mettgenberg and von Ammon were sent to the Netherlands occupied territory because some German courts set up there were receiving Night and Fog cases in violation of the decree that they should be transferred to Germany. They held a conference at The Hague with the highest military justice authorities and the heads of the German courts in the Netherlands, which resulted in a report of the matter to the OKW at Berlin, which agreed with Mettgenberg and von Ammon that—

"The same procedure should be used in the Netherlands as in other occupied territories, that is, that all Night and Fog matters should be transferred to Germany."

With respect to the effectiveness and cruelty of the NN decree, the defendant von Ammon commented thus:

"The essential point of the NN procedure, in my estimation, consisted of the fact that the NN prisoners disappeared from the occupied territories and that their subsequent fate remained unknown."

The distribution of the NN cases to the several competent Special Courts and the People's Court was decided upon by defendant von Ammon. A report of 9 September 1942, signed by von Ammon, addressed to defendant Rothenberger, to be submitted to the Minister of Justice and the defendant Mettgenberg, stated that there are pending in Special Courts Night and Fog cases as follows: At Kiel, nine cases with 262 accused; at Essen, 180 cases with 863 accused; and at Cologne, 177 cases with 331 accused. By November 1943 there were turned over at Kiel, 12 cases with 442 accused; at Essen, 474 cases with 2,613 accused; and at Cologne, 1,169 cases with 2,185 accused.

A note dated Berlin, 26 September 1942, for the attention of defendant Rothenberger, signed by defendant von Ammon, stated that by order of the Reich Minister the hitherto—

"Exclusive jurisdiction of the Special Courts over NN cases is to some extent to be replaced by the People's Court of justice."

A letter dated 14 October 1942 to Minister of Justice Thierack from Freisler, then president of the People's Court, states that he understood that a conference held on 14 October 1942 extended the jurisdiction of the People's Court over NN cases. Freisler states that he conducted the preliminary proceedings with Ministerial Director Lehmann of the OKW with regard to the Ministry of Justice taking over the Night and Fog proceedings. He explains that the Night and Fog proceedings were top secret and no file or records were made in order to be quite sure that under no circumstances should any information be obtained by the outside world with regard to the fate of the alien prisoners. He also emphasizes the fact that under no circumstances could any other sentence than the one proposed by the public prosecutor be passed and to make sure of this in the technical routine it was decided that—

"1. The prosecutor should be entitled to withdraw the charges until the pronouncement of the sentence.

"2. The court was to be instructed to give the prosecutor another chance to give his point of view, in case their view should diverge from his."

Freisler further states:

"In fulfillment of my promise I deemed it necessary to inform you of this, dear sir, as these facts were not permitted to be recorded in the files and are probably unknown in the department."

By his supplemental directive of 28 October 1942, Thierack made note of the fact that the "jurisdiction of the People's Court (No. 1, 1 and 2 of the additional circular directives of 14 October 1942)" had been extended to NN cases. Thierack's letter, dated 25 October 1942 to defendant Lautz, copy to von Ammon, established and expanded jurisdiction of the People's Court over NN cases.

Thereafter the People's Court handled many Night and Fog cases, convicting the accused in secret sessions with no records whatsoever made of any evidence adduced and no record was made of the sentence pronounced. The defendant von Ammon testified that about one-half of the Night and Fog prisoners tried by the People's Court were executed.

Later NN cases were sent to German Special Courts at Breslau and Katowice, Poland, and to Silesia and other places as will be shown herein.

The use of concentration camps for NN prisoners was shown by a letter dated 18 August 1942, signed by Gluecks, SS Brigadefuehrer and General Major of the SS, which contained enclosures for information and execution by officials in charge of concentration camps, including Mauthausen, Auschwitz, Flossenbuerg, Dachau, Ravensbrueck, Buchenwald, and numerous others. The letter states that such prisoners will be transferred under the Keitel decree from the occupied countries to Germany for transfer to Special Courts. Should that for any reason be impossible, the accused will be put into one of the above-named concentration camps. Those in charge of the camps were instructed that absolute secrecy of such prisoners' detention was to be maintained including the prevention of any means of communication with the outside world either before or after the trial.

The following is illustrative of inhumane prison conditions for NN prisoners. The affidavit of Ludwig Schirmer, warden in the prison at Ebrach, confirmed by his oral testimony, states:

"The Ebrach prison which was used for criminal convicts had a capacity of 595 prisoners. In 1944, however, the prison became overcrowded and finally held a maximum of from 1,400 to 1,600 prisoners in 1945.

"This crowding had been caused by numerous NN prisoners from France and Belgium. Among them was the French General Vaillant who died in the prison of old age and of a heart disease. Owing to the overcrowding of the penitentiary, it was impossible to avoid the frequent outbreak of diseases, such as pulmonary tuberculosis, consumption, and, of course many cases of undernourishment. The very poor medical care was a serious disadvantage; the doctor showed up only two or three times a week. Sixty-two inmates died during the last months of the war. Many of them, of course, came in already sick. During the last months, a criminal convict was employed as physician. He was a morphinomaniac and a man of very low character.

"Although there were stocks of food at hand, the feeding of prisoners was bad; people got only soup and turnips for weeks. NN prisoners were crowded together, four in a single cell. From time to time a certain number of the prisoners was transferred to the concentration camp."

The affidavit of Josef Prey, head guard at the Amberg prison, confirmed by his oral testimony, states that foreigners, Jews, and NN prisoners at Amberg prison, which had a capacity of 900 to 1,100 were incarcerated there. Yet shortly before the collapse there were 2,000 prisoners of whom 800 to 900 prisoners were Polish,

and NN prisoners who included Frenchmen, Dutchmen, and Belgians. From time to time by secret decree prisoners were transferred to the concentration camps at Mauthausen. Defendant Engert, the official representative of the department of justice, visited and officially inspected the prison and knew of these conditions.

By his affidavit Engert states that Thierack told him the Night and Fog prisoners had to be treated with special precaution, not allowed any correspondence, locked up hermitically from the outer world, and that care should be taken that their real names remain unknown to the lower prison personnel. Engert further states that these orders were the result of the Fuehrer decree of 7 December 1941 and that Thierack told him the Night and Fog prisoners were accused of resistance and violence against the armed forces. He did not know what became of these NN prisoners at the various prison camps. He did know that an agreement existed with the Gestapo that the bodies of Night and Fog prisoners should be given to them for secret burial. It was shown by other testimony that defendant Engert was ministerial director, who handled and investigated the Night and Fog prisoners and that he was in charge of the task of transferring prisoners and knew their nationality and the character of crime charged against them.

On 14 June 1944 defendant von Ammon wrote Bormann, Chief of the Party Chancellery, a letter sent by way of defendant Mettgenberg, requesting permission of the Fuehrer to inform NN women held under death sentence of the fact that such sentence has been reprieved, since he considers it to be unnecessarily cruel to keep these "condemned women" in suspense for years as to whether their death sentence will be carried out.

Mrs. Solf, the widow of a former distinguished German cabinet officer and ambassador, testified that she was tried and held as a political prisoner of the Nazi regime for several years in Ravensbrueck concentration camp and other prisons where a large number of foreign women were imprisoned. Concerning the ill-treatment of these women and the prison conditions under which they were incarcerated, Mrs. Solf testified:

"As to the prisoners who were with me at Ravensbrueck, as far as I can remember there was only an Italian woman of Belgian descent who was treated well, better than we were. However, in the penitentiary of Cottbus, as well as in the prison of Moabit, I met many foreigners. In the penitentiary of Cottbus, there alone were 300 French women who were sentenced to death, and five Dutch women sentenced to death who after a week or two were pardoned to penitentiary terms and whom

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I saw in the courtyard. The 300 French women sentenced to death were sent to Ravensbrueck at the end of November 1944. The night before they were transported they had to sleep on a bare stone floor. One of the auxiliary wardens, who was also an interpreter for them and who had a great deal of courage and a kind heart, came to me in order to ask us political prisoners to give them our blankets, which we certainly did."

She further testified:

"I know and have seen for myself that, for instance, in Moabit, some of the brutal wardens kicked them and shouted at them for reasons which seemed very, very unjust because these women did not understand what they were supposed to do."

The Night and Fog decree was from time to time implemented by several plans or schemes, which were enforced by the defendants. One plan or scheme was the transfer of alleged resistance prisoners or persons from occupied territories who had served their sentences or had been acquitted to concentration camps in Germany where they were held incommunicado and were never heard from again. Another scheme was the transfer of the inhabitants of occupied territories to concentration camps in Germany as a substitute for a court trial. Defendant Engert made such an order.

Trials under NN Decree

The evidence establishes beyond a reasonable doubt that in the execution of the Hitler NN decree the Nazi regime's Ministry of Justice, Special Courts, and public prosecutors agreed to and acted together with the OKW and Gestapo in causing to be arrested, transported to Germany, tried, sentenced to death and executed, or imprisoned under the most cruel and inhumane conditions in prisons and concentration camps, thousands of the civilian population of the countries overrun and occupied by the Nazi regime's military forces during the prosecution of its criminal and aggressive war.

The trials of the accused NN persons did not approach even a semblance of fair trial or justice. The accused NN persons were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused

learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them. These facts are proved by captured documents and evidence adduced on the trial, to some of which we now advert.

The first trial of NN cases took place at Essen. A letter from the prosecutor, dated 20 August 1942, addressed to the Reich Minister of Justice, was received on 27 August 1942, states that five defendants were to be tried and that two of them were to get prison terms and that—

> "In the remaining cases the death sentence is to be ordered and inquiries made whether they should be executed by the guillotine."

These sentences were later pronounced.

In response to several inquiries from prosecutors at Special Courts in Essen, Kiel, and Cologne citing pending NN cases, the defendants Mettgenberg and von Ammon replied that, in view of the regulation for the keeping of NN trials absolutely secret, defense counsel chosen by NN defendants would not be permitted.

In these same inquiries, it is stated that if defense counsel were carefully selected from those who were recognized as unconditionally reliable, pro-State and judicially efficient lawyers, no difficulty should arise with respect to the secrecy of such proceedings. It is suggested that if an attorney should inquire concerning representation of an NN defendant, he should be informed that it is not permissible to investigate whether or not there was any proceeding pending against the accused. This inquiry related to 16 NN French defendants who were to be tried at Cologne. Other evidence introduced in the case showed that this practice was followed.

The foreign countries department of the Wehrmacht High Command reported to defendant von Ammon on 15 October 1942 a list of 224 alleged spies arrested in France in the execution of what was known as "Action porto", of whom 220 had already been transported to Germany. Inquiry was made whether these prisoners should be regarded as coming under Hitler's NN Decree. A later directive issued 6 March 1943, which was initialed by defendant Mettgenberg and sent to the SS Chief Himmler, states that orders and regulations covering NN prisoners in general will be applied to "porto action" groups. The circular decree states further that in case of death of "porto action" prisoners, the same procedure is followed with respect to secrecy as is followed in NN cases, and that the estates of "porto action" prisoners are to

be retained by the penal institution for the time being, and that relatives are not to be informed about the death of such prisoners, especially not of their execution.

A letter dated 9 February 1943, Berlin, to the president of the People's Court, chief public prosecutor at Kiel and Cologne, and Chief Public Prosecutor at Hamm, states that for the purpose of carrying out the Night and Fog decree or directive (*NG–253, Pros. Ex. 317*):

> "In trials (before the Landesgericht), in which according to the regulations, defense counsel has to be provided for the defendant, the regulation may be ignored when the president of the court can conscientiously state that the character of the accused and the nature of the charge make the presence of a defense counsel superfluous."

In connection with the foregoing matter, a secret note to defendant von Ammon, dated 18 January 1941, suggests that a regulation concerning counsel for NN prisoners should be drafted. A letter dated 4 January 1943 states that in accordance with the power granted under the Fuehrer's order of 7 December 1941 (*NG–253, Pros. Ex. 317*):

> "Article IV, paragraph 32 of the Competence Decree of 21 February 1940 (relating to appointment of defense counsel) is cancelled. The president of the court will order defendant to be represented only if he is unable to defend himself or for any special reason it seems desirable that defendant should be represented."

A letter dated 21 April 1943, Berlin, by Thierack, Minister of Justice, states that (*NG–256, Pros. Ex. 320*):

> "Your ordinance of 21 December 1942 decreed that in criminal cases concerning criminal actions against the Reich and the occupation authority in the occupied territories, defense counsel of one's own choice should not be approved of on principle."

A letter by Thierack to the president of the People's Court, Berlin, dated 13 May 1943, states that (*NG–256, Pros. Ex. 320*):

> "The directives given by the Fuehrer on 7 December 1941 for the prosecution of criminal actions committed against the Reich or the occupation authorities in the occupied territories are applicable, according to their meaning and their tenor, to foreigners only, and not to German nationals or provisional Germans."

A draft of an extensive secret order or directives of the Reich Minister of Justice, dated 6 March 1943, covering secret NN procedure was sent to and initialed by or for heads of Ministry De-

partments III and IV (the defendant Mettgenberg), Department V (headed by defendant Engert), [initialed by Marx] and Department VI (headed by defendant Altstoetter). The directives instructed all so concerned to take further measures "in order not to endanger necessary top secrecy of NN procedure". Separate copies of this order, dated 6 March 1943, were sent to the aforementioned ministry departments, including Department VI, headed by defendant Altstoetter, who admits having seen and executed the directives, to defendant von Ammon and to, among others, the chief Reich prosecutor at the People's Court (defendant Lautz); the attorneys general in Celle, Duesseldorf, Frankfurt on Main, Hamburg, Hamm, Kiel, and Cologne; and the attorney general at the Prussian Court of Appeal; and for the attention of presidents of the People's Court, district courts of appeal at Hamm, Kiel, and Cologne, and the Prussian court of appeal at Berlin. Among the measures of secrecy included in the order or directives were the following (*NG–269, Pros. Ex. 319*):

"The cards used for investigations for the Reich criminal statistics need not be filled in. Likewise, notification of the penal records office will be discontinued until further notice. However, sentences will have to be registered in lists or on a card index in order to make possible an entry into the penal records in due course.

"In case of death, especially in cases of execution of NN prisoners, as well as in cases of female NN prisoners giving birth to a child, the registrar must be notified as prescribed by law. However, the following remark has to be added:

" 'By order of the Reich Minister of the Interior, the entry into the death (birth) registry must bear an endorsement, saying that examination of the papers, furnishing of information and of certified copies of death (birth) certificates is only admissible with the consent of the Reich Minister of Justice.' "

Department VI headed by defendant Altstoetter handled matters relating to registration of deaths and births. The order further provides:

"Farewell letters by NN prisoners as well as other letters must not be mailed. They have to be forwarded to the prosecution who will keep them until further notice.

"If an NN prisoner who has been sentenced to death and informed of the forthcoming execution of the death sentence desires spiritual assistance by the prison padre, this will be granted. If necessary, the padre must be sworn to secrecy.

"The relatives will not be informed of the death and especially of the execution of an NN prisoner. The press will not be

informed of the execution of a death sentence, nor must the execution of a death sentence be publicly announced by posters.

"The bodies of executed NN prisoners or prisoners who died from other causes have to be turned over to the State Police for burial. Reference must be made to the existing regulations on secrecy. It must be pointed out especially that the graves of NN prisoners must not be marked with the names of the deceased.

"The bodies must not be used for teaching or research purposes.

"Legacies of NN prisoners who have been executed or died from other causes must be kept at the prison where the sentence was served."

Later, in some instances the right to spiritual assistance was denied and a later directive authorized the turning over of bodies of NN persons to institutes for experimental purposes.

A letter dated 3 June 1943, from the Reich Ministry of Justice to the People's Court justices and the Chief Public Prosecutors, initialed by defendant Mettgenberg, deals with the subject of trials under the NN decree of foreigners who were nationals of other countries than those occupied by the Nazi forces. The difficulty obviously involved a violation of international law as to such nationals of other countries. In particular, the difficulty arose as to the regulation for the maintenance of secrecy of such trials and whether the secrecy with regard to NN cases should apply. The reply was that they were to be tried in accordance with the circular decrees of 6 February 1942 and 14 October 1942, and the regulations issued for the amendment of these circular decrees to be entitled "NN Prisoners Taken by Mistake". This decree provides that if the trial of such foreigners could not be carried out separately from the trial of the nationals of the occupied countries for reasons pertaining to the presentation of evidence, then the trials were to be strictly in accordance with the provisions of NN procedure; otherwise said foreign nationals would obtain knowledge of the course of the trial against their accomplices.

A note signed by the defendant von Ammon, dated 7 October 1943, states that NN prisoners were often ignorant of charges against them until a few moments before the trial. He further states that Chief Reich Public Prosecutor Lautz asked him whether there were any objections to the translation of the indictment into the language of the defendant, which would then be handed to him. Defendant von Ammon replied that there would be no objection to the proceeding and stated (*NG–281, Pros. Ex. 323*):

"It proved rather awkward that defendants learned the details of their charges only during the trial. Also, the interpreta-

tion by defense counsel is not always sufficient because their French mostly is not good enough and defendants were brought to the place of trial only shortly before it was held."

The same difficulty arose as to Czech defendants.

A report on a conference with respect to new procedure in treatment of Night and Fog cases originating in the Netherlands, signed "von Ammon" and "Mettgenberg, 9 November 1943", addressed to Ministerial Director Engert and others, states that while returning from The Hague to Berlin the undersigned representative of the Reich Ministry of Justice held on 5 November as scheduled, a conference with the head officials of the court of appeals at Hamm and that defendant Joel thought the housing of NN prisoners, also such of Dutch nationality, at Papenburg, would be possible and unobjectionable. This was later carried out.

A secret letter dated 29 December 1943, addressed to defendant von Ammon from the presiding judge and chief prosecutor of Hamm Court of Appeals notified von Ammon of an imminent conference concerning transfer of the NN trials to the NN Special Courts at Oppeln and Katowice.

A letter from Breslau dated 10 January 1944, signed by Dr. Sturm, asks that ministerial councillor, defendant von Ammon, be available for a meeting at Breslau between 15 and 31 January 1944 to discuss routine proceedings for handling NN cases.

A letter addressed to the German commander of the French occupied zone states that effective from 15 November 1943 all cases of crimes committed against the Reich or the occupation forces in occupied French zones hitherto submitted to the ordinary legal authorities were to be taken over by the Special Court and attorney general in Cologne and Breslau.

The defendant von Ammon attended conferences with public prosecutors in Breslau and Katowice (Poland) on 18 and 19 February 1944, concerning housing of NN prisoners and possibility of transferring NN cases from the Netherlands, Belgium, and northern France to Special Courts in Poland for trial; von Ammon reported the results of these conferences in detail to, among others, the defendant Klemm (under secretary) and personally wrote on his report that he had secured appropriate Gauleiter's concurrence to the proposed transfer. Shortly thereafter the Ministry of Justice issued a decree endorsed to the defendant Mettgenberg for signature, and submitted twice to von Ammon, for information and cosignature, whereby these Dutch, Belgian, and northern French NN cases were to be transferred to Silesia for trial. In response to this decree, von Ammon was personally notified that the defendant Joel (then general public prosecutor at Hamm)

feared objections from the Wehrmacht because of the longer transportation involved in the transfer.

A directive by the Reich Minister of Justice with respect to treatment of NN prisoners, dated Berlin, 21 January 1944, initialed by defendant von Ammon, to the president of the People's Court, to the Reich Leader SS, Reich prosecutor of the People's Court (defendant Lautz), to the Chief Public Prosecutor at Hamm (defendant Joel), and others, states that when an NN prisoner had been acquitted by a general court, if it appears that the accused is innocent or if his guilt has not been established sufficiently, then he has to be handed over to the Secret Police. The directive further states:

> "If in the main trial of an NN proceeding it appears that the accused is innocent or if his guilt has not been sufficiently established, then he is to be handed over to the Secret State Police; the public prosecutor informs the Secret State Police about his opinion whether the accused can be released and return into the occupied territories, or whether he is to be kept under detention. The Secret State Police decide which further actions are to be taken.
>
> "Accused who were acquitted, or whose proceedings were closed in the main trial, or who served a sentence during the war, are to be handed over to the Secret State Police for detention for the duration of the war."

A letter dated 21 January 1944, Berlin, to the OKW and the Judge Advocate General Department, dispatched 22 January 1944 (copy to Dr. Mettgenberg with request for approval) complains of lack of coordination in NN cases between military courts and justice officials. This complaint relates primarily to transfer of NN cases.

In answer to the objections to the transfer of NN cases arising in France from Cologne to Breslau, dated 18 January 1944, the defendants Mettgenberg and von Ammon insisted that the transfer is necessary and directed its accomplishment. Three days later a letter endorsed by Mettgenberg informed Himmler that this transfer of NN cases had taken place.

On 24 April 1944 von Ammon reported in detail on a trip he made to Paris previously referred to. This official visit served particularly to obtain information of the security situation in France and to determine whether the NN procedures of the Breslau Special Court were approved by the army. This meeting occurred in the office of the Chief Justice of the German Military Governor of Paris, General von Stuelpnagel. Von Ammon submitted this report both to Klemm and Mettgenberg who initialed it.

A letter from Hamm (Westphalia), 26 January 1944, to the Reich Minister Thierack, signed by defendant Joel, suggests the speeding up of proceedings to avoid delays in NN cases, and suggests that:

"The Chief Public Prosecutor submits record to the chief Reich prosecutor only if, according to previous experience or according to directives laid down by the chief Reich prosecutor, it is to be expected that he will take over, or partly take over the case.

"As a rule, even now when the draft of the indictment is submitted for approval to the Reich Minister of Justice, the records are not enclosed. The decision rests with me, to whom the documents are brought by courier."

A note signed by Dr. Reicholt, 20 April 1944, copy to defendant von Ammon, expresses the same difficulty experienced by defendant Joel and asks that Chief Public Prosecutor at the People's Court decide quickly which of the accused persons he wanted to keep so that they may be transferred as quickly as possible.

The foregoing requests for speed in handling NN cases were due to disturbances caused by air raids. The Reich Minister of Justice replied, 26 April 1944, that in the main "the delay in the proceedings is unavoidable."

Defendant von Ammon reported on a conference with German occupying forces of Belgium and northern France, held in Oppeln on 29 and 30 June 1944. Von Ammon stated that since the Allied invasion had not caused undue tension as yet, it was unnecessary at that time to make penalties in NN cases more severe. This report was initialed by defendant Mettgenberg.

Disposition of NN Cases

A statistical survey of NN cases as of 1 November 1943 made to Ministerial Director Dr. Vollmer, Berlin, 22 November 1943, shows cases and sentences passed on NN prisoners as follows:

1. Turned over by the Wehrmacht authorities to senior public prosecutors at Kiel, 12 cases with 442 defendants; at Essen, 474 cases with 2,613 defendants; at Cologne, 1,169 cases with 2,185 defendants.

2. Charges filed by senior public prosecutors as follows: At Kiel, nine cases with 175 defendants; at Essen, 254 cases with 860 defendants; at Cologne, 173 cases with 257 defendants; by chief public prosecutor at the People's Court (Lautz), 111 cases with 494 defendants.

3. Sentences passed by Special Courts at Kiel, eight on 168 defendants; at Essen, 221 cases with 475 defendants; at Cologne,

128 cases with 183 defendants; at People's Court, 84 cases with 304 defendants.

The defendant von Ammon testified that about one-half of all defendants tried by the People's Court were given the death penalty and were executed. The foregoing documents show that defendant Lautz was Chief Public Prosecutor at the People's Court at the time the 304 sentences were pronounced in the Night and Fog cases.

A similar survey, 5 months later (30 April 1944), shows that a total of 8,639 NN defendants transferred to the various Special Courts and the People's Court in Germany, 3,624 were indicted, and 1,793 were sentenced. Defendant von Ammon initialed this survey.

The foregoing statistical reports as to time are obviously incomplete. They do not show the number of NN cases tried at Breslau, Katowice, and other places. The foregoing documents show that at these places great difficulty was experienced because of lack of prisons for the large number of NN prisoners who were sent to these areas. Nor do they show the number of NN prisoners committed to concentration camps without trial. They do not show the number of residue NN prisoners who were at the end of the control of NN matters by the Minister of Justice committed to concentration camps and never heard from thereafter.

Use of NN Prisoners in Armament Industry

In file of reports for the years 1943 and 1944 of NN cases still pending in the Ministry of Justice, the attorney general at Katowice (Poland) stated to the Ministry of Justice the following (*NG–264, Pros. Ex. 334*) :

"NN prisoners held within the jurisdiction of the Court of Appeal of Katowice are already employed to a large extent in the armament industry, regardless of whether they are being held for questioning or punishment. They are quartered there in special camps at or near the place of the respective industrial enterprise. In this way it is intended, if possible, to place all NN prisoners at the disposal of the armament industry.

"It has been disclosed that the NN prisoners already employed in the armament industry, as for instance the 400-odd prisoners working in Laband, have done a very good job and excel in particular as skilled workers. The armament industry therefore wants to retain the employed NN prisoners also after their acquittal or after they have served their sentence.

"I ask for a decision on whether and, if so, how that demand can be complied with. Considerable doubts arise from the fact that there is no legal right to confine them further and that

the judicial authorities would thus take preventive police measures. There is the question, however, whether the situation of the Reich does not justify even such extraordinary measures."

This request was handled by defendant von Ammon, who endorsed it as follows:

"Submitted * * * first to Department V (headed by defendant Engert) with the request for an opinion. If you have no objections I intend to contact the RSHA in accordance with the report of the attorney general at Katowice."

Clemency in the NN Cases

As Under Secretary, defendant Klemm was required to pass upon clemency matters either while acting with or in the absence of the Minister of Justice. He admits passing upon clemency pleas in NN death cases and refusing all of them. Fourteen documents concerning NN matters passed through defendant Klemm after he became under secretary of State. He knew of the transfer of NN cases from Essen to Silesia and knew of "routine" NN matters which passed through his department.

In the fall of 1944 Hitler ordered the discontinuance of the NN proceedings by the justice and the OKW courts and transferred the entire problem to the Gestapo the NN prisoners being handed over to the Gestapo at the same time. In later conferences attended by defendant von Ammon, the Ministry of Justice agreed to and later actually carried out the transfer by committing them from the Ministry's prisons to the Gestapo's custody. Defendant Lautz was ordered to suspend People's Court proceedings against NN prisoners and transfer them to the Gestapo. The witness Hecker stated that those NN prisoners of the Berlin district, of which he had knowledge, were sent to Oranienburg.

The final order of the Ministry of Justice committing all NN prisoners on hand to the Gestapo and the concentration camps was one of extreme cruelty.

The foregoing documents and the undisputed facts show that Hitler and the high ranking officials of the armed forces and of the Nazi Party, including several Reich Ministers of Justice and other high officials in the Ministry of Justice, judges of the Nazi regime's courts, the public prosecutors at such courts, either agreed upon, consented to, took a consenting part in, ordered, or abetted, were connected with the Hitler NN plan, scheme, or enterprise involving the commission of war crimes and crimes against humanity during the waging of the recent war against the Allied nations and other neighboring nations of Germany.

The foregoing documents and facts show without dispute that several of the defendants participated to one degree or another

either as a principal; or ordered, or abetted, took a consenting part in, or were connected with the execution or carrying out of the Hitler NN scheme or plan. The defendants so participating will be later discussed in the summation of the evidence.

The Night and Fog decree originated with Hitler as a plan or scheme to combat alleged resistance movements against the German occupation forces but it was early extended by the Ministry of Justice to include offenses against the German Reich. Often the offenses had nothing to do with the security of the armed forces in the occupied territories. Many of them occurred after military operations had ceased and in areas where there were no military operations. The first secret decree of the Ministry of Justice for the execution or carrying out of the NN decree provided for:

"1. The prosecution of criminal offenses against the Reich or;
"2. The occupation troops in occupied areas."

It declared that the directive will be as a rule applicable to the seven above listed general types of offenses or crimes, including "Communist activity". The term "Communist activity" is general and political in nature. The evidence shows that political prisoners in occupied territories were tried and sentenced to death under the NN proceedings. Pertinent here with respect to the so-called resistance activities is the finding of the IMT that:

> "The local units of the Security Police and SD continued their work in the occupied territories after they had ceased to be an area of operations. The Security Police and SD engaged in widespread arrests of the civilian population of these occupied countries, imprisoned many of them under inhumane conditions, subjected them to brutal third degree methods, and sent many of them to concentration camps. Local units of the Security Police and SD were also involved in the shooting of hostages, the imprisonment of relatives, the execution of persons charged as terrorists, [and saboteurs without a trial], and the enforcement of the 'Nacht und Nebel' decrees under which persons charged with a type of offense believed to endanger the security of the occupying forces were either executed within a week or secretly removed to Germany without being permitted to communicate with their family and friends." *

Defendant Schlegelberger explained the fundamental purpose of the NN decree to be a deterrent "through cutting off of the prisoners from every contact with the outside world". He further explained "that the NN prisoners were expected and were to be

* Trial of the Major War Criminals, op. cit., Volume I, page 266.

tried materially according to the same regulations which would have been applied to them by the courts martial in the occupied territories" and that accordingly, "the rules of procedure had been curtailed to the utmost extent."

The enforcement of the directives under the Hitler NN plan or scheme became a means of instrumentality by which the most complete control and coercion of a lot of the people of occupied territories were affected and under which thousands of the civilian population of occupied areas were imprisoned, terrorized, and murdered. The enforcement and administration of the NN directives resulted in the commission of war crimes and crimes against humanity in violation of the international law of war and international common law relating to recognized human rights, and of article II, paragraphs 1(*b*) and (*c*) of Control Council Law No. 10.

During the war, in addition to deporting millions of inhabitants of occupied territories for slave labor and other purposes, Hitler's Night and Fog program was instituted for the deportation to Germany of many thousands of inhabitants of occupied territories for the purpose of making them disappear without trace and so that their subsequent fate remain secret. This practice created an atmosphere of constant fear and anxiety among their relatives, friends, and the population of the occupied territories.

The report of the Paris Conference of 1919, referred to above, listed 32 crimes as constituting "the most striking list of crimes as has ever been drawn up, to the eternal shame of those who committed them." This list of crimes was considered and recognized by the Versailles Treaty and was later recognized as international law in the manner hereinabove indicated. Among the crimes so listed was the "deportation of civilians" from enemy occupied territories.

Control Council Law No. 10 in illustrating acts constituting violations of laws or customs of war, recognizes as war crimes the "deportation to slave labour or for any other purpose of civilian population from occupied territory." (Art. II, 1(*b*).) C. C. Law 10 [Article II] paragraph 1(*c*) also recognizes as crimes against humanity the "enslavement, deportation, imprisonment * * * against any civilian population."

The IMT held that the deportation of inhabitants from occupied territories for the purpose of "efficient and enduring intimidation" constituted a violation of the laws and customs of war. The deportation for the purpose of "efficient and enduring intimidation" is likewise condemned by C. C. Law 10, under the provision inhibiting "deportation * * * for any other purpose, of civilian population from occupied territory."

Also among the list of 32 crimes contained in the Conference Report of 1919 are "murder and massacre, and systematic terrorism". C. C. Law 10 makes deportation of civilian population "for any purpose" a crime recognized as coming within the jurisdiction of the law. The admitted purpose of the Night and Fog decree was to provide an "efficient and enduring intimidation" of the population of occupied territories. The IMT held that the Hitler NN decree was "a systematic rule of violence, brutality, and terror", and was therefore in violation of the laws of war as a terroristic measure.

The evidence shows that many of the Night and Fog prisoners who were deported to Germany were not charged with serious offenses and were given comparatively light sentences or acquitted. This shows that they were not a menace to the occupying forces and were not dangerous in the eyes of the German justices who tried them. But they were kept secretly and not permitted to communicate in any manner with their friends and relatives. This is inhumane treatment. It was meted out not only to the prisoners themselves but to their friends and relatives back home who were in constant distress of mind as to their whereabouts and fate. The families were deprived of the support of the husband, thus causing suffering and hunger. The purpose of the spiriting away of persons under the Night and Fog decree was to deliberately create constant fear and anxiety among the families, friends, and relatives as to the fate of the deportees. Thus, cruel punishment was meted out to the families and friends without any charge or claim that they actually did anything in violation of any occupation rule of the army or of any crime against the Reich.

It is clear that mental cruelty may be inflicted as well as physical cruelty. Such was the express purpose of the NN decree, and thousands of innocent persons were so penalized by its enforcement.

The foregoing documents show without dispute that the NN victim was held incommunicado and the rest of the population only knew that a relative or citizen had disappeared in the night and fog; hence, the name of the decree. If relatives or friends inquired, they were given no information. If diplomats or lawyers inquired concerning the fate of an NN prisoner, they were told that the state of the record did not admit of any further inquiry or information. The population, relatives, or friends were not informed for what character of offense the victim had been arrested. Thus, they had no guide or standard by which to avoid committing the same offense as the unfortunate victims had committed which necessarily created in their minds terror and dread that a like fate awaited them.

Throughout the whole Night and Fog program ran this element of utter secrecy. This secrecy of the proceedings was a particularly obnoxious form of terroristic measure and was without parallel in the annals of history. It could have been promulgated only by the cruel Nazi regime which sought to control and terrorize the civilian population of the countries overrun by its aggressive war. There was no proof that the deportation of the civilian population from the occupied territories was necessary to protect the security of the occupant forces. The NN plan or scheme fit perfectly into the larger plan or scheme of transportation of millions of persons from occupied territories to Germany.

C. C. Law 10 makes deportation of the civilian population for any purpose an offense. The international law of war has for a long period of time protected the civilian population of any territory or country occupied by an enemy war force. This law finds its source in the unwritten international law as established by the customs and usages of the civilized nations of the world. Under international law the inhabitants of an occupied area or territory are entitled to certain rights which must be respected by the invader occupant.

This law of military occupation has been in existence for a long period of time. It was officially interpreted and applied nearly a half century ago by the President of the United States of America during the war with Spain in 1898. By General Order No. 101, 18 July 1898 (U. S. Foreign Relations, p. 783), the President declared that the inhabitants of the occupied territory "are entitled to the security in their persons and property and in all their private rights and relations." He further declared that it was the duty of the commander of the Army of Occupation "to protect them in their homes, in their employments, and in their personal and religious rights," and that "the municipal laws of the conquered territory, such as affect private rights of persons and property and provide for punishment of crime, are continued in force" and are "to be administered by the ordinary tribunals, substantially as they were before the occupation." The President referred to the fact that these humane standards of warfare had previously been established by the laws and customs of war, which were later codified by the Hague Conventions of 1899 and 1907, and which constituted the effort of the civilized participating nations to diminish the evils of war by the limitation of the power of the invading occupant over the people and by placing the inhabitants of the occupied area or territory "under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

A similar order was issued during the first war with Germany by the President of the United States of America when the American Expeditionary Forces entered the Rhineland in November 1918. (General Order No. 218, 28 November 1918.) At the conclusion of this occupancy, the German Government expressed its appreciation of the conduct of the American occupying forces.

But Germany soon forgot these humane standards of warfare, as is shown by the undisputed evidence. The general policy of the Nazi regime was to terrorize and in some instances to exterminate the civilian populations of occupied territories.

Pertinent here is the finding of the IMT that:

> "In an order issued by the defendant Keitel on 23 July 1941, and drafted by the defendant Jodl, it was stated that:
>
> " 'In view of the vast size of the occupied areas in the East, the forces available for establishing security in these areas will be sufficient only if all resistance is punished, not by legal prosecution of the guilty, but by the spreading of such terror by the armed forces as is alone appropriate to eradicate every inclination to resist among the population * * *. Commanders must find the means of keeping order by applying suitable Draconian measures'." *

Both Keitel and Jodl were sentenced to death by the IMT and later executed. It was the same Keitel who had issued, over his own signature, the Hitler NN decree which provided that (*NG 669–PS, Pros. Ex. 305*):

> "Efficient and enduring intimidation can only be achieved either by capital punishment or by measures by which the relatives of the criminal and the population do not know the fate of the criminal. This aim is achieved when the criminal is transferred to Germany."

Beyond dispute the foregoing decrees were inspired by the same thought and purpose and represent the general policy of the Nazi regime in the prosecution of its aggressive war. This general policy was to terrorize, torture, and in some occupied areas to exterminate the civilian population. The undisputed evidence in this case shows that Germany violated during the recent war every principle of the law of military occupation. Not only under NN proceedings but in all occupations she immediately, upon occupation of invaded areas and territories, set aside the laws and courts of the occupied territories. She abolished the courts of the occupied lands and set up courts manned by members of the Nazi totalitarian regime and system. These laws of occupation were cruel and extreme beyond belief and were enforced by the Nazi courts

* Ibid., pp. 235–236.

in a cruel and ruthless manner against the inhabitants of the occupied territories, resulting in grave outrages against humanity, against human rights and morality and religion, and against international law, and against the law as declared by C. C. Law 10, by authority of which this Court exercises its jurisdiction in the instant case. The evidence adduced herein provides undeniable and positive proof of the ill-treatment of the subjugated people by the Nazi Ministry of Justice and prosecutors to such an extent that jurists as well as civilians of civilized nations who respect human rights and human personality and dignity can hardly believe that the Nazi judicial system could possibly have been so cruel and ruthless in their treatment of the population of occupied areas and territories.

The foregoing procedure under the NN decree was clearly in violation of the following provisions sanctioned by the Hague Regulations:

"*Article 5.*—Prisoners of war * * * cannot be confined except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

"*Article 23(h).*—* * * It is expressly forbidden * * * to declare abolished, suspended, or inadmissible in a court of law the rights and actions [of the nationals] of the hostile party.

"*Article 43.*—The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the law in force in the country.

"*Article 46.*—Family honor and rights, the lives of persons and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."

Both the international rules of war and C. C. Law 10 inhibit the torture of civilians by the occupying forces. Under the Night and Fog decree civilians were secretly transported to concentration camps and were imprisoned under the most inhumane conditions as was shown by the above statements from captured documents. They were starved and ill-treated while in concentration camps and prisons. Thus, the Night and Fog decree violated these express inhibitions of international law of war as well as the express provisions of C. C. Law 10.

Such imprisonment and ill-treatment was also in violation of the rule prescribed by the Conference of Paris of 1919 which prohibits the "internment of civilians under inhumane conditions".

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The Night and Fog decree was in violation of the international law as recognized by the Paris Conference of 1919 in that the NN prisoners were deported to Germany and forced to labor in the munitions plants of the enemy power.

The foregoing documents establish beyond dispute that they were so employed in munitions plants with the sanction and approval of the Reich Ministry of Justice under the approval of the defendant von Ammon.

The extent of activity and the criminality of the defendants who participated in the execution and carrying out of the Night and Fog decree will be discussed under the summation of the evidence relating to each such defendant. Each defendant has pleaded in effect as a defense the act of State as well as superior orders in justification or mitigation of any crime he may have committed in the execution of the Night and Fog decree. The basis for individual liability for crimes committed and the law relating thereto was clearly and ably declared by the IMT judgment which reads as follows:

> "It was submitted that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized. In the recent case of *Ex parte Quirin* (1942 317 U. S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said:
>
> " 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals.'
>
> "He went on to give a list of cases tried by the Courts, where individual offenders were charged with offenses against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *

* Ibid., pp. 222–223.

The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offense charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offense, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency. Some of the defendants took part in the enactment of laws and decrees the purpose of which was the extermination of Poles and Jews in Germany and throughout Europe. Others, in executive positions, actively participated in the enforcement of those laws and in atrocities, illegal even under German law, in furtherance of the declared national purpose. Others, as judges, distorted and then applied the laws and decrees against Poles and Jews as such in disregard of every principle of judicial behavior. The overt acts of the several defendants must be seen and understood as deliberate contributions toward the effectuation of the policy of the Party and State. The discriminatory laws themselves formed the subject matter of war crimes and crimes against humanity with which the defendants are charged. The material facts which must be proved in any case are (1) the fact of the great pattern or plan of racial persecution and extermination; and (2) specific conduct of the individual defendant in furtherance of the plan. This is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.

We turn to the national pattern or plan for racial extermination.

Fundamentally, the program was one for the actual extermination of Jews and Poles, either by means of killing or by confinement in concentration camps, which merely made death slower and more painful. But lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich. We have already noted the decree by which Jews were excluded from the legal profession. Intermarriage between Jews and persons of German blood was prohibited. Sexual intercourse between Jews and German nationals was punished with extreme severity by the courts. By other decrees Jews were almost completely expelled from public service, from educational institutions, and from many business enterprises. Upon the death of a Jew his property was

confiscated. Under the provisions for confiscation under the 11th amendment to the German Citizenship Law, *supra*, the decision as to confiscation of the property of living Jews was left to the chief of the Security Police and the SD. The law against Poles and Jews cited *supra* (4 December 1941) was rigorously enforced. Poles and Jews convicted of specific crimes were subjected to different types of punishment from that imposed upon Germans who had committed the same crimes. Their rights as defendants in court were severely circumscribed. Courts were empowered to impose death sentences on Poles and Jews even where such punishment was not prescribed by law, if the evidence showed "particularly objectionable motives". And, finally, the police were given *carte blanche* to punish all "criminal" acts committed by Jews without any employment of the judicial process. From the great mass of evidence we can only cite a few illustrations of the character and operation of the program.

On 30 January 1939 in an address before the Reichstag, Hitler, who was at that very time perfecting his plot for aggressive war, said:

> "If the international Jewish financiers within and without Europe succeed in plunging the nations once more into a world war, then the result will not be the Bolshevization of the world and thereby the victory of Jewry, but the obliteration of the Jewish race in Europe."

We quote from the writings of Alfred Rosenberg (since hanged), "High Priest of the Nazi Racial Theory and Herald of the Master Race:"

> "A new faith is arising today—the myth of the blood, the faith to defend with the blood the divine essence of man. The faith, embodied in clearest knowledge, that the Nordic blood represents that mysterium which has replaced and overcome the old sacraments." *

The Rosenberg philosophy strongly supported the program of the Nazi Party, which reads as follows:

> "None but members of the nation (Volk) may be citizens of the State. None but those of German blood, whatever their creed, may be members of the nation. No Jew, therefore, may be a member of the nation."

It was to implement this program that the discriminatory laws against Poles and Jews were enacted as hereinabove set forth.

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* Rosenberg, *Der Mythus des 20. Jahrhunderts*, (Munich 1935), page 114 (1st Ed., 1930), cited in National Socialism, Department of State Publication 1864 (U. S. Government Printing Office, Washington 1943), page 31.

A directive of the Reich Ministry of Justice, signed by Freisler, dated 7 August 1942, addressed to prosecutors and judges, set forth the broad general purposes which were to govern the application of the law against Poles and Jews and the specific application of that law in the trial of cases. We quote (*NG–744, Pros. Ex. 500*):

"The penal law ordinance of 4 December 1941 concerning Poles was intended not only to serve as a criminal law against Poles and Jews, but beyond that also to provide general principles for the German administration of law to adopt in all its judicial dealings with Poles and Jews, irrespective of the role which the Poles and Jews play in the individual proceedings. The regulations of article IX for instance, according to which Poles and Jews are not to be sworn in, apply to proceedings against Germans as well. * * *

"1. Proceedings against Germans should be carried on whenever possible without calling Poles and Jews as witnesses. If, however, such a testimony cannot be evaded, the Pole or Jew must not appear as a witness against the German during the main trial. He must always be interrogated by a judge who has been appointed or requested to do so, * * *.

"2. Evidence given by Poles and Jews during proceedings against Germans must be received with the utmost caution especially in those cases where other evidence is lacking."

On 13 October 1942 the Reich Minister of Justice Thierack wrote to Reichsleiter Bormann, in part as follows (*NG–558, Pros. Ex. 143*):

"With a view to freeing the German people of Poles, Russians, Jews, and gypsies, and with a view to making the eastern territories which have been incorporated into the Reich available for settlements for German nationals, I intend to turn over criminal proceedings against Poles, Russians, Jews, and gypsies to the Reich Leader SS. In so doing I base myself on the principle that the administration of justice can only make a small contribution to the extermination of members of these peoples. The justice administration undoubtedly pronounces very severe sentences on such persons, but that is not enough to constitute any material contribution toward the realization of the above-mentioned aim."

On 18 September 1942 a conference was held among Thierack, Himmler, Bormann, Rothenberger, and others. The notes of the conference, signed by Thierack, disclose that the subjects of discussion included "special treatment" at the hands of the police in cases where judicial sentences were not severe enough. Among

other points agreed upon between Bormann, Himmler, and Thierack, were the following (*654–PS, Pros. Ex. 39*) :

"The Reich Minister of Justice will decide whether and when special treatment at the hands of the police is to be applied. * * *

"The delivery of asocial elements while serving penal sentences to the Reich Leader of SS to be worked to death. Persons under security detention, Jews, gypsies, Russians, and Ukrainians, Poles with more than 3-year sentences, Czechs and Germans with more than 8-year sentences will be turned over without exception according to the decision of the Reich Minister for Justice. First of all the worst asocial elements among those just mentioned are to be handed over. I shall inform the Fuehrer of this through Reichsleiter Bormann. * * *

"It is agreed that, in consideration of the intended aims of the government for the clearing up of the eastern problems, in future Jews, Poles, gypsies, Russians, Ukrainians are no longer to be judged by the ordinary courts, so far as punishable offenses are concerned, but are to be dealt with by the Reich Leader SS. * * *"

The defendant Rothenberger testified that he was not present when these agreements were made. However that may be, it is clear that they came to his notice shortly thereafter.

Of special significance is the record concerning the establishment of penal laws for Poles and Jews in the annexed eastern territories. On 17 April 1941 the defendant Schlegelberger addressed a letter to the Reich Minister and chief of the Reich Chancellery. In it he states that as soon as the Special Courts were introduced in the eastern territories under the decree of 5 September 1939 he tried to make those "courts with their particularly prompt and energetic procedure centers for combating all Polish and Jewish crime." He states that "the procedure of compulsory prosecution was rescinded, at is seems intolerable that Poles and Jews should in this way compel the German prosecutor to issue an indictment." Poles and Jews were also prohibited from raising private actions and accessory actions. He further states:

"On being informed of the Fuehrer's intention to discriminate in the sphere of penal law between the Poles (and probably the Jews as well), and the Germans, I prepared, after preliminary discussions with the presidents of the courts of appeal and the attorney generals of the annexed eastern territories, the attached draft concerning the administration of the penal laws against Poles and Jews in the annexed eastern territories and in the territory of the former Free City of Danzig."

Again, he says:

"So far I have been in agreement with the opinion held by the Fuehrer's deputy, on the fact that a Pole is less sensitive to the imposition of an ordinary prison sentence. Therefore, I had taken administrative measures to ensure that Poles and Jews be separated from other prisoners and that their imprisonment be rendered more severe. Number 3 goes still farther and substitutes for the terms of imprisonment and hard labor prescribed by Reich law other prison sentences of a new kind, viz, the prison camp and the more rigorous prison camp."

Speaking of the proposed draft prepared by him, Schlegelberger said:

"The part concerned with procedure contains first the special regulations existing up to now of the preliminary decree. In addition, a Pole and a Jew sentenced by a German court is not to be allowed in the future any legal remedy against the judgment; neither will he have a right of appeal, or be allowed to ask that the case be reopened. All sentences will take effect immediately. In future, Poles and Jews will also no longer be allowed to object to German judges on the grounds of prejudice; nor will they be able to take an oath. Coercive measures against them are permissible under easier conditions."

A memorandum dated 22 April 1941, bearing the same file number as the letter of Schlegelberger, states that Schlegelberger has transmitted the proposed draft, and adds:

"The draft establishes a draconic special criminal law for Poles and Jews, giving a wide range for the interpretations of the facts of the case, with the death penalty applicable throughout. The conditions of imprisonment are also much more severe than provided for in the German criminal law."

The note further states:

"The Minister of Justice differs only in two points from the suggestions of the Fuehrer's deputy."

It then states that the Fuehrer's deputy considered it more appropriate to authorize the Reich governors to introduce the special criminal law, whereas the Minister of Justice provides for its introduction by a Reich decree. The second difference of opinion was somewhat to the credit of the defendant Schlegelberger. The Fuehrer's deputy considered the introduction of corporal punishment appropriate, and the Minister of Justice refused to agree.

On 3 August 1942 the Reich Minister of Justice sent a draft of the proposed ordinance to a number of high officials, including the Reich Minister of Interior and the Reich Minister for Popular Enlightenment and Propaganda. The letter was signed "By order:

Freisler." Freisler was at that time State Secretary in the Reich Ministry of Justice. The letter contained this significant statement:

"I have emphasized the importance in war of this ordinance because it indirectly serves national defense."

The enclosed draft provided that Jews should not be entitled to make use of the right of appeal, revision, or complaint against decisions in criminal cases, and could not appeal to the courts for a decision against sentences inflicted by the police. It also provided that in cases where an appeal had already been filed it should be considered cancelled.

On 13 August 1942 the Reich Minister of Interior wrote to the Reich Minister of Justice, requesting that the draft be extended so as to restrict the right of Jews to appeal in administrative as well as criminal cases. On the same day the defendant Schlegelberger wrote to the Reich Minister for Popular Enlightenment and Propaganda concerning the addition to the draft as suggested by the Reich Minister of the Interior. We quote:

"I declare that I have no objections against an extension of my draft to matters of administrative law and to decisions by administrative authorities."

He then suggested an additional provision to the effect that Jews should be forbidden to testify on oath, but that they might be prosecuted as for perjury though no oath is to be taken.

On 8 March 1943 the Chief of the Security Police and the SD, Kaltenbrunner,* wrote to Minister of the Interior Frick urging immediate passage of the proposed ordinance. The following reasons were given:

"1. Previous evacuations of Jews have been restricted to Jews who were not married to non-Jews. In consequence, the numbers of Jews who have remained in the interior is quite considerable. As the ordinance would also include these Jews as well, the measures it plans are not objectless.

"2. The provision of article 7 of the ordinance according to which, at the death of a Jew, his fortune escheats in its entirety to the Reich, results in the accumulation of considerably less work for the State Police. At the present time the procedure used by the State Police in handling the confiscation of such Jewish inheritances must frequently be modified to suit each special case."

He adds that the provision for the transfer of Jews to the police is based on an agreement between Himmler and Thierack, who

* Ernst Kaltenbrunner, a defendant before the IMT, was sentenced to death. See Trial of the Major War Criminals, op. cit., volume I, page 365.

had by that time succeeded Schlegelberger as Reich Minister of Justice.

On 21 April 1943 a memorandum for the files of the Reich Chancellery reports a conference of State secretaries on the proposed ordinance at which the defendant Rothenberger was present. The conference came to the conclusion that certain modifications should be made. The final result of the prolonged discussion was the enactment of the 13th regulation under the Reich Citizenship Law of 1 July 1943, which was signed by Frick, Bormann, and Thierack. It will be recalled that that regulation, *supra,* provided that criminal actions committed by Jews should be punished by the police; that the property of a Jew should be confiscated after his death. These and other provisions were also made effective in the Protectorate of Bohemia and Moravia where German courts had jurisdiction.

With few exceptions Jews were wholly excluded from the administration of justice. In a speech before the NSDAP congress on 14 September 1934, Hans Frank stated:

> "It is unbearable to us to permit Jews to play any role whatsoever in the German administration of justice. * * * It will therefore be our firm aim to exclude Jews increasingly from the administration of the law as time goes on."

On another occasion Frank, as president of the Academy for German Law, directed: "For all future time it will be impossible that Jews will act in the name of German Law. * * *"

In an order reminiscent of the "burning of the books" in medieval days, Frank also directed that the works of Jewish authors should be removed from all public or study libraries whenever possible.

On 5 April 1933 the defendant Barnickel made an entry in his diary:

> "Today it is said in the newspaper that in Berlin there are about 3,500 attorneys and more than half of them are Jewish. Only 35 of them are to be admitted as lawyers. * * * To exclude these Jewish attorneys from one day to the next means terrible brutality."

The defense witness, Fritz Wallentin, stated that in general all non-Aryan judges were removed from the administration of penal justice very soon after 30 January 1933. The evacuation of Jews to the East for extermination was in full swing at least as early as November 1941, and continued through the war years thereafter. As an illustration of the nature of this program as carried out throughout the Reich, we cite the report of the Secret State Police Main Office, Nuernberg-Fuerth; Branch Office Wuerzburg. This

report refers to the deportation from a comparatively small area around the city of Wuerzburg and shows evacuation of Jews to the east in the following numbers: On 27 July 1941, 202 persons; on 24 March 1942, 208 persons; on 25 April 1942, 850 persons; on 10 September 1942 (to Theresienstadt) 177 persons; on 23 September 1942 (to Theresienstadt) 562 persons; on 17 June 1943 (to Theresienstadt) seven persons; on 17 June 1943, 57 Jews were evacuated to the East. The report continues: "With this last transport, all the Jews who had to be evacuated according to instructions issued have left Main-Franken." The report shows that the total number of 2,063 Jews were evacuated from the Main-Franken area alone. The furniture, clothing and laundry items left by the Jews were given to the finance offices of Main-Franken and turned into cash by them.

Even before transfers to the Gestapo had been substituted for judicial procedure the position of a Pole or a Jew who was tried by the courts was not a happy one. The right of self defense on the part of a Pole was specifically limited. Poles and Jews could not challenge a German judge for prejudice. Other limitations upon the right of appeal and the like are set forth, *supra* (law against Poles and Jews, 4 December 1941).

On 22 July 1942 Reich Minister Goebbels stated that "it was an untenable situation that still today a Jew could protest against the charge of the president of the police, who was an old Party member and a high SS Leader. The Jew should not be granted any legal remedy at all nor any right of protest."

The defendant Lautz testified that according to the provisions of decree which antedated the war and by reason of the general regulations of the law in every case it had to be pointed out in the indictment if the person was a Jew or of mixed race.

On 23 January 1943 the Oberlandesgericht president at Koenigsberg wrote to the Minister of Justice concerning defense of Poles before tribunals in Incorporated Eastern Territories. We quote:

> "The decree of 21 May 1942 * * * states that in accordance with the order on penal justice in Poland of 4 December 1941 attorneys are not (to) undertake the defense of Polish persons before tribunals in the Incorporated Eastern Territories. This decree has been received with satisfaction by all the judges and prosecutors in the whole of my district."

These directives by the authorities in the Reich under Hitler were not mere idle threats. The policies and laws were rigorously enforced. We quote from a sworn statement of former defendant Karl Engert as follows:

> "The handing over to the Gestapo of Jews, Poles, and gypsies was not under my supervision, but under that of Mr. Hecker,

who worked under me in my division. However, he was not responsible to me, but directly to the Minister Thierack." Again he said:

"About 12,000 inmates of the correction houses were assigned for transfer to the Gestapo. * * * Out of the total 12,000 my division assigned 3,000 for transfer in 1942. How many Jews, Poles, and gypsies were assigned I do not know; that must be in the statistics."

Reich Minister Goebbels, in an address to the judges of the People's Court, on 22 July 1942, stated that "if still more than 40,000 Jews, whom we considered enemies of the State, could go freely about in Berlin, this was solely due to the lack of sufficient means of transportation. Otherwise the Jews would have been in the East long ago."

Between 9 and 11 November 1938, a pogrom was carried out against the Jews throughout the Reich, and upon direct orders from Berlin. Defense witness Peter Eiffe testified that he heard rumors of the proposed pogrom on the night of 8 November and called at the Ministry of Propaganda where he was told that "somebody has let the cat out of the bag again." During the 3-day period Jewish property was destroyed throughout the Reich and thousands of Jews were arrested.

In Berlin the destruction of Jewish property was particularly great. To cap the climax on 12 November 1938, Field Marshal Goering issued the following decree:*

"Article I.—All damage done due to the indignation of the people at the incitement of international Jewry against Nationalist Socialist Germany carried out on the 8, 9, and 10 November 1938, on Jewish enterprises and living quarters is to be removed by the Jewish owners immediately.

"Article II.—The costs of restoration are to be borne by the owner of the Jewish business concerned * * *.

"Section 2.—Insurance claims of Jews of German nationality will be confiscated in favor of the Reich."

For this purpose a fine of one billion marks was imposed upon the Jews. The witness Schulz, who was an attorney in Berlin, acted in behalf of Frau Liebermann, the widow of the internationally known artist, Max Liebermann. Frau Liebermann was at that time 80 years old and the share of the fine imposed upon her was 280,000 marks. Ultimately orders were issued for her deportation to the East. She, however, died, either from heart failure or poison, as she descended the steps to be carried away. Defense

* 1938 RGBl. I, p. 1581.

witness Schulz* also testified concerning other methods of Jewish persecution. He said:

"* * * When a Jew wanted to emigrate, I had much to do with it. He had to pay the Reich escape tax, that was so and so much percent of his property and then a large amount was taken away from him by assessing his property very high. After all of that was done and the day he went to the passport office in order to get his clearance, his passport, and get his visa then he was told that now he still had to go to the notary, Dr. Stege, and had to deposit a voluntary fee to promote the emigration of the Jews, and that is where he paid the balance, and then left with his personal satchel, with his little valise."

Speaking of the "asocial" persons, Dr. Thierack, on 5 January 1943, at a mass meeting of the NSDAP, stated (*NG–275, Pros. Ex. 25*):

"I have seen to it that these people shall no longer be employed for any sort of work that is not dangerous. The most dangerous tasks are just the thing that is for them. Now, today, when thousands of these people are carrying supplies in the far north or building roads, I cannot help it if some of them die, but at least they are of some use."

The Roman Catholic chaplain at Amberg prison stated under oath that a large proportion of the inmates of that prison were Poles who had been sentenced under the "Poles' Act." Many of them died from undernourishment. They were forced to eat potato peelings and hunt through rubbish heaps for eatable refuse. From this prison "asocial elements" were picked out and sent in batches to the Mauthausen concentration camp. All of the first batch was said to have perished. Among the prisoners were Jews who had been sentenced for race pollution.

The witness Hecker stated under oath that after Thierack's "doubtful decree" concerning the transfer of Jews, Poles, and gypsies, prisoners in protective custody, and asocial elements from the justice prisons to the RSHA in the autumn of 1942, the Jews as a whole were immediately handed over. The work was carried out by Department V of the Ministry of Justice. Lists were prepared monthly and sent to Minister Thierack through the chief of the department.

On 22 October 1942 a directive (*648–PS, Pros. Ex. 264*) under the letterhead of the Reich Minister of Justice was issued to various prosecuting officers in which it was stated that "by agreement with the Reich Leader SS, lawfully sentenced prisoners confined in penal institutions will be transferred to the custody

* Complete testimony of defense witness Hans Heinrich Schulz is recorded in the mimeographed transcript, 25 September 1947. (Tr. pp. 9530–9552.)

of the Reich Leader SS." Those designated for transfer to the SS included "Jews, men and women, detained under arrest, protective custody, or in the workhouse; * * * and Poles, residing in the former Polish state territory on 1 September 1939, men and women, sentenced to penal camps or subsequently turned over for penal execution, if sentence is above 3 years, * * *. With completion of the transfer to the police, the penal term is considered interrupted. Transfer to the police is to be reported to the penal authority and in cases of custody to the superior executive authority, with the information that the interruption of the penal term has been ordered by the Reich Ministry of Justice." The directive is signed "Dr. Crohne."

A secret directive dated Berlin, 5 November 1942, was issued to the heads of the SS and to the police services, in which it was stated (*L–316, Pros. Ex. 265*):

> "Re: Jurisdiction over Poles and eastern nationals.
>
> "I. The Reich Leader SS has come to an arrangement with the Reich Minister of Justice Thierack whereby the justice waives the execution of the usual penal procedure against Poles and eastern nationals. These persons of alien race are in future to be handed over to the police. Jews and gypsies are to be treated in the same way. This agreement has been approved by the Fuehrer.
>
> "II. This agreement is based on the following considerations: Poles and eastern nationals are alien and racially inferior people living in the German Reich territory."

The order continues:

> "Such considerations which may be right for adjudicating a punishable offense committed by a German are however wrong for adjudicating a punishable offense committed by a person of alien race. * * * As a result of this, the administration of penal law for persons of alien race must be transferred from the hands of the administrators of justice into the hands of the police."

On 24 September 1942 the defendant Joel prepared a secret report concerning the Reich Marshal's plans for action in the Occupied Eastern Territories. The report states that "the Reich Marshal is looking for daring fellows who will be employed in the East for special purposes and who will be able to carry out tasks of creating confusion behind the lines." The suggestion was that "poachers" and "fanatical members of smuggling gangs who take part in gun battles on the frontiers," should be employed for this purpose. A copy of the report was sent to State Secretary Rothenberger for his attention and was submitted in connection with a

proposed conference to be held on 9 October 1942. Minutes of a conference of 9 October 1942, signed by Dr. Crohne, incorporate the substance of Joel's report, and state that the poachers have already been turned over to the Reich Leader SS for special duties. The report recommends that the district attorneys be given the task of obtaining the convicts for this special service, and provides further (*662–PS, Pros. Ex. 263*):

"*Delivery of asocial convicts.*—Persons in penal institutions designated as asocial persons by judicial decision are to be turned over to the Reich Leader SS.

"1. *Persons in custody for reasons of security.*—Persons in custody for reasons of security who are in German penal institutions will be put at the disposal of the Reich Leader SS. The execution of sentence will be regarded as interrupted by the delivery. * * *

"*b.* Whether women are also to be delivered is still doubtful. * * * In this regard it will have to be a fundamental point from the beginning that in the case of female Poles, Jews, and gypsies no doubt about the delivery can exist.

"*c.* Foreigners are not affected. Poles, Russians, Ukrainians, Jews, and gypsies do not rank as foreigners. * * *.

"2. *Jews, gypsies, Russians, and Ukrainians* will be delivered to the Reich Leader SS without exception.

"3. *Poles.*—Ethnic Poles who are subject to the Polish criminal law regulations, or have been delivered to the Polish penal authorities, and who have more than 3 years' sentence to serve, will be delivered to the Reich Leader SS.

"Poles with smaller sentences will remain in the custody of the prison system. After serving their sentences they will be reported by name to the police just the same."

It will be observed that the decisions concerning special treatment for Poles and Jews which were reached at this conference of 9 October 1942 antedate by almost 9 months the enactment of the 13th regulation concerning the Reich Citizenship Law of 1 July 1943 which provided "that criminal actions committed by Jews shall be punished by the police."

On 1 April 1943 a letter from the Reich Ministry of Justice to the public prosecutors of the courts of appeal and others stated that the "Reich Security Office has directed by the decree of 11 March 1943 as follows:

"*a.* Jews, who in accordance with number VI of the guiding principles, are released from a penal institution, are to be taken by the State police (chief) office competent for the district in which the penal institution is located, for the rest of their lives

to the concentration camps Auschwitz or Lublin in accordance with the regulations for protective custody that have been issued. The same applies to Jews who in the future are released from a penal institution after serving a sentence of confinement.

"*b.* Poles, who in accordance with number VI of the guiding principles, are released from a penal institution, are to be taken by the State police (chief) office competent for the district in which the penal institution is located, for the duration of the war to a concentration camp in accordance with the regulations on protective custody that have been issued.

"The same applies in the future to Poles who after serving a term of imprisonment of more than 6 months are to be discharged by a penal institution."

It was stated that the ruling replaces previous orders. The instrument is stamped "Reich Ministry of Justice" and is signed by Dr. Eichler.

As a crowning example of fanatical imbecility, we cite the following document issued in April 1943 which was sent to the desk of the defendant Rothenberger for his attention and was initialed by him (*NG–1656, Pros. Ex. 535*):

"The Reich Minister of Justice
"Information for the Fuehrer
"1943 No.

"After the birth of her child a full-blooded Jewess sold her mother's milk to a pediatrician and concealed that she was a Jewess. With this milk babies of German blood were fed in a nursing home for children. The accused will be charged with deception. The buyers of the milk have suffered damage, for mother's milk from a Jewess cannot be regarded as food for German children. The impudent behavior of the accused is an insult as well. Relevant charges, however, have not been applied for, so that the parents, who are unaware of the true facts, need not subsequently be worried.

"I shall discuss with the Reich health leader the racial-hygienic aspect of the case.

"Berlin, April 1943".

The witness Lammers, former Chief of the Reich Chancellery, testified as follows:*

"Q. * * * Now, you answered Dr. Kubuschok that the subject of sterilization of half-Jews was an alternative to their being moved to the East and that it had been raised by half-Jews themselves in 1942 or prior thereto.

* Complete testimony of defense witness Hans Heinrich Lammers is recorded in the mimeographed transcript 22 July 1947, pages 5582–5620.

"A. Yes. I said so."

He testified further that the half-Jews were not subject to any compulsion. He was apparently of the opinion that a person was a free agent if he had a choice between sterilization and deportation to a concentration camp.

It will be recalled that the law of 4 December 1941 against Poles and Jews applied to the "Incorporated Eastern Territories." Those territories were seized in the course of criminal aggressive war, but aside from the fact it is clear, as we have indicated, *supra,* that the purported annexation was premature and invalid under the laws and customs of war. The so-called annexed territories in Poland were in reality nothing more than territory under belligerent occupation of the military forces of Germany. The extension to and application in these territories of the discriminatory law against Poles and Jews was in furtherance of the avowed purpose of racial persecution and extermination. In the passing and enforcement of that law the occupying power in our opinion violated the provisions of the Hague Convention from which we quote:

> "Until a more complete code of the laws of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

Other relevant portions are as follows:

> "*Article 43.*—The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.
>
> "*Article 46.*—Family honor and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated." (*Hague Convention No. IV of 18 October 1907* 36 Stat. 2277; Treaty Series No. 539; Mallory Treaties, Vol. 2, page 2269.)

The prosecutions which were proposed by Lautz cannot be justified upon any honest claim of military necessity. As a lawyer of ability, he must have known that the proposed procedure was in violation of international law.

Although the authorities are not in accord as to the proper construction of article 23h of the regulations annexed to the

Hague Convention of 1907, we are of the opinion that the introduction and enforcement of the law against Poles and Jews in occupied Poland resulted in a violation of that provision which is as follows:

"It is forbidden to declare abolished, suspended, or inadmissible in a court of law the right and actions of the nationals of the hostile party." *

The evidence discloses that the transfer of persons to concentration camps was done even before the war and on direct orders of Hitler. Dr. Lammers, Chief of the Reich Chancellery, on 8 August 1939, notified the Reich Minister of Justice that "the Fuehrer has given an order that all dispensable persons in security detention are to be put at the disposal of the Reich Leader SS immediately." The same procedure was employed as to persons who had never been convicted.

On 24 January 1939, a conference was held at which reports were received from eight different court districts. The subject was "Protective Custody after Serving Term of Imprisonment, after Acquittal, after Release from Imprisonment on Remand." Among the cases reported were those of defendants who were taken into custody by the police in the court room immediately after their acquittal. Others were taken by the police in cases where there had been a refusal to issue a warrant of arrest. The report on the Hamburg situation by the defendant Rothenberger states that the number of persons taken into protective custody has increased. Rothenberger reports that in six cases Jewish women had been taken into protective custody because of sexual intercourse with Aryans. He quotes the State Police file as follows:

"1. Protective custody, 'to make the punishment finally effective' * * *.

"2. Protective custody, 'to make the served sentences still more effective' * * *.

"3. Protective custody, 'because of the big number of previous convictions'.

"4. Protective custody 'to prevent prejudicing the course of justice through the interference of lawyers as defense counsel'. "

The report on the conference ends as follows:

"The Minister concludes the discussion by indicating that it is to be the task of the chief presidents to see that arrests in the court room by the State Police are avoided, and recommends for the rest to maintain the connection with the State Police."

The report is signed by the defendant Klemm.

* Hyde, op. cit., volume III (2d rev. ed.), page 1714.

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Former defendant Engert as vice president of the People's Court, and Thierack, the president of the People's Court, protested in July and August 1940 against the trial of minor cases in the People's Court as not being compatible with the dignity of the tribunal and suggested that the defendants in such cases should be transferred to a concentration camp. As Thierack put it—

> "However right it is to exterminate harshly and uproot all the seeds of insurrection, as for example we see them in Bohemia and Moravia, it is wrong for every follower, even the smallest, to be given the honor of appearing for trial and being judged for high treason before a People's Court or, failing that, before an appellate court. In order to deal with these small cases and even with the smallest, the culprits should surely be shown that German sovereignty will not put up with their behavior and that it will take action accordingly. But that can also be done in a different way and I think in a more advantageous one, than through the tedious and also very expensive and ponderous channels of court procedure. I have therefore no objection whatsoever, if all the small hangers-on who are somehow connected with the high treason plans which have been woven by others are brought to their senses by being transferred to a concentration camp for some time."

As early as 29 January 1941 the senior public prosecutor at Hamm wrote to the Reich Minister of Justice, for the attention of State Secretary Schlegelberger (*NG–685, Pros. Ex. 259*):

> "Upon inquiry, the Reich Trustee for Labor for the economic territory of Westphalia-Lower Rhine has informed me that 'in accordance with an agreement between the Reich Minister for Labor and the Reich Leader SS as Chief of the German Police, breach of work contracts by Poles are to be punished by the Secret State Police with protective custody or concentration camps. The meaning of this step'—so writes this Reich trustee —'is that in the case of Poles the strictest measures are to be taken at once * * *'. For this reason we made it a point in my office to transfer the cases involving breaches of work contracts by Polish civilian workers, to the Gestapo (Secret State Police) for further action."

The same letter informs the defendant Schlegelberger of uncertainty which has arisen in the treatment of Polish civilians because in some cases the courts would sentence to 2 or 3 years imprisonment while the State Police may pronounce the death sentence for the same crime.

While the part played by the Ministry of Justice in the extermi-

nation of Poles and Jews was small compared to the mass extermination of millions by the SS and Gestapo in concentration camps, nevertheless the courts contributed greatly to the "final solution" of the problem. From a secret report from the office of the Reich Minister of Justice to the judges and prosecutors, including the defendant Lautz, it appears that 189 persons were sentenced under the law for the protection of German blood and honor in 1941, and 109 in 1942. In the year 1942, 61,836 persons were convicted under the law against Poles and Jews. This figure includes persons convicted in the Incorporated Eastern Territories, and also convictions for crimes committed in "other districts of the German Reich by Jews and Poles who on 1 September 1939 had their residence or permanent place of abode in territory of the former Polish state." These figures, of course, do not include any cases in which Jews were convicted of other crimes in which the law of 4 December 1941 was not involved.

The defendants contend that they were unaware of the atrocities committed by the Gestapo and in concentration camps. This contention is subject to serious question. Dr. Behl testified that he considered it impossible that anyone, particularly in Berlin, should have been ignorant of the brutalities of the SS and the Gestapo. He said: "In Berlin it would have been hardly possible for anybody not to know about it, and certainly not for anybody who was a lawyer and who dealt with the administration of justice." He testified specifically that he could not imagine that any person in the Ministry of Justice, or in the Party Chancellery, or as a practicing attorney or a judge of a Special (or) People's Court could be in ignorance of the facts of common knowledge concerning the treatment of prisoners in concentration camps. It has been repeatedly urged by and in behalf of various defendants that they remained in the Ministry of Justice because they feared that if they should retire, control of the matters pertaining to the Ministry of Justice would be transferred to Himmler and the Gestapo. In short, they claim that they were withstanding the evil encroachments of Himmler upon the justice administration, and yet we are asked to believe that they were ignorant of the character of the forces which they say they were opposing. We concur in the finding of the first Tribunal in the case of United States et al. *vs.* Goering, et al., concerning the use of concentration camps. We quote:

> "Their original purpose was to imprison without trial all those persons who were opposed to the government, or who were in any way obnoxious to German authority. With the aid of a secret police force, this practice was widely extended, and in

course of time concentration camps became places of organized and systematic murder where millions of people were destroyed.

* * * * * * *

"A certain number of the concentration camps were equipped with gas chambers for the wholesale destruction of the inmates, and with furnaces for the burning of the bodies. Some of them were in fact used for the extermination of Jews as part of the 'final solution' of the Jewish problem.

* * * * * * *

"In Poland and the Soviet Union these crimes were part of a plan to get rid of whole native populations by expulsion and annihilation, in order that their territory could be used for colonization by Germans. Hitler had written in 'Mein Kampf' on these lines, and the plan was clearly stated by Himmler in July 1942, when he wrote:

" 'It is not our task to Germanize the East in the old sense, that is to teach the people there the German language and the German law, but to see to it that only people of purely Germanic blood live in the East'." *

A large proportion of all of the Jews in Germany were transported to the east. Millions of persons disappeared from Germany and the occupied territory without a trace. They were herded into concentration camps within and without Germany. Thousands of soldiers and members of the Gestapo and SS must have been instrumental in the processes of deportation, torture, and extermination. The mere task of disposal of mountainous piles of corpses (evidence of which we have seen) became a serious problem and the subject of disagreement between the various organizations involved. The thousands of Germans who took part in the atrocities must have returned from time to time to their homes in the Reich. The atrocities were of a magnitude unprecedented in the history of the world. Are we to believe that no whisper reached the ears of the public or of those officials who were most concerned? Did the defendants think that the nation-wide pogrom of November 1938 officially directed from Berlin and Hitler's announcement to the Reichstag threatening the obliteration of the Jewish race in Europe were unrelated? At least they cannot plead ignorance concerning the decrees which were published in their official organ, "The Reichsgesetzblatt". Therefore, they knew that Jews were to be punished by the police in Germany and in Bohemia and Moravia. They knew that the property of Jews was confiscated

* Trial of the Major War Criminals, op. cit., volume I, pp. 234, 235, and 237.

on death of the owner. They knew that the law against Poles and Jews had been extended to occupied territories, and they knew that the Chief of the Security Police was the official authorized to determine whether or not Jewish property was subject to confiscation. They could hardly be ignorant of the fact that the infamous law against Poles and Jews of 4 December 1941 directed the Reich Minister of Justice himself, together with the Minister of the Interior, to issue legal and administrative regulations for "implementation of the decree". They read *The Stuermer*. They listened to the radio. They received and sent directives. They heard and delivered lectures. This Tribunal is not so gullible as to believe these defendants so stupid that they did not know what was going on. One man can keep a secret, two men may, but thousands, never.

The evidence conclusively establishes the adoption and application of systematic government-organized and approved procedures amounting to atrocities and offenses of the kind made punishable by C. C. Law 10 and committed against "populations" and amounting to persecution on racial grounds. These procedures when carried out in occupied territory constituted war crimes and crimes against humanity. When enforced in the Alt Reich against German nationals they constituted crimes against humanity.

The pattern and plan of racial persecution has been made clear. General knowledge of the broad outlines thereof in all its immensity has been brought home to the defendants. The remaining question is whether or not the evidence proves beyond a reasonable doubt in the case of the individual defendants that they each consciously participated in the plan or took a consenting part therein.

THE DEFENDANT SCHLEGELBERGER

The defendant Franz Schlegelberger was born on 23 October 1875 in Koenigsberg. He received the degree of doctor of law at the University of Leipzig in 1899 and passed the higher state law examination in 1901. He is the author of several law books. His first employment was as an assistant judge at the local court in Koenigsberg. In 1904 he became judge at the district court at Lyck. In 1908 he was appointed judge of the local court in Berlin and in the fall of the same year was appointed as an assistant judge of the Berlin Court of Appeals. He was then appointed councillor of the Berlin Court of Appeals in 1914, where he worked until 1918. During the First World War, on 1 April 1918 he became an assistant to the Reich Board of Justice. On 1 October 1918 he was appointed Privy Government Councillor and department chief. In 1927 he was appointed ministerial director in the Reich

Ministry of Justice. On 10 October 1931 he was appointed Secretary of State in the Reich Ministry of Justice under Minister of Justice Guertner, which position he held until Guertner's death. Upon Guertner's death on 29 January 1941 Schlegelberger was put in charge of the Reich Ministry of Justice as administrative Secretary of State. When Thierack became the new Minister of Justice on 20 August 1942, Schlegelberger resigned from the Ministry.

In 1938 Hitler ordered Schlegelberger to join the NSDAP. Schlegelberger testified that he made no use of the Party, that he never attended a Party meeting, that none of his family belonged to the Party, and that Party attitudes often rendered his position difficult. However, upon his retirement as Acting Minister of Justice on 20 August 1942, Schlegelberger received a letter of appreciation from Hitler together with a gift of 100,000 RM.

Later in 1944 Hitler gave Schlegelberger the special privilege to use the 100,000 RM to purchase a farm, which under the rule then prevailing could have been purchased only by an expert agriculturist. Schlegelberger states that the 100,000 RM were on deposit in a Berlin German bank to his account when the collapse came. Thus, it is shown that Hitler and Schlegelberger were not too objectionable to each other. These transactions also show that Hitler was at least attempting to reward Schlegelberger for good and faithful service rendered in the performance of some of which Schlegelberger committed both war crimes and crimes against humanity as charged in the indictment.

We have already adverted to his speech at the University of Rostock on 10 March 1936, on the subject, "A Nation Beholds Its Rightful Law." In this speech Schlegelberger declared:

> "In the sphere of criminal law the road to a creation of justice in harmony with the moral concepts of the new Reich has been opened up by a new wording of section 2 of the criminal code, whereby a person is also (to) be punished even if his deed is not punishable according to the law, but if he deserves punishment in accordance with the basic concepts of criminal law and the sound instincts of the people. This new definition became necessary because of the rigidity of the norm in force hitherto."

As amended, section 2 remained in effect until repealed by Law No. 11 of the Allied Control Council. The term "the sound people's sentiment" as used in amended section 2 has been the subject of much discussion and difference of view as to both its proper translation and interpretation. We regard the statute as furnishing no objective standards "by which the people's sound sentiment may be measured". In application and in fact this expression became the "healthy instincts" of Hitler and his coconspirators.

What has been said with regard to the amendment to section 2 of the criminal code is equally true of the amendment of section 170a of the code by the decree of Hitler of 28 June 1935, which is also signed by Minister Guertner and which provides:

> "If an act deserves punishment according to the common sense of the people but is not declared punishable in the code, the prosecution must investigate whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by the proper application of this penal law." *

This new conception of criminal law was a definite encroachment upon the rights of the individual citizen because it subjected him to the arbitrary opinion of the judge as to what constituted an offense. It destroyed the feeling of legal security and created an atmosphere of terrorism. This principle of treating crimes by analogy provided an expedient instrumentality for the enforcement of Nazi principles in the occupied countries. German criminal law was therefore introduced in the incorporated areas and also in the nonincorporated territories, and German criminal law was thereafter applied by German courts in the trial of inhabitants of occupied countries though the inhabitants of those countries could have no possible conception of the acts which would constitute criminal offenses.

In the earlier portions of this opinion we have repeatedly referred to the actions of the defendant Schlegelberger. Repetition would serve no good purpose. By way of summary we may say that Schlegelberger supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretense of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence. It was his signature on the decree of 7 February 1942 which imposed upon the Ministry of Justice and the courts the burden of the prosecution, trial, and disposal of the victims of Hitler's Night and Fog. For this he must be charged with primary responsibility.

He was guilty of instituting and supporting procedures for the wholesale persecution of Jews and Poles. Concerning Jews, his ideas were less brutal than those of his associates, but they can scarcely be called humane. When the "final solution of the Jewish question" was under discussion, the question arose as to the disposition of half-Jews. The deportation of full Jews to the East was then in full swing throughout Germany. Schlegelberger was unwilling to extend the system to half-Jews. He therefore pro-

* 1935 RGBl. I, page 844.

posed to Reich Minister Lammers, by secret letter on 5 April 1942 (*4055–PS, Pros. Ex. 401*) :

"The measures for the final solution of the Jewish question should extend only to full Jews and descendants of mixed marriages of the first degree, but should not apply to descendants of mixed marriages of the second degree. [First degree presumably those with two non-Aryan grandparents, and second degree with only one.]

"With regard to the treatment of Jewish descendants of mixed marriages of the first degree, I agree with the conception of the Reich Minister of the Interior which he expressed in his letter of 16 February 1942, to the effect that the prevention of propagation of these descendants of mixed marriages is to be preferred to their being thrown in with the Jews and evacuated. It follows therefrom that the evacuation of those half-Jews who are no more capable of propagation is obviated from the beginning. There is no national interest in dissolving the marriages between such half-Jews and a full-blooded German.

"Those half-Jews who are capable of propagation should be given the choice to submit to sterilization or to be evacuated in the same manner as Jews."

Schlegelberger knew of the pending procedures for the evacuation of Jews and acquiesced in them. As to half-Jews his only suggestion was that they be given the free choice of either one of the impaling horns of a dilemma. On 17 April 1941 Schlegelberger wrote to Lammers as follows (*NG–144, Pros. Ex. 199*) :

"On being informed of the Fuehrer's intention to discriminate in the sphere of penal law between the Poles (and probably the Jews as well), and the Germans, I prepared, after preliminary discussions with the presidents of the courts of appeal and the attorneys general of the annexed eastern territories, the attached draft concerning the administration of the penal laws against Poles and Jews in the annexed eastern territories and in the territory of the former Free City of Danzig."

The draft of a proposed ordinance "concerning the administration of justice regarding Poles and Jews in the Incorporated Eastern Territories" was attached to his letter and is in evidence. A comparison of its phraseology with the phraseology contained in the notorious law against Poles and Jews of 4 December 1941 discloses beyond question that Schlegelberger's draft constituted the basis on which, with certain modifications and changes, the law against Poles and Jews was enacted. In this respect he was not only guilty of participation in the racial persecution of Poles

and Jews; he was also guilty of violation of the laws and customs of war by establishing that legislation in the occupied territories of the East. The extension of this type of law into occupied territories was in direct violation of the limitations imposed by the Hague Convention, which we have previously cited.

It is of interest to note that on 31 January 1942 Schlegelberger issued a decree providing that the provisions of the law against Poles and Jews "will be equally applicable with the consent of the public prosecutor to offenses committed before the decree came into force". We doubt if the defendant would contend that the extension of this discriminatory and retroactive law into occupied territory was based on military necessity.

Schlegelberger divorced his inclinations from his conduct. He disapproved "of the revision of sentences" by the police, yet he personally ordered the murder of the Jew Luftgas on the request of Hitler, and assured the Fuehrer that he would, himself, take action if the Fuehrer would inform him of other sentences which were disapproved.

Schlegelberger's attitude toward atrocities committed by the police must be inferred from his conduct. A milking-hand, Bloedling, was sentenced to death in October 1940, and during the trial he insisted his purported confession had been obtained as a result of beatings imposed upon him by the police officer Klinzmann. A courageous judge tried Klinzmann and convicted him of brutality and sentenced him to a few months imprisonment. Himmler protested against the sentence of Klinzmann and stated that he was going "to take the action of the Hauptwachtmeister of the police Klinzmann as an occasion to express gratitude for his farsighted conduct which was only beneficial to the community." He said further:

> "I must reward his action because otherwise the joy of serving in the police would be destroyed by such verdicts. But finally K. has to be rehabilitated in public because his being sentenced by a court is known in public."

On 10 December 1941 Schlegelberger wrote to the Chief of the Reich Chancellery stating that he was unable to understand the sentence passed against Klinzmann. We quote:

> "No sooner had the verdict passed on Klinzmann become known here, orders were for this reason given to the effect that the sentence in case of its validation should not be carried out for the time being. Instead, reports concerning the granting of a pardon should be made as soon as possible. In the meantime, however, the sentence passed on Klinzmann became valid, by decision of the Reich [Supreme] Court of 24 November 1941 which abandoned the procedure of revision as apparently un-

founded. Taking into regard also the opinion you expressed on the sentence, Sir, I now ordered the remission of the sentence and of the costs of proceedings by way of pardon as well as the striking out of the penalty note in the criminal records."

On 24 December 1941 Schlegelberger wrote to Lammers that he had quashed the proceedings. In February 1942 Himmler wrote expressing appreciation of the efforts in quashing the proceedings against Klinzmann and stated that he had since promoted him to Meister of the municipal police.

Schlegelberger presents an interesting defense, which is also claimed in some measure by most of the defendants. He asserts that the administration of justice was under persistent assault by Himmler and other advocates of the police state. This is true. He contends that if the functions of the administration of justice were usurped by the lawless forces under Hitler and Himmler, the last state of the nation would be worse than the first. He feared that if he were to resign, a worse man would take his place. As the event proved, there is much truth in this also. Under Thierack the police did usurp the functions of the administration of justice and murdered untold thousands of Jews and political prisoners. Upon analysis this plausible claim of the defense squares neither with the truth, logic, or the circumstances.

The evidence conclusively shows that in order to maintain the Ministry of Justice in the good graces of Hitler and to prevent its utter defeat by Himmler's police, Schlegelberger and the other defendants who joined in this claim of justification took over the dirty work which the leaders of the State demanded, and employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home. That their program of racial extermination under the guise of law failed to attain the proportions which were reached by the pogroms, deportations, and mass murders by the police is cold comfort to the survivors of the "judicial" process and constitutes a poor excuse before this Tribunal. The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes.

Schlegelberger resigned. The cruelties of the system which he had helped to develop were too much for him, but he resigned too late. The damage was done. If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands? The consequences which Schlegelberger feared were realized. The police, aided by Thierack, prevailed. Schlegelberger had failed. His hesitant injustices no longer satisfied the urgent demands of

the hour. He retired under fire. In spite of all that he had done he still bore an unmerited reputation as the last of the German jurists and so Hitler gave him his blessing and 100,000 RM as a parting gift. We are under no misapprehension. Schlegelberger is a tragic character. He loved the life of an intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security. He is guilty under counts two and three of the indictment.

THE DEFENDANT KLEMM

Herbert Klemm, formerly State Secretary of the Reich Ministry of Justice, was born in Leipzig on 15 May 1903. After normal schooling, he passed his first legal state examination in 1925, his second legal state examination in 1929. From 1929 to 1933, he was court assessor of the prosecution authority of Dresden. From March 1933 to March 1935 he was the personal Referent and adjutant of Thierack, Minister of Justice, Saxony. In 1935, at the time of the centralization of the administration of justice, he was transferred to the Reich Ministry of Justice where he remained until he was mobilized for war service on 23 June 1940. On 20 April 1939 he was promoted to the office of Ministerialrat. In July of 1940 he was assigned to the Reich Commissioner for the Occupied Dutch Territories, upon the request of the Plenipotentiary for Occupied Dutch Territories. On 17 March 1941 he was transferred to the staff of the deputy of the Fuehrer, which later became the Party Chancellery, in Munich. He remained with the Party Chancellery until 4 January 1944, when he became state secretary of the Reich Ministry of Justice under Thierack. He remained in this capacity until the surrender.

Klemm's Party connections were as follows: he applied for membership in the NSDAP on 4 November 1930; his membership card, 405576, was received 1 January 1931. On 30 June 1933 he joined the SA; the highest rank which he received in the SA was that of Oberfuehrer. When in Saxony he was the legal advisor of the SA for Saxony and liaison officer between the SA for Saxony and the Minister of Justice for Saxony. When he was transferred to Berlin, he was the liaison officer between the Reich Ministry of Justice and the SA Chief of Staff for Germany and the legal advisor to the Chief of Staff of the SA for Germany.

He was a member of the National Socialist Jurists' League from 1933. In September of 1944 he was appointed deputy chief of the National Socialist Jurists' League by Thierack, who was at that time chief.

He received the Bronze Party Service decoration in 1941 and the Golden Party decoration, the latter being conferred by Bormann in 1943.

During the time in which the defendant was in Saxony, he was a member of the disciplinary court of the SA group which dealt with the purge of the SA in connection with the Roehm Putsch.

A brief outline of the official activities of the defendant Klemm is as follows: after transfer to Berlin in 1935, the defendant dealt with acts against the State and Party and, later, the malicious acts law. In this field prosecution could be ordered only by the Ministry of Justice with the permission of the office of the deputy of the Fuehrer, which later became the Party Chancellery.

It was during this period that the following circular, dated Berlin, 18 October 1937, and initialed by Klemm, was issued (*NG–310, Pros. Ex. 33*):

"1. Criminal procedures concerning more severe interrogations by the Stapo will be dealt with centrally by Chief Prosecutor Klemm. They are to be sent to the competent co-worker Prosecutor Winkler.

"2. As far as reports concerning executions when escaping from concentration camps, etc., suicides in K.Z. arrive, they shall continue to be dealt with by the specialist competent for the respective subject. The general consultant for political criminal matters, however, is to be informed of the reports. They are to be submitted to him once."

The practice of more severe interrogations, according to the testimony of Lautz, caused much worry to those concerned with the administration of justice. By the term "more severe interrogations" is meant "third degree" methods which Hitler authorized the police to use in cases considered important for the safety of the State.

From July 1940 to March 1941, while Klemm was in Holland, he had charge of both civil and penal law. The penal section in Holland was for German citizens not in the army and Dutch who infringed on German interests. He was also liaison officer between the commissioner general for the administration of justice and secretary of the Dutch Ministry of Justice at The Hague.

During this period there were published in the official gazette for the occupied Dutch territories, in the year 1944,* decrees of the Reich Commissioner of Occupied Dutch Territories, Seyss-Inquart, pertaining to the registry of Jewish property, the confiscation of same under certain circumstances, and for the transfer

* This date is evidently a recording error, in as much as the decrees mentioned were published in 1940 and 1941.

of Jewish property to an official in the nature of an administrator. During this time a letter was written by Tenkink, Secretary General of the Dutch Ministry of Justice, to the Reich Commissioner of Holland, which shows the defendant's signature, informing the commissioner of excesses committed against Jews in Holland.

During this period letters dated 24 and 30 September 1940, marked "Secret," and signed by the defendant, to the department for legislation, Lange Vijverberg, with opinions and recommendations as to the registration and confiscation of Jewish property in Holland, were transmitted.

A letter dated 24 September 1940 contains the following statement:

> "In my view it must be achieved with other means to eliminate Jewish influence from such corporations. In the Reich, too, it needed months of careful work to gradually extract Jewish capital without disturbing the economy or to eliminate Jewish influence altogether."

The defendant Klemm was in the office of the deputy of the Fuehrer and Party Chancellery from March 1941 to January 1944. The Party Chancellery had to approve the drafts of decrees in connection with national laws and ordinances and also was charged with the responsibility for the approval of high official appointments. The Party Chancellery was formed from what had originally been the office of the deputy of the Fuehrer under Hess. It was the instrument of the Party in matters of State and soon became virtually the instrument of Bormann.

In the Party Chancellery Klemm was Chief of Group III–C. This group had the following functions, as stated by the defendant:

> "First, it had to deal with laws and drafts and decrees of the Reich Ministry of Justice, unless for reasons of their subject they were dealt with by another group, because that group appeared to be competent. Secondly, penal matters based on the law against malicious acts, as far as on the basis of legal provisions the approval of the Chief of the Party Chancellery was required for the prosecution. Thirdly, complaints from Party offices or individuals against decision by the courts. Fourth, complaints from the administration of justice against interference by Party offices into pending trials. Fifth, to observe especially civil and penal cases which concerned the Party. Sixth, matters of legal reform, and seventh, expert opinions in the field of the Party law."

Among his activities, and in conference with officials from the

Ministry of Justice, he made suggestions for strengthening the powers of the police.

At another conference with officials from the Ministry of Justice concerning the political evaluations of persons in connection with legal procedure, he represented the standpoint of the Party that Party evaluations should be accepted by the courts.

During the time that Klemm was Chief of Group III-C, the act providing for the retroactive application of law concerning treason was enacted and applied to the annexed eastern territories. It was claimed by the defendant that this was based upon a decision of Bormann.

At this time legislation depriving the Jews of legal rights was also contemplated; drafts of the proposals made were dealt with, and the letter of 9 September 1942, prepared in Department III, was dispatched.

Also as part of the activities of Group III–C under Klemm, the proposal of the defendant Schlegelberger regarding confirmation of sentences of penal cases by the president of the district court of appeals was disposed of and the defendant claims he influenced Bormann to oppose this recommendation of the Ministry of Justice.

During this period a circular entitled, "The New Organization of Justice," signed by Bormann, and which the defendant Klemm claims was intended to free the Ministry of Justice from Party criticism, states as follows:

> "Hereby is further required that you report to me all complaints which you have to bring in matters of justice, so that I can clear up the situation immediately by confidential negotiations with the Reich Minister of Justice. Should it, after a discussion with the Reich Minister of Justice, seem absolutely necessary that a problem is brought to the Fuehrer, then this will be taken care of by Reich Minister Dr. Lammers and myself."

During this period Klemm wrote the Minister of Justice as follows:

> "Your letter of 5 August 1943 is agreed to. No objections are raised to applying the German Criminal Code for Juveniles to foreign juveniles, unless they are Jewish, Polish, or gypsies. Regarding juvenile gypsies and those of mixed gypsy descent, you are asked to see to it that, simultaneously with the coming into force of the new law concerning Reich juveniles, a special regulation will come into effect which will prevent the German Criminal Code for juveniles from applying to gypsies and those of gypsy descent merely because a definite regulation is lacking."

The defendant states that during this period Bormann called him on the telephone and inquired whether he knew Rothenberger and inquired about Rothenberger. Also he later submitted to the defendant Klemm an inquiry as to the background and qualifications of persons presumed to have been possible appointees as Reich Minister of Justice. These included Thierack, and Klemm states that his report to Bormann was favorable to Thierack. These inquiries were made of the defendant in spite of the fact that, according to his testimony, he had to deal only with matters pertaining to the administration of justice, and these were definitely personnel matters under another department of the Party Chancellery.

During this period he was the liaison officer between Thierack and the Party Chancellery. As to this relationship, Klemm states:

> "Thierack asked me in all matters concerning the justice group of the Party Chancellery to come to him, that is to him personally, immediately and not to discuss them with the various Referents at the Ministry * * * and as I had worked in both fields, the best thing for him to get acquainted with the matter would be if I reported to him in person."

With reference to Klemm's duties as Under Secretary of State, the following paragraph of a report of the conference of the department chiefs, held 6 January 1944, outlines in part his duties in the Ministry as follows (*NG–195, Pros. Ex. 45*):

> "The Minister announced that from now on the Departments III, IV, and V, too, would be placed under the control of the State Secretary and hereby recalled the contrary regulation in office routine, which was published on 27 August 1942, but added that all death sentences must continue to be submitted to him. He would request the State Secretary to be present when they were submitted. Furthermore, all political and legal matters of particular importance must be reported to him."

Klemm maintains that his supervision of Departments III, IV, and V was merely on paper. However, the testimony of Hecker does not bear this out as regards Department V, nor does the testimony of Eggensperger.

During this period the decree against Poles and Jews was still being enforced under the jurisdiction of the Ministry of Justice insofar as any was left, outside the sphere of the Gestapo and the concentration camps.

During this period the Ministry of Justice still dealt with Nacht und Nebel cases. The defendant Klemm denies, in general, knowledge of NN procedure. Fourteen exhibits have been introduced in this case showing transactions concerning NN matters, subse-

quent to the time Klemm took over the office of State Secretary. The defendant admits knowledge that Nacht und Nebel prisoners were transferred from Essen to Silesia. He admits refusal of spiritual care for NN prisoners by foreign clergymen. He admits knowledge of a draft of a letter from Thierack to Bormann to the effect that NN women who were not to be executed should be so advised. He admits denying clemency to eight NN prisoners when he was acting as deputy for Thierack. In the remaining 123 cases, clemency was denied by Thierack when Klemm was presumably sitting in conference with him.

Among the fourteen documents enumerated above is a report from the defendant von Ammon, initialed by Klemm, relative to a trip concerning NN matters. This report states (*NG–231, Pros. Ex. 332*) :

> "The Military Commander in Chief, France, is grateful for the evidence which the military courts in occupied French territory receive as a result of the activity of the general legal authorities concerned with the prosecution and trial of NN cases in occupied French territory."

Klemm explains this document by stating that he merely approved the trip. With the above explanations, Klemm's counsel stated:

> "These are the only documents which the prosecution has submitted against you as far as NN cases are concerned."

In view of the fact that Klemm was State Secretary when these matters were disposed of and, nominally at least, charged with supervision of Department IV where they were handled, this conclusion is not one which this Tribunal accepts.

With regard to clemency during the time the defendant was State Secretary, Klemm is shown to have dealt with clemency matters as the advisor of Thierack when he was present and as his deputy in his absence. He states that personally he dealt only with clear cases and, further, that in clear cases clemency had been disapproved by seven agencies before it became a clear case. He states that clear cases were legally incontestable.

His testimony that in clear cases seven agencies disapproved clemency during the period when he was State Secretary, does not conform to the testimony of the defendant Lautz or with Exhibit 279 which Lautz cites. Lautz' testimony on this point is as follows:

> "The examination of these clemency pleas for their correctness was no longer possible for the prosecutions in the majority of cases. The prosecutors now had to restrict themselves to adding the pleas to their reports without changing them. The time limit laid down in the decree was, as a rule, not adhered to be-

cause the offices at the People's Court and the Reich prosecution were so overburdened that it was impossible for them to submit the files within the time limit set. Owing to that, occasionally there was sufficient time to make further investigations in the matter of the clemency plea. However, the opinion of the court, the prison, and all other agencies was no longer heard. They had been of importance before." (*Tr. p. 5947.*)

Moreover, what may constitute a legally incontestable case is subject to considerable speculation. Presumably a case based upon a confession would be legally incontestable. Certainly it can hardly be assumed that the defendant Klemm was unaware of the practice of the Gestapo with regard to obtaining confessions. He had dealt with this matter during his early period with the department of justice. It is hardly credible that he believed that the police methods which at an earlier time were subject to some scrutiny by the Ministry of Justice, had become less harsh because the Gestapo, in October of 1940, was placed beyond the jurisdiction of law. He must have been aware that a prolific source of clear cases based on confessions and, therefore, legally incontestable, came to him from the obscurity of the torture chamber.

During the time Klemm was State Secretary, the plan of the leaders of the Nazi state to inspire the lynching of Allied fliers by the people of Germany was inaugurated, and during this period the matter of execution of approximately 800 political prisoners, prior to evacuation of the penitentiary at Sonnenburg, took place. These matters will be dealt with more fully hereafter.

As heretofore pointed out in this opinion, the essential elements to prove a defendant guilty under the indictment in this case are that a defendant had knowledge of an offense charged in the indictment and established by the evidence, and that he was connected with the commission of that offense.

As to the matter of knowledge of the defendant Klemm, aside from the sources of knowledge heretofore pointed out in this opinion in regard to all of the defendants herein, certain other facts are significant. The defendant's sources of information were of a wide scope. He had been the liaison officer between the administration of justice and the SA in Saxony and the legal advisor of the chief of the SA for Saxony. On transfer to Berlin, he acted in the same capacity with the SA main office for the Third Reich and was the liaison officer between the Ministry of Justice and the SA Main office. In Holland he was head of the department of legal matters under Seyss-Inquart. He served with the Office of the Deputy of the Fuehrer and Party Chancellery from March 1941 to January 1944. There he was in charge of Group III–C. He was the friend of Klopfer in charge of Group III and, from the

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evidence, a trusted lieutenant of Bormann. Finally, he was State Secretary under Thierack, whom he had known since he was his adjutant and personal Referent in Saxony. In Berlin he lived with Thierack for the period in which he was State Secretary.

Klemm's career under the Third Reich moved smoothly from comparative insignificance to the position of State Secretary in the Ministry of Justice. His ascent was marked by no serious differences as to Party policies. He was close to both Bormann and Thierack and ascended by their favor. Under the circumstances it is not credible that he was ignorant of the policies and methods of these ruthless figures.

The defendant lays great stress on an order of Hitler as to secrecy and states that in connection with this order he adhered strictly to it; that he did not attempt to hear anything outside of his official duties. Such orders as to secrecy were not confined to Germany during the war; they were standard procedure in other countries and by no means excluded knowledge of secret matters derived from normal human contacts, particularly friends and acquaintances in the higher levels of state affairs. Further, the confidential position held by the defendant gave him a wide scope as to secret matters within the sphere of his official duties. As State Secretary of the Ministry of Justice and deputy of the minister in his absence, the defendant's official duties required knowledge of the higher spheres of State policy.

More specifically, Klemm knew of abuses in concentration camps. He knew of the practice of severe interrogations. He knew of the persecution and oppression of the Jews and Poles and gypsies. He must be assumed to have known, from the evidence, the general basis of Nacht und Nebel procedure under the Department of Justice. Therefore, it becomes important to consider his connection with the carrying out of these crimes alleged in the indictment and established by the evidence in this case.

It is clear from the evidence, heretofore outlined in part, that when the defendant Klemm was in Holland he knew of the persecution of Jews and he was connected to some extent with that persecution.

While he was in the Party Chancellery he wrote the letter, heretofore pointed out, denying the application of the German juvenile law to Poles, Jews, and gypsies. This Tribunal does not construe that letter as a legal opinion but as an expression of Party policy, submitted through the Party Chancellery to the Ministry of Justice to the effect that minors of the prescribed races must be subject to the merciless provisions of the decree against Poles and Jews. The argument that they were necessarily excluded because they were foreigners, and that the German Juvenile Act

contemplated entrance into the Hitler Youth, and similar provisions applicable only to Germans has little significance when the letter itself expressly states that there were no objections to applying the German Criminal Code for juveniles to foreign juveniles, unless they were Poles, Jews, or gypsies. Further, it can hardly be construed as a legal opinion as to gypsies in view of the statement therein made that a special regulation will come into effect which will prevent the German Criminal Code for juveniles from applying to gypsies and those of gypsy descent merely because a definite regulation is lacking.

While in the Party Chancellery, Klemm took part in drafting the law to make treason retroactive and applying it to annexed territories, and this draft bears his signature.

As State Secretary he knew of the NN procedure and was connected therewith, particularly as to the approximately 123 NN prisoners sentenced to death who were denied clemency while he sat in conference with Thierack, and in the eight cases where he denied clemency as deputy for Thierack.

As State Secretary in the Ministry of Justice, he necessarily exercised supervision over the enforcement of the decree against Poles and Jews and dealt with clemency matters pertaining to cases tried under that decree.

In connection with the defendant Klemm, two other transactions constituting crimes charged in the indictment are of particular significance. The first of these is charged under the second count of the indictment as a war crime against all the defendants and, particularly under paragraph 18 of the indictment, charging the defendant Klemm with special responsibility and participation. This pertains to the inciting of the German population to murder Allied airmen forced down within the Reich.

Evidence of this plan of the leaders of the German State is found as follows: First in the correspondence relative to the treatment of so-called "enemy terrorist airmen". As part of this correspondence from the deputy chief of the operations staff of the armed forces, entitled "Secret matter", dated 6 June 1944, and signed by General Warlimont,* the following sentence is significant:

"Lynch justice should be considered as being the rule." Further, a draft of a letter, dated Salzburg, 20 June 1944, to the Chief of the High Command of the Armed Forces, apparently drawn by the Foreign Office, contains this paragraph:

"The above considerations warrant the general conclusion that the cases of lynching ought to be stressed in the course of

* General Warlimont was a defendant in the High Command Case (United States *vs.* Wilhelm von Leeb, et al., Case 12, vols. X–XI, this series).

this action. If the action is carried out to such an extent * * * the deterring of enemy airmen is actually achieved."

In furtherance of this plan, Goebbel's speech of 27 May 1944 is cited and the letter from the Chief of the Party Chancellery, Fuehrer Headquarters, 30 May 1944, marked "Secret—not for publication," and bearing the initials of Thierack, concerning "the people's judgment of Anglo-American murders," signed by Bormann, is significant, particularly the following paragraph:

"No police or criminal proceedings have been taken against the citizens who have taken part herein."

The distribution of this circular was as follows: "Reichsleiter, Gauleiter, Verbaendefuehrer, Kreisleiter,"* and contains the following note to all Gauleiter and Kreisleiter, initialed by Thierack and signed by Friedrichs:

"The Chief of the Party Chancellery requests that the Kreisleiter inform the Ortsgruppenleiter only verbally of the contents of this circular."

Exhibit 109 [635–PS, Pros. Ex. 109] is of even greater significance. This is a letter from the Reich Minister and chief of the Reich Chancellery, dated 4 June 1944, to the Reich Minister of Justice, Dr. Thierack, headed, "Regards people's justice against Anglo-American murders". This letter is quoted in its entirety:

"The Chief of the Party Chancellery informed me about the enclosed transcript of a secret circular letter and requested me likewise to inform you.

"I herewith comply with this and beg you to consider how far you want to instruct the courts and district attorneys with it.

"The Reich Leader and Chief of the German Police has, as I was further told by executive leader Bormann, so instructed his police leaders."

It contains a handwritten note, initialed by Thierack as a signature and also initialed by Klemm, which reads as follows:

"Return note with the addition that such cases are to be submitted to me for the purpose of their examination for quashing in case proceedings are pending."

In this adroit plan to encourage the murder of Allied airmen and escape the responsibility, therefore, under the recognized rules of warfare, the procedures adopted by the Ministry of Justice were unique and worthy of the legal minds of those who dealt with the matter. As shown in the affidavit of Pejlovec, a secret

* The reference is to the highest and higher leaders of the National Socialist German Workers' Party.

directive was sent out by the Ministry of Justice calling for reports in cases of the lynching of Allied airmen. This directive was interpreted by Pejlovek to the effect that no prosecutions were contemplated.

The witness Dr. Gustav Mitzschke, Referent in the legislative department, testified that he was instructed to call upon the State Secretary, which he did, and received the following instructions:

> "When you talk to General Public Prosecutor Helm at Munich, please tell him that in cases where Allied fliers have been killed or ill-treated, the police and any other agencies concerned are to pass on the files to the prosecution office, and that the prosecution as quickly as possible must make a report to the minister and also forward the files."

Helm issued a directive to the prosecutors under him. This directive called for reports and files in such cases and stated that they were necessary because sometimes other factors, such as robbery or the use of Allied uniforms to cover the murder of Germans, had to be considered.

Klemm stated that Mitzschke was directed to inform Helm that reports were to be given in all cases.

The witness Helm stated that the note in conformity with Mitzschke's instructions as to the reports to be made was written and sent out, he thinks, on the same day of Mitzschke's visit and, in his cross-examination he states that he is sure it was not later than the day after Mitzschke's visit.

The witness Hans Hagemann, general public prosecutor at Duesseldorf, testified that he was directed that in such cases a report had to be made to the Ministry of Justice. He also verified the secret decree sent out by the Minister of Justice.

The nature of the reports called for, in itself, is not considered by this Tribunal of particular importance. Thierack had directed Klemm, as shown above, to submit to him reports as to cases pending "for quashing." The procedure followed by the Ministry went beyond this in that it required reports and the transmittal of files of cases where no indictment had as yet been issued. The Ministry of Justice thus took over, in substance, the disposition of these cases and the prosecution throughout Germany was thereby restricted in its normal duty of filing indictments against those who had murdered Allied airmen and were criminals under German law. From the evidence in this case and from sources of judicial information, this Tribunal knows of many instances of the lynching of Allied airmen by the German population. No case has been brought to the attention of this Tribunal where an indictment was actually filed for such offenses. What reports and

files were submitted to the Ministry of Justice we do not know, but it is obvious that such reports as were made were allowed to die in the archives of the Ministry.

There is evidence as to one case pertaining to this matter. The defendant Klemm in his testimony refers to it. Around the turn of the year 1944–45 in Kranenburg, in the district of the court of appeals, Duesseldorf, an SA leader had shot two captured paratroopers in cold blood. Regarding this, Klemm stated:

> "We prosecuted that case and even though the police, as well as the Party offices, offered considerable resistance, these discussions were advanced energetically. I do not know of the final outcome."

The evidence in this case, as shown by the testimony of Hagemann, indicates that during September of 1944, at the time of the Allied parachute attack on Arnhem two captured Canadian paratroopers were shot by one Kluetgen while a Kreisleiter stood by and either permitted or encouraged the shooting.

The witness Hagemann undertook to investigate the matter but was unable to do so fully because a Kreisleiter could not be so examined if he refused to testify. It was necessary if the Kreisleiter was to be examined to have the approval of the Party Chancellery. An application was made for such consent but it was never given. Hagemann stated that he made a report over the telephone to the Ministry about the case. He believed he spoke with the defendant Mettgenberg. Afterwards he made a written report to the Ministry of Justice. He told the Ministry that he needed their support to obtain permission for the Kreisleiter to testify. He received written instructions to clear up the case completely, but since no approval was received to interrogate the Kreisleiter, he could not continue the proceedings. He stated, that again and again he requested the Ministry to obtain permission for him to examine the Kreisleiter. When asked whether he heard from the Ministry regarding this authority, he stated that he had not.

Permission to examine the Kreisleiter not having been obtained, he was never examined. Up to the time of the capitulation of Germany, no indictment had been filed against Kluetgen. This apparently was the prosecution and energetic action on the part of the Ministry of Justice to which Klemm referred in his testimony. In many cases discussed before this Tribunal, indictment, trial, and final execution were certainly more expeditiously handled.

In this plan to incite the population to murder Allied airmen, the part of the Ministry of Justice was, to some extent, a negative one. However, neither its action in calling for a report on pending

cases for quashing, nor its action in calling for reports and files pertaining to all such incidents, was negative. Certainly the net effect of the procedure followed by the Ministry of Justice resulted in the suppression of effective action in such cases, as was contemplated in the letter from the Reich Ministry and Chief of the Reich Chancellery to the Ministry of Justice.

The defendant Klemm was familiar with the entire correspondence on this matter. He specifically directed the witness Mitzschke to obtain reports. His own testimony shows that he knew of the failure to take effective action in the case cited, and it is the judgment of this Tribunal that he knowingly was connected with the part of the Ministry of Justice in the suppression of the punishment of those persons who participated in the murder of Allied airmen.

The second transaction of particular importance with regard to the defendant Klemm is connected with the penitentiary at Sonnenburg. The record in this case shows that in the latter part of January 1945 this great penal institution under the Ministry of Justice was evacuated and that prior thereto, between seven and eight hundred political prisoners therein were shot by the Gestapo.

Klemm denies knowledge of this matter and states:

> "From the documents in this case only, particularly from the affidavit of Leppin, I found out that over 800 persons were shot at Sonnenburg."

He testified further that about the middle of January, Thierack had told him that Himmler had subordinated the prisoners at Sonnenburg to his own command and that as Minister of Justice of the Reich he, Thierack, could no longer do anything in regard to this institution. He testified further:

> "It is not only my opinion but it was absolutely clear that at that time that penal institution was exclusively under the order of Himmler."

He stated that he spoke to Hansen about the subject of Sonnenburg after this conversation with Thierack as to the change in authority, and that Hansen knew about such change. He testified further "that the prisoners were turned over to the Gestapo, I only found out here in this courtroom."

As to what occurred in the Ministry of Justice with regard to the evacuation of Sonnenburg, the testimony of Robert Hecker is important. Hecker was the Referent in the department of justice in Department V of Berlin. Hecker testified in substance as follows: that in discussions with Hansen, the general public prosecutor for the Kammergericht in Berlin and the official under the Ministry of Justice responsible for certain matters in penal institu-

tions, Hansen told him it might be necessary to evacuate Sonnenburg and that preliminary discussions had been carried on; that he, Hansen, had discussed the matter with the State Secretary with regard to the measures to be taken, and he had misgivings and suggested to Hecker that Hecker discuss the matter with the State Secretary. Hecker further stated that when he was the official on duty one night for the Minister of Justice, he received a telephone call from the director at Sonnenburg to the effect that a Russian break-through had taken place and asking for instructions; that he thereupon called Thierack at his home and asked for instructions and Thierack stated that the institution would be defended, and that the authorities at the institution were so informed. As the break-through did not then threaten the penitentiary, this order was not carried out. Hecker testified that later the director of the prison asked what measures he should take if the occasion should arise and that thereupon he called the general public prosecutor at the Kammergericht as to what instructions had been issued. The general public prosecutor was away at that time but the Referent who was present informed him that according to the instructions issued, the police were supposed to be informed in the case of evacuations. He testified further that Eggensperger, a Referent in Department V of the Ministry of Justice, who was on duty the night of the evacuation of Sonnenburg, had informed him the next morning that the prison had been evacuated; that Eggensperger told him that Hansen had called the night before, stating that the action of turning the prisoners not to be evacuated over to the Gestapo was under way and, when questioned as to whether it had been authorized by the Ministry of Justice, Hansen had named Klemm as the person in the Ministry who knew of and approved the transaction. He stated further that Eggensperger had made a typewritten note reporting his telephone conversation with Hansen and that he had received a copy of the note.

On cross-examination the witness Hecker testified in substance that he was himself in charge of the problem of the evacuation of prisons. When asked if he had heard that Himmler, in the middle of January, had issued an order concerning Sonnenburg, he answered that he had not and repeatedly denied any knowledge to the effect that Himmler had taken charge at Sonnenburg, and stated that he had not heard any rumor in the Ministry of Justice to the effect that Thierack had given up authority to issue orders concerning Sonnenburg. He stated that the conversation with Thierack over the telephone was at night and that Thierack had merely answered briefly his inquiry, stating that the institution would be defended. He testified that during the course of that

night he repeatedly spoke to the authorities in Sonnenburg penitentiary and that he tried to contact the competent person in the Kammergericht, namely Hansen, in regard to the matter. Hecker stated that the director of the penitentiary knew that some kind of an agreement with the Gestapo existed and what he should do in the case of an evacuation, and that there were secret directives for evacuating penitentiaries and prisons. As to the note made by Eggensperger, he stated that it included a statement to the effect that the matter had been discussed between the General Public Prosecutor and the State Secretary Klemm. When asked about what happened to prisoners not evacuated, he replied that "as far as I was informed, the prisoners were shot by the Gestapo."

The testimony of Eggensperger in connection with the evacuation of Sonnenburg is also significant. Eggensperger testified that he was an official in the penal execution department of the Ministry of Justice; that he was the official on duty for the entire Ministry of Justice to whom telephone calls were channeled on the night that Hansen reported the evacuation of Sonnenburg. Hansen called him during the night and informed him that during that night the prisoners of Sonnenburg penitentiary would be handed over to the Gestapo; that a detachment of the Gestapo had already arrived at Sonnenburg; and that the action was under way. "Hansen told me that this evacuation, or rather this transfer of the prisoners being carried out, was because the enemy constituted an immediate danger to the prison." When asked whether this directive had been approved by anyone in the Ministry of Justice, Hansen answered, "Yes. This matter has been discussed with the State Secretary Klemm." He testified as to the note which he made reporting the transaction, and that Hecker received a copy of this note. He stated that he had been deeply impressed by the information which he had received and asked Hecker if it was true that the State Secretary knew anything about the matter and approved it, and when asked what Hecker said, he answered:

> "Hecker shrugged his shoulders. He looked at me and said, 'Well, Hansen has—' Well, I can only give you the sense of what he says, that Hansen has fooled this Under Secretary of State and he has got around him, or he impressed him. I think he said, 'Hansen has convinced the Under Secretary of State to approve it.' "

He further stated that when he asked Hansen whether the minister or the Ministry were familiar with the matter, he answered in the affirmative and told him that the State Secretary knew about it and that he had put this down in his file note.

On cross-examination when asked if, as a liaison officer in Berlin in Department V, he reported repeatedly to the defendant Klemm in his capacity as State Secretary, he answered, "Yes." When asked with what matters he was concerned, he answered, "Again and again there were current matters which had to be discussed with the State Secretary who wanted some information and some information I gave him myself. In some complicated cases I asked the officials in charge to come in." The witness also testified that because of Klemm's personality he, Eggensperger, was quite surprised at the action of Klemm and that was why he discussed the matter with Hecker in the morning. He testified further that it was his duty to make the file note as to the telephone conversation which he had received; that that file note was, he would say, about a half of a typewritten page. When asked if the file note included the name Klemm in connection with the fact that Hansen had referred to him, he answered, "Yes." When asked whether Hansen spoke about an agreement, whether he used the word "agreement," the witness answered that while he could not state the exact word used, that Hansen informed him that the matter had been discussed and approved, and stated that Hansen "reported to me the execution of a directive which had been issued." He further stated:

> "If you ask me concerning the execution, it was the report of a general public prosecutor concerning an important occurrence in a penitentiary. I would formulate it like that. It was his duty to report this matter."

When asked if the name Klemm was mentioned by Hansen because Hansen had noticed that the witness had some doubts, the witness answered:

> "I certainly didn't ask him whether the State Secretary had a report on that matter. I certainly asked him that the minister knew about it, and therefore, it was striking that he did not refer to the minister himself but rather to Klemm."

He further testified:

> "I was the only official, apart from Hecker, in Department V, who had remained in Berlin, and in that capacity I maintained contact between the Ministry—that is the RMJ—and the evacuated divisions. If Hansen was given any instructions, then it was I who passed them on to him. That brought about the fact that I had frequent contact with him, particularly over the telephone."

He stated further that he never heard of anybody being called to account for the action taken in connection with the massacre at Sonnenburg.

Pertaining to the question as to who had the authority to determine what prisoners were to be evacuated in case of evacuation and what prisoners were to be turned over to the Gestapo for liquidation, [NG–030, Pros.] Exhibit 290 is important.

This exhibit includes the directive from the Reich Ministry of Justice, dated 5 February 1945, which is designated "Secret," to the public prosecutor in Linz, re: preparation for an evacuation of the penal institution within the district of Oberlandsgericht Graz. This letter shows enclosures. It states as follows:

"In view of the proximity of the front line I have advised the public prosecutor in Graz to make the necessary preparations for possible evacuation of the penal institutions within his jurisdiction, and I have decided that your district shall be the reception center for these institutions. You are requested to take any steps which may be necessary for their reception, as it might [become urgent at any moment. You will also get in touch] with the public prosecution in Graz and exchange all necessary particulars with him for the settlement of questions concerning you both. For details I refer to the enclosed directives. You are requested to keep me informed of whatever steps you take."

It also includes a directive from the Reich Ministry of Justice with the file mark "IV a 56/45 g," dated Berlin, 12 February 1945, marked "Secret," and also contains the stamp of the Oberlandesgericht president at Linz, "Received 9 March 1945." It is designated, "Relieving of the Penitentiaries." It shows enclosures as follows: "Additional copies for the public prosecutor and all independent penal institutions." This directive states, among other things:

"Foreigners can only be set free in full agreement with the police authorities; otherwise they must be transferred to the police."

This directive is signed "Thierack."

The exhibit contains further a directive to the public prosecutors, Linz, and is in part as follows:

"To the: Public Prosecutors, Linz.
The authorities in charge of the independent administrative offices.
Judges in charge of the juvenile prisons in Ottenheim [and Mattighofen].

"For their knowledge and consideration. The circulars given in the Reich ordinance of the Reich Ministers of Justice, dated 12 February, have been communicated as follows: * * *."

This directive also contains a form to be used in connection with the discharge of prisoners, designated: "Supplement to: Reich Ordinance of Reich Ministers of Justice, dated 12 February 1945," with the file mark "IV a 56/45 g," and has the seal of Linz showing receipt.

The exhibit also includes a directive of "Evacuation of the Judicial Executive Institutions Within the General Plan for the Evacuation of Threatened Territories in the Reich." This is marked "Secret" and has no heading, no date, and no signature (*NG–030, Pros. Ex. 290*).

This states, in paragraph 1:

"The evacuation of penal institutions lying within territories threatened by enemy attack is a matter of concern for the public prosecutors of the territories to be evacuated as well as for those within the territories appointed for reception in transit. This does not apply if the evacuation can be confined to a change of locality within the Landesgericht itself. The carrying out without friction of all measures of evacuation therefore depends upon the close cooperation of the public prosecutors concerned who must get in touch with each other on all the particulars which are necessary for those measures. The individual measures for evacuation must be left as far as possible to the personal initiative of the public prosecutors concerned, as only they possess the necessary knowledge of local conditions and are able to bring about the required cooperation with local administrative and Party offices. These directives can only give an indication of what is to be done."

From the import, a fair inference is that it was an enclosure to the original letter of Thierack.

Further along, the document states:

"NN prisoners are not to be released under any circumstances. They are to be rapidly transferred to territories which are not in danger of enemy attack according to special orders.

"Foreigners are to be released only if they had their residence in the Reich for many years, if they are especially reliable and fulfill all the requirements under (*h*).

"Jews, Jewish persons of mixed race of the first degree, and gypsies are not to be released.

"For Polish subjects, who are protected personnel, a release may be considered only if the requirements made under (*h*) apply to them after the strictest investigation. The same applies to people living in the Protectorate of Bohemia and Moravia. Poles who have been sentenced to at least 1 year internment in a disciplinary camp, may also be turned over to the police, with

an interruption, if necessary, in the execution of their sentence. This can only be done if an agreement is reached with the commander of the Security Police and the SD."

Under the heading of "Carrying-out the evacuation" is stated (*NG–030, Pros. Ex. 290*) :

"As soon as orders for evacuation are issued, the evacuation has to be carried out in full accordance with the plans agreed upon. In many cases, it is true, prevailing conditions will necessitate deviations and improvisations. Should it become impossible, for any reasons, to bring the prisoners back to the extent agreed upon, these prisoners who are not outspokenly asocial or hostile to the State, are to be released in good time so that they will not fall into the hands of the enemy. The elements mentioned before, however, must be turned over to the police for their removal, and if this is not possible they must be rendered harmless by shooting. All traces of the extermination are to be carefully removed."

Further documents in this exhibit, issued at Linz, show that by agreement and orders of the defense commissioner, orders were issued by the prosecutor at Linz which appear to implement the preceding document. On 14 April 1945 the chief public prosecutor at Linz made an official report to the Reich Ministry of Justice showing steps which he had taken.

The significant directives of the Minister of Justice above quoted were issued shortly after the incident at Sonnenburg and concerned the disposition of prisoners in the penitentiaries of the Reich in areas threatened by the Allied advance. It is also significant that the defendant Klemm who denies all connection with or authority over the penitentiary at Sonnenburg in late January 1945 subsequently on 11 February 1945 ordered the evacuation of the prison at Bautzen, including the discharge of certain prisoners and the transfer of those not so discharged to Waldheim; and that around Easter of 1945 he ordered the evacuation of the prison at Rothenfeld and instructed the matron as to the disposition of the prisoners.

It is the contention of the defendant that Hansen was an unreliable person who falsely used the name of the State Secretary. It is to be noted, however, that the testimony does not show that Hansen was undertaking to obtain from Eggensperger authority for some contemplated action under alleged authority from the State Secretary. Hansen called Eggensperger who was the official on duty at the Ministry of Justice to make an official report of an action which was already under way and when questioned as to his authority, he cited the approval of the State Secretary. His report was embodied in an official note as he could assume it would

be. This note stated that the action taken was based upon the approval of the State Secretary. Surely Hansen, an official under the Minister of Justice, whatever his character might have been, would never have dared to use falsely an alleged authority by the State Secretary to account for the liquidation of some 800 people and then make an official report that, according to all normal procedure, would come directly into the hands of the State Secretary.

This Tribunal is asked to believe that in the middle of January, Himmler took over the operations of the penitentiary at Sonnenburg and that the first time that the State Secretary, the defendant Klemm, heard of the liquidation of those who were not evacuated was in this trial. That Himmler controlled evacuations within the area of his command was shown by evidence in this case and can be assumed from the nature of the evacuation. An evacuation is a matter of military concern since it involves interference on the roads with military operations and transport. The operational control of a penal institution is an entirely different matter. In the middle of January, Himmler was in command of an army which was having considerable difficulty and he was scarcely in a position to assume the functions and responsibilities in the Ministry of Justice as regards the operations of a penal institution. Certainly if he did so it is strange that Eggensperger, a Referent in Department V dealing with penal institutions, or Hecker, also in Department V and in charge of evacuations of penal institutions, or the director of the institution at Sonnenburg, knew nothing about this transfer of authority some two weeks after it is alleged to have been made. It was also strange that Hansen, who is alleged to have known of this transfer of authority, would call the Ministry of Justice and make an official report as to the transaction on the night when it was under way and cite as his authority for his connection therewith the State Secretary. That the defendant Klemm knew nothing about the liquidation of some 800 people in this institution until he learned it in this trial, overtaxes the credulity of this Tribunal. Even in Nazi Germany the evacuation of a penal institution and the liquidation of 800 people could hardly have escaped the attention of the Minister of Justice himself or his State Secretary charged with supervision of Department V which was competent for penal institutions. Exhibit 290, herein extensively quoted, shows that the operations of penal institutions and the disposition of the inmates remained a function of the Ministry of Justice, and it is the opinion of this Tribunal that the Ministry of Justice was, at the time of the evacuation of Sonnenburg, responsible for the turning over of the

inmates to the Gestapo for liquidation, and that the defendant, Klemm, approved in substance, if not in detail, this transaction.

When Rothenberger was ousted as State Secretary because he was not brutal enough, it was Klemm who was chosen to carry on the Thierack program in closest cooperation with the heads of the Nazi conspiracy. Klemm was in the inner circle of the Nazi war criminals. He must share with his dead friend, Thierack, (with whom he had lived), and his missing friend, Bormann, the responsibility, at a high policy level, for the crimes committed in the name of justice which fill the pages of this record. We find no evidence warranting mitigation of his punishment.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant, Klemm, is guilty under counts two and three of the indictment.

THE DEFENDANT ROTHENBERGER

From his own sworn statements we derive the following information concerning the defendant Rothenberger. He joined the NSDAP on 1 May 1933 "for reasons of full conviction." From 1937 until 1942 he held the position of Gau Rechtsamtleiter. He states: "As such I also belonged to the Leadership Corps." Parenthetically, it should be stated that the organization within the Leadership Corps to which he belonged has been declared criminal by the judgment of the first International Military Tribunal, and that membership therein with knowledge of its illegal activities is a punishable crime under C. C. Law 10. We consider the interesting fact of his membership in the Leadership Corps no further, solely because defendant Rothenberger was not charged in the indictment with membership in a criminal organization. He was a Dienstleiter in the NSDAP during 1942 and 1943. From 1934 to 1942 he was Gaufuehrer in the National Socialist Jurists' League. In 1931 he became Landgerichtsdirektor, and in 1933 Justiz-Senator in Hamburg. From 1935 to 1942 he was president of the district court of appeals in Hamburg. In 1942 he was appointed Under Secretary in the Ministry of Justice under Thierack. He remained in that office until he left the Ministry in December 1943, after which he served as a notary in Hamburg. Thus, it is established by his own evidence that while serving as president of the district court of appeals he was also actively engaged as a Party official. Other evidence discloses the wide extent to which the interests and demands of the Ministry of Justice, the Party, the Gau Leadership, the SS, the SD, and the Gestapo affected his conduct in matters pertaining to the administration of justice. Rothenberger took over the Gau Leadership of the National Socialist Lawyers' League at the request of Gauleiter Kauffmann,

who was the representative of German sovereignty in the Gau and who was, for all intents and purposes, a local dictator. As Gaufuehrer during the period following the seizure of power, Rothenberger had ample opportunity to learn of the corruption which permeated the administration of justice. He testified:

"It has been emphasized here time and again how during the first period, after the revolution of 1933, every Kreisleiter attempted to interfere in court proceedings; the Gestapo tried to revise sentences, and it is known how the NSRB, the National Socialist Jurists' League, tried to gain influence with the Gauleiter or the Reichsstatthalter in order to act against the administration of justice."

Concerning the dual capacity in which he served, he said:

"On account of the identity, of course, between president of the district court of appeals and Gaufuehrer, I was envied by all other district courts of appeal because they continually had to struggle against the Party while I was saved this struggle."

In August 1939, on the eve of war, Rothenberger was in conference with officials of the SS and expressed to them the wish to be able to fall back on the information apparatus of the SD, and offered to furnish to the SD copies of "such sentences as are significant on account of their importance for the carrying-out of the National Socialist ideas in the field of the administration of justice." Rothenberger testified that during the first few years after the seizure of power, there was the usual system of SD informers in Hamburg. The unsatisfactory personnel in the SD was removed by Reichstatthalter Kauffmann, and the defendant Rothenberger nominated in their place individuals who, he said, "were judges and who I knew would never submit reports which were against the administration of justice." He states also:

"In the meantime, the directive had been sent down from the Reich Ministry of Justice to the effect that the SD should be considered and used as a source of information of the State by agencies of the administration of justice."

While he was president of the district court of appeals at Hamburg, and during the war, this ardent advocate of judicial independence was not adverse to acting as the agent of Gauleiter Kauffmann. On 19 September 1939 Kauffmann, as Reichsstatthalter and defense commissioner, issued an order as follows:

"The president of the Hanseatic Court of Appeals, Senator Dr. Rothenberger, is acting on my order and is entitled to demand information in matters concerning the special courts and to inspect documents of every kind. All administrative

offices as well as the offices of the NSDAP are requested to assist him in his work."

On 26 September 1939 Rothenberger, as president of the Hanseatic Court of Appeals, notified the Prosecutor General of Kauffmann's order and requested that a copy of the indictment "in all politically important cases or cases which are of special interest to the public should be sent to him." In a report to Schlegelberger of 11 May 1942 he spoke of the "crushing effect" of the Fuehrer's speech of 26 April 1942 and of the feeling of consequent insecurity on the part of the judges, and said:

"I have therefore assumed responsibility for each verdict which the judges discuss with me before passing it."

In the same report he states that on 6 May 1942 he made arrangements with all senior police officers, senior SS, senior officers of the criminal police, of the Secret State Police, and of the SD "to the effect that every complaint about juridical measures taken by judges was to be referred to me before the police would take action (especially regarding execution of sentence)."

In June 1942 Rothenberger reported to the defendant Schlegelberger that he had made similar arrangements in Bremen with the Kreisleiter, president of the police, leader of the Secret State Police (Gestapo), and the leader of the SD. He reported to Schlegelberger:

"In view of the present situation, I am intensifying the internal direction and control of jurisdiction which I have considered to be my main task since 1933."

On 7 May 1942 Rothenberger issued an order in which he stated his intention to inform himself prior to the proceedings on cases which are of political significance "or which involve the possibility of a certain conflict between formal law and the instinctive reactions of the people or National Socialist ideology." He directed that reports be submitted to him which must be in sufficient detail in order, as he said, "to enable my deputy to judge the necessity of my intervention."

By reference to his own words we have already set forth Rothenberger's expressed convictions as to the duty of a judge as the "vassal" of the Fuehrer to decide cases as the Fuehrer would decide. The conclusion which we are compelled to draw from a great mass of evidence is not that Rothenberger objected to the exertion of influence upon the courts by Hitler, the Party leaders, or the Gestapo, but that he wished that influence to be channeled through him personally rather than directed in a more public way at each individual judge. On the one hand he estab-

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lished liaison with the Party officials and the police, and on the other he organized the system of guidance of the judges who were his subordinates in the Hamburg area. He testifies that he considered the system of conferences between judges and prosecutors before trial, during trial and sometimes after trial, but before the consultation of the judges, to be wrong, and states that he considered it more correct, in view of the situation, that such a discussion should take place a long time before the trial and not between individual judges and the prosecutor, "but on a higher level, namely, between the chiefs of the offices, so that there would be no possibility to exert an influence on the individual judge in any way." Concerning his dictatorial attitude toward the other judges, Rothenberger testified: "Of course, guidance is guidance, and absolute and complete independence of the judge is possible only in normal conditions of peace, and we did not have these conditions after the Hitler speech."

The guidance system instituted by the defendant Rothenberger was not limited to conferences concerning pending cases of political importance before trial. We are convinced from the evidence that he used his influence with the subordinate judges in his district to protect Party members who had been charged or convicted of crime, that on occasions he severely criticized judges for decisions rendered against Party officials, and on at least one occasion was instrumental in having a judge removed from his position because he had insisted upon proceeding with a criminal case against a Party official.

As further illustration of the character of control which was exercised by Rothenberger over the other judges in his district, reference is made to his letter of 7 May 1942 addressed to the judges in Hamburg and Bremen in which he announced that a conference would be held for the discussion of cases fixed for the following week. We quote (*NG–389, Pros. Ex. 76*):

> "A few cues to matters which will come up will be given, file numbers quoted, and comments made in a few key words."

He especially required of the judges that they report to him concerning penal cases against Poles, Jews, and other foreigners, and "penal and civil cases in which persons are involved who are State or Party officials, or NSDAP functionaries, or who hold some other eminent position in public life."

One will seek in vain for any simple, frank, or direct statement by Rothenberger relative to any of the abuses of the Nazi system. His real attitude can only be extracted from the ambiguities of his evasive language. We quote from the record of the re-

port made by Rothenberger to the judges on 27 January 1942 (*NG–1106, Pros. Ex. 462*) :

"With regard to the matter it had to be considered whether or not any material claims made by the Jews could still be answered in the affirmative. Concerning this question, it might, however, be practical to maintain a certain reserve."

In an early report to the Hamburg judges, Rothenberger discussed the opinion of the Ministry concerning the legal treatment of Jews. He stated that the fact that a debtor in a civil case is a Jew should as a rule be a reason for arresting him; that Jews may be heard as witnesses but extreme caution is to be exercised in weighing their testimony. He requested that no verdict should be passed in Hamburg when a condemnation was exclusively based on the testimony of a Jew, and that the judges be advised accordingly.

On 21 April 1943, as the result of a long period of interdepartmental discussions, a conference of the state secretaries was held. Rothenberger was at the time State Secretary in the Ministry of Justice and participated in the conference concerning the limitation of legal rights of Jews. Kaltenbrunner also participated. At this meeting consideration was given to drafts of a decree which had long been under discussion. Modifications were agreed upon and the result was the promulgation of the infamous 13th regulation under the Reich Citizenship Law which provided that criminal actions committed by Jews shall be punished by the police and that after the death of a Jew his property shall be confiscated.

We next consider Rothenberger's activity concerning the deprivation of the rights of Jews in civil litigation. In the report of 5 January 1942 the defendant wrote:

"The lower courts do not grant to Jews the right to participate in court proceedings in *forma pauperis*. The district court suspended such a decision in one case. The refusal to grant this right of participation in court proceedings in *forma pauperis* is in accordance with today's legal thinking. But since a direct legal basis is missing, the refusal is unsuitable. We therefore think it urgently necessary that a legal regulation or order is given on the basis of which the rights of a pauper can be denied to a Jew." (*Pros. Ex. 373, NG–392, document book 5–D, p. 331.*)

Notwithstanding his statement of 5 January to the effect that it would be unsuitable to deprive Jews of this right without a legal regulation, we find that on 27 January 1942 the report of a conference shows the following (*NG–1106, Pros. Ex. 462*) :

"The senator reported that the question of the poor law concerning Jews has gained significance again. With the district court there were two cases pending. He requested that contacts with the district court and with the local court judges be made at once so that a uniform line is followed to the effect that the Jews be denied the benefits of the poor law. It would be entirely out of the question that Jews be granted the benefits of the poor law subsequent to the present development. This would apply especially to Jews who had been evacuated, but in his opinion also to those who had not been evacuated."

About this time a report concerning the claim of the Jewish plaintiff, Israel Prenzlau, came to the attention of the defendant Rothenberger. The Jew sought the right to proceed in *forma pauperis*. The report on the case contains the following statement by a Gau economic advisor, which is couched in the usual Nazi language of sinister ambiguity (*NG–589, Pros. Ex. 372*):

"In reply to your inquiry I state my point of view in detail.

"In a lawsuit between a German national and a Jew, I consider the settling of a dispute by compromise settlement in court inadmissible for political reasons. The German national, as party in the lawsuit, pursuant to his clearly defined conceptions of justice derived from his political schooling since 1933, can expect that the court will decide the case by a verdict, i. e., take a conclusive attitude toward the dispute in hand. What is expected is a decision which was arrived at not from purely legal points of view, as result of a legal train of thought, but which is an expression to the way in which National Socialist demands concerning the Jewish question are realized by German administrators of justice. Evading this decision by a compromise might mean encroaching upon the rights of a fellow citizen in favor of a Jew. This kind of settlement would be in contradiction to the sound sentiments of the people. I therefore consider it inadmissible."

The report shows that upon receipt of the opinion of the Gau economic advisor, "the defendants thereupon refused settlement with the plaintiff and now deny that they owe him anything." The court which had jurisdiction of the Prenzlau case granted to the plaintiff the right to proceed in *forma pauperis*. On 13 February 1942 having before him the report of the Gau economic advisor, the defendant Rothenberger wrote to the president of the district court, Hamburg, as follows:

"I do not intend to approach the economic advisor of the Gau for the time being, seeing from the documents that the ultimate beneficiary of the claim, the son of the plaintiff, emigrated in

the year 1938 and his property, therefore, surely being confiscated. I fail to understand why the court granted *forma pauperis* rights to the assignee, a Jew, without first consulting the authority for sequestration of property."

A note dated 24 February shows that Rothenberger had issued a directive to two judges of his district to the effect that every case involving the claim of the right of Jews to proceed in *forma pauperis* must first be submitted to him. On 5 March 1942 a directive was issued from the Reich Ministry of Justice in substantial conformity with the recommendation of the defendant Rothenberger. It provided:

"In future the granting of rights of *forma pauperis* to Jews can only come into consideration if the carrying-out of the lawsuit is in the common interest, viz, in disputes concerning family rights (divorce in cases of mixed marriages, establishing the descent)."

After the enactment of the foregoing ordinance, and on 7 May 1942, a courageous president of the district court at Hamburg wrote to Rothenberger stating that in his opinion the right of Jews to proceed in *forma pauperis* would have to be granted. He added:

"I am convinced that it is in the common interest that an Aryan cannot evade without further ado a just claim against him merely for the reason that the court denies the *forma pauperis* right to Jews."

Notwithstanding this protest, and on 22 May 1942, the defendant Rothenberger, in reliance upon the ordinance which was based upon his recommendation, wrote to the president of the district court of Hamburg that he considered it "adequate that the *forma pauperis* right granted to the plaintiff Prenzlau be canceled. Please have this taken into consideration by the court in a form which you deem appropriate."

The foregoing narrative takes on additional significance when summarized. First, Rothenberger recommends to the Minister of Justice that it is desirable to deny to Jews the right to proceed in *forma pauperis,* but that such denial is inadmissible because there is no law to justify it. He recommends the passage of such a law. About 3 weeks later, no law having been passed, he recommends that the judges take a uniform line depriving the Jew of the right to proceed in *forma pauperis.* A specific case now arises in which the right was granted to a Jew, and the defendant Rothenberger receives veiled suggestions from the Gau economic advisor to the effect that defendants should not be allowed to compromise a case brought against them by a Jewish plaintiff because the court

should decide against the Jew in any event on political grounds. Concerning this suggestion Rothenberger ventures no comment. The defendant in the Prenzlau case takes his cue from the advice of the economic advisor and denies liability; the court grants to the Jew the right to proceed in *forma pauperis*. Rothenberger criticizes this action, although the lower court had acted in strict conformity with the law. In March the awaited law excluding the Jew from the benefit of the poor-law is passed. In May, Rothenberger overrules the protest of a judge and directs the canceling of the order which was made by the lower court. This dictation by the defendant Rothenberger to other courts and judges of his district was not done in the course of a legal appeal from the lower court to the court over which he presided. It was done after the manner of a dictator directing an administrative inferior how to proceed.

Rothenberger not only participated in securing the enactment of a discriminatory law against Jews; he enforced it when enacted and, in the meantime, before its enactment, upon his own initiative he acted without authority of any law in denying to Jewish paupers the aid of the courts.

It is true that the denial to Jews of the right to proceed in civil litigation without advancement of costs appears to be a small matter compared to the extermination of Jews by the millions under other procedures. It is nevertheless a part of the government-organized plan for the persecution of the Jews, not only by murder and imprisonment but by depriving them of the means of livelihood and of equal rights in the courts of law.

The defendant Rothenberger testified that various judges reported to him "that they had heard rumors to the effect that everything was not quite all right in the concentration camps" and that they wished to inspect one. Accordingly, Rothenberger and the other judges visited the concentration camp at Neuengamme. He testified that they inquired about food conditions, accommodations, and the methods of work, and spoke to some inmates, and he asserts that they did not discover any abuses. This was in 1941. Again in 1942, according to his own testimony, the defendant visited Mauthausen concentration camp in company with Kaltenbrunner, who was later in charge of all concentration camps in Germany and has since suffered death by hanging. At Mauthausen concentration camp the defendant Rothenberger again inspected installations, conferred with inmates, and inquired as to the cause of detention of the inmates with whom he had talked. He states that from his spot checks he "could not find out that there was any case of a sentence being 'corrected.' "

Upon inquiry as to what the defendant meant by the "correction of sentences," he answered:

"By correcting of a sentence we mean that when the court had pronounced a sentence, for example, had condemned somebody to be imprisoned for a term of 5 years—if the police now, after these 5 years had been served, if the police arrested this man and put him into a concentration camp—this is only an example of a correction. Or even if, and this is clearer, it happened that a person was acquitted by a court, and in spite of that the police put this man into a concentration camp. These are examples of correction of sentences."

The defendant stated that he did not observe and could not discover any abuse at Mauthausen. In this connection the testimony of defense witness Hartmann is of interest. Hartmann accompanied Dr. Rothenberger on his visit to Mauthausen concentration camp. He testified that rumors were current in Germany to the effect that conditions were not what they should be in the concentration camps. Hartmann testifies that they went about the camp freely and observed everything closely. On cross-examination by the Tribunal, Hartmann testified as follows:*

"Q. * * * When you visited Mauthausen concentration camp, you knew, did you not, that the courts in the Ministry of Justice never sentenced convicted criminals to a concentration camp? * * *

"A. Yes.

"Q. Did Dr. Rothenberger know it?

"A. Yes.

"Q. Then you knew that these ten people that he talked with, and the one or two that you talked with, were not there by reason of any action on the part of the Ministry of Justice or the court, but were there only by reason of action by the police or by the Party, did you not?

"A. Yes. That was preventive custody undertaken by the police."

The witness Hartmann testified further:

"Q. And they had already served their sentences as imposed by court before they were taken into this custody of the police, is that right?

"A. Yes. That is how I see it.

* Complete testimony of defense witness Hans Hartmann is recorded in the mimeographed transcript, 17 September 1947, pages 8999–9068.

"Q. And at that time, these twelve people who had served their sentences and had been taken over by the police—that met with the approval of the defendant Dr. Rothenberger, as I understand you?

"A. Well [we] did not approve the concentration camp as an institution altogether, but first of all we wanted to achieve this —that it would no longer happen that a defendant was acquitted and then after acquittal the Gestapo arrested (him) in front of the courtroom. * * * In those cases, too, he did not approve the fact that these people were in a concentration camp because we were of the opinion that only the administration of justice should decide these questions of criminal law and nobody else. But according to the power conditions within the State, as they happened to exist, our interest was first of all to remove the worst evils."

Upon redirect examination by counsel for the defendant Rothenberger, defense witness Hartmann testified as follows:

"Q. Therefore, sometimes was the situation for you and Dr. Rothenberger like this: that apparently you affirmed something with a smiling face, something which as a human being you had to disapprove of and reject?"

To this question the witness answered that Dr. Rothenberger "for reasons of power politics" had to accept the conditions though he did not approve them. After his inspection of Mauthausen concentration camp, Dr. Rothenberger took no action whatsoever with regard to the information which he had received.

It follows that the defendant Rothenberger, contrary to his sworn testimony, must have known that the inmates of the Mauthausen concentration camp were there by reason of the "correction of sentences" by the police, for the inmates were in the camp either without trial, or after acquittal, or after the expiration of their term of imprisonment.

It must be borne in mind that this inspection by the defendant Rothenberger was made at Mauthausen concentration camp, an institution which will go down in history as a human slaughter house and was made in company with the man who became the chief butcher.

We are compelled to conclude that Rothenberger was not candid in his testimony and that in denying knowledge of the institution of protective custody in its relationship with the concentration camps he classified himself as either a dupe or a knave. Nor can we believe that his trips to the camps were merely for pleasure or for general education. He also advised other judges to make like investigations. We concede that the concentration camps were

not under the direct jurisdiction of the Reich Minister of Justice, but are unable to believe that an Under Secretary in the Ministry, who makes an official tour of inspection, is so feeble a person that he could not even raise his voice against the evil of which he certainly knew.

If the defendant Rothenberger disapproved of protective custody and the consequent employment of concentration camps, it must be because of a change in heart concerning which we have had no evidence. On 13 June 1941 Rothenberger wrote Secretary Freisler suggesting that many small cases were being tried by the Special Court and that this was not compatible with the importance of the court. He referred to minor offenses which came under the public enemy decree, "in which, however, protective custody will be requested by virtue of the offender's past life and his character." Again, he speaks of cases in which motion is made for the offender to be taken into protective custody.

On 5 January 1942 the defendant Rothenberger addressed a report on the general situation in the Hamburg area to the Reich Minister of Justice. From this document his attitude concerning the institution of protective custody may be ascertained. Concerning the "transfer to the public prosecutors of the right to decide about the duration of protective custody," he said:

> "In a certain connection with this problem is the transfer to the public prosecutor's office of the right to decide about the duration of the protective custody. I regret that it is obvious that the courts are more cautious and reserved than they were previously in regard to the order of protective custody, because the duration of the protective custody is not any more within their control. This attitude of the courts cannot be approved, but it is psychologically understandable; I am afraid, that the reform effected the opposite of the intended more vigorous practice in regard to protective custody."

In February 1939 the defendant Rothenberger and the Chief Public Prosecutor reported to the Hamburg judges upon a conference which had been held in Berlin. The record of the joint report in which Rothenberger participated is as follows (*NG–629, Pros. Ex. 28*):

> "A report was then made on the discussions on protective custody. The ministry is of the opinion—also held here—that no objection can be raised to protective custody as long as it is purely protective, but that corrective measures, such as became known in certain cases, must not become a habit."

In conclusion, the evidence discloses a personality full of complexities, contradictions, and inner conflict. He was kind to many

half-Jews, and occasionally publicly aided them, yet he was instrumental in denying them the rights to which every litigant is entitled. He fulminated publicly against the "Schwarze Korps" for attacking the courts, yet he reproached judges for administering justice against Party officials and unquestionably used his influence toward achieving discriminatory action favorable to high Party officials and unfavorable to Poles and Jews. He wrote learnedly in favor of an independent judiciary, yet he ruled the judges of Hamburg with an iron hand. He protested vehemently against the practice of Party officials and Gestapo officers who interfered with the judges in pending cases, but he made arrangements with the Gestapo, the SS, and the SD whereby they were to come to him with their political affairs and then he instituted "preview and review" of sentences with the judges who were his inferiors. He thought concentration camps wrong but concluded that they were not objectionable if third degree methods did not become a habit.

Rothenberger was not happy with his work in Berlin. In his farewell speech on leaving Hamburg, he exuberantly exclaimed that he had been "an uncrowned king" in Hamburg, but he would have us believe that he received a crown of thorns in Berlin. Soon he learned of the utter brutality of the Nazi system and the cynical wickedness of Thierack and Himmler, whom he considered his personal enemies. He could not stomach what he saw, and they could not stomach him. The evidence satisfies us that Rothenberger was deceived and abused by his superiors; that evidence was "framed" against him; and that he was ultimately removed, in part at least, because he was not sufficiently brutal to satisfy the demands of the hour. He was retired to the apparently quiet life of a notary in Hamburg, but even then we find that he was receiving some pay as an Under Secretary and was assisting Gauleiter Kauffmann in political matters in that city.

The defendant Rothenberger is guilty of taking a minor but consenting part in the Night and Fog program. He aided and abetted in the program of racial persecution, and notwithstanding his many protestations to the contrary he materially contributed toward the prostitution of the Ministry of Justice and the courts and their subordination to the arbitrary will of Hitler, the Party minions, and the police. He participated in the corruption and perversion of the judicial system. The defendant Rothenberger is guilty under counts two and three of the indictment.

THE DEFENDANT LAUTZ

The defendant Lautz from 20 September 1939 until the end of the war served as Chief Public Prosecutor at the People's Court in

Berlin. He joined the NSDAP in May 1933. During the period of his service the "higher officials" under his supervision increased from 25 to about 70. The office originally consisted of four departments which were later increased to five to correspond with the number of senates of the People's Court. After the enlargement of the department there were five public prosecutors and one senior public prosecutor in each department. The defendants Barnickel and Rothaug were among the senior public prosecutors under the general supervision of the defendant Lautz. The crimes with which his office dealt were those over which the People's Court had jurisdiction. Of particular interest here were the prosecutions for undermining the German defensive strength, high treason and treason, cases of attempted escape from the Reich by Poles and other foreigners, and NN cases.

A great number of prosecutions were brought under the decree of 17 August 1938 which provides that "Whoever * * * openly seeks to paralyze or undermine the will of the German people or an allied nation to self-assertion by bearing arms" should be punished by death. This was the law which effectively destroyed the right of free speech in Germany. The prosecutor's office was required to handle approximately 1,500 cases a month involving charges of this type. Under supervision of the defendant Lautz all of these charges had to be examined and assigned for trial to the People's Court in serious cases, or to other courts. In the cases which were assigned to the People's Court for trial "there was always the possibility that the death sentence would be pronounced."

The defendant Lautz instructed his subordinates that only those cases were to be retained for trial before the People's Court in which it was "possible to assume full responsibility if the People's Court senate pronounces the death sentence."

Lautz did not shirk responsibility for the acts of his deputies. He testified that the signature of his deputy "meant, of course, that I assumed responsibility for that matter."

In connection with the work of his department it was the duty of the defendant Lautz to sign all indictments, all suspensions of proceedings, and all reports to his superior, the Minister of Justice. This work assumed such proportions that it became necessary to delegate parts thereof to his subordinates, but the defendant Lautz required that important matters be reported directly to him. In partial explanation of his activities and motives in connection with his enforcement of the law against undermining the military efficiency of the nation, Lautz stated:

> "Just as I think it is a good thing that no one today can claim that this war was lost only through treason, I must also

say that I regret that because of this war and through these death sentences many people, who were otherwise all right, had to lose their lives."

As an illustration of the type of case which was prosecuted under this law, we cite the case of the defendant who said to a woman: "Don't you know that a woman who takes on work sends another German soldier to his death?" This offense was described by Lautz and Rothaug as a serious case of undermining the military efficiency of the nation. The office of the Chief Public Prosecutor of the People's Court was vested with a wide discretion in connection with the assignment of cases to the various courts for trial. It will be recalled that the malicious acts law of 20 December 1934 provided for punishment of persons who made false or treacherous statements "fit to injure the welfare or prestige of the government and of the Reich", etc. Under this law moderate punishments by imprisonment were authorized, whereas, under the law against undermining the defensive strength of the nation, the death penalty was mandatory. If the prosecutor sent the case for trial to the People's Court on the charge of undermining, instead of sending it to a lower court for trial under the malicious acts law, he determined for all practical purposes the character of the punishment to be inflicted, and yet the evidence satisfies us that there was no rule by which the cases were classified and that the fate of the victims depended merely on the opinion of the prosecutor as to the seriousness of the words spoken.

The connection of the defendant Lautz with the illegal Nacht und Nebel procedure is established beyond question. The People's Court acquired jurisdiction of NN cases under the decree of the Reich Minister of Justice of 14 October 1942. Lautz estimated that the total number of NN cases examined by his department was approximately one thousand, of which about two hundred were assigned to the People's Court for trial, but he added that each case could concern several defendants. No good purpose will be served by a second review of the testimony concerning the Nacht und Nebel decree. In harmony with the decision in the case of the United States [et al.] *vs.* Goering, et al., this Tribunal finds that the secret procedure which was instituted and enforced through the Ministry of Justice constituted a war crime and a crime against humanity. The Chief Public Prosecutor of the People's Court zealously enforced the provisions of this decree, and his conduct in so doing violated the laws and customs of war and the provisions of C. C. Law 10.

Treason Cases Involving Border Crossings by Poles

Lautz estimated that from 150 to 200 persons were prosecuted for leaving their places of work and attempting to escape from

Germany by crossing the border into Switzerland. These cases were prosecuted under the provisions of penal code concerning treason and high treason.

On 24 February 1942 an indictment against the Pole Ledwon was filed by Parrisius as deputy for the defendant Lautz. The indictment was marked "Secret Treason Case", and bore the stamp of the Chief Public Prosecutor at the People's Court. A letter signed by Lautz bearing the same date was addressed to the presidents of the Second Senate of the People's Court and advises them that he is sending to the court the indictment in the case Ledwon. The indictment alleges that on 28 July 1941 the accused left his place of work in Bavaria and attempted to escape by crossing the Reich border, and that he was stopped by a customs official whom he struck with his fist while evading the arrest. The indictment states that the reason given by the defendant Ledwon for his attempt to escape from Germany "does not deserve credence; it may rather be assumed that he intended to join the Polish Legion organized on the side of the hostile powers". The indictment states that the defendant knew that the aim of the Polish Legion was to restore a Polish state. On the basis of the foregoing specific allegations, the indictment charges that the defendant prepared within Germany "(1) the highly treasonable enterprise to separate from the Reich by force a territory belonging to the Reich; (2) to have aided and abetted the enemy inside Germany during a war against the Reich, and thus, as a Pole, not to have behaved according to the German laws and to the directives of the German authorities; and (3) to have committed a violent attempt on a German official. * * *." The indictment was brought under the provisions of sections 80, 83, and 91b of the penal code, and under the provisions of the law against Poles and Jews. Section 80 provides for the imposition of the death penalty upon anyone attempting by violence or threat of violence to detach from the Reich territory belonging to the Reich. Section 83 provides for the punishment of any person who solicits and incites an undertaking of high treason. Section 91b provides for imprisonment or death for any person who undertakes acts in favor of the enemy powers or causes a detriment against the armed forces of the Reich. On 10 August 1942 the case was tried. The court found the following facts: defendant was a Pole who lived in Poland on 1 September 1939. (See: Law against Poles and Jews.) After the Polish campaign the defendant reported "voluntarily" for work in Germany and then tried to leave the country. The court states further that "the prosecution charges the defendant with the intention of going to Switzerland in order to join the Polish Legion there." It adds that the Polish Legion

was interned in Switzerland and that many Poles had been caught at the frontier, some of whom could be convicted of planning to join the Polish Legion in Switzerland. The court, with unwanted candor, states that "the trial did not show any concrete evidence that the defendant * * * had any knowledge of a Polish Legion in Switzerland." It held that due to lack of evidence "the defendant could not be convicted of the crime of preparation for treason and of treasonably aiding the enemy." The opinion of the People's Court continues (*NG–355, Pros. Ex. 128*):

> "The defendant is, however, guilty according to the result of the trial, of an offense under the ordinance relating to the administration of penal law for Poles, of 4 December 1941. The general conditions of this ordinance are fulfilled, as the defendant is, by origin, education, and sentiment, a racial Pole and was on 1 September 1939 resident in the former Polish State. In leaving his place of work as an agricultural laborer, of his own accord, at the end of July, i. e., during the harvest, he disturbed the orderly procedure of the harvest work of his employer to the detriment of the harvest. His action moreover was detrimental to the whole of the German people, for in leaving his place of work in order to go abroad he deprived the German people forever of his labor. Germany, in order to cover her war needs and to ensure food supplies for the front as well as for home, however, needs all persons employed, including foreigners. Every worker who by escape abroad deprives the German war economy for good of his labor, reduces the number of badly needed manpower, and thus endangers the interest of the German people."

The court held that it was irrelevant whether the Pole knocked the customs official down, because in any event he used force sufficient to prevent his arrest at the time. It observed that under the law against Poles and Jews "the only possible penalty is the death sentence, unless a less serious case can be made out in the defendant's favor. The senate was not able to recognize such case."

The opinion concludes as follows:

> "But by using violence against the customs officer who was going to arrest him and thus resisting the legal German authority, he has proved himself such a fanatical and violent Pole that he has forfeited any right for leniency. In view of the heavy responsibility of the Polish nation for the bloodshed caused during the weeks of August and September 1939, it is the duty of every member of this nation to obey willingly the rules of the German authorities. A Pole who, on the contrary,

uses violence against a German official can only be punished sufficiently by the highest degree of punishment. Accordingly, this has been imposed on the defendant."

The Pole was sentenced to death.

We are not here to retry the case. We may, therefore, ignore the ridiculous charge that the defendant desired to join an interned legion and the allegation that he came to the Reich "voluntarily" after the invasion of Poland. We have already discussed the essential evil in the practice of prosecutors whereby they charged that Poles were guilty of high treason by attempting to separate from the Reich territory which had never been legally annexed to the Reich. In the Ledwon case the sinister subtlety of the Nazi procedure is laid bare. If the case had been brought only under the law against Poles and Jews, the People's Court would not have had jurisdiction, so the defendant was charged with high treason for attempting to separate from the Reich, territory which did not belong to it. The proof of high treason failed. There remained only the charge that in attempting to escape from Germany and from forced labor there, the defendant assaulted a customs officer with his fist and that what he did was done as a Pole in violation of the law against Poles and Jews. It was under that discriminatory law that Ledwon was sentenced to death and executed. The defendant Lautz is guilty of participating in the national program of racial extermination of Poles by means of the perversion of the law of high treason.

In a similar case, upon an indictment signed by Parrisius and filed by authority of the defendant Lautz, the People's Court sentenced three Poles to death upon a charge of preparation of high treason "because they, as Poles, harmed the welfare of the German people, and because in a treasonable way they helped the enemy and also prepared for high treason." The specific facts found by the court were that the defendant Mazur and others attempted to cross the border into Switzerland for the purpose of joining the Polish Legion. By such conduct and by depriving the German Reich of the benefit of their labor, it was held that the efforts of the defendants aimed "at forcibly detaching the eastern regions incorporated in the Reich * * * from the German Reich." The opinion contains an illuminating passage concerning treason committed by attempting to join an interned legion. We quote (*NG–352, Pros. Ex. 129*):

"After the defeat of France in the present war, as is known to the senate (court) from other proceedings, detachments of the Polish Legion crossed the border into Switzerland and were interned in camps. The legion continues under the command of

Polish officers and is kept in readiness for military action against the Reich on the side of the enemy in the event of German troops invading Switzerland."

The evidence of intent to join the interned legion is paltry, but as before we will not attempt to retry the case on the facts. The court held that according to the law against Poles, the death sentence must be imposed. We quote:

"They wanted to deprive the German nation forever of their labor. Thus, they have damaged the welfare of the German nation. This is an offense under the ordinance on the administration of penal law against Poles. * * *

"The precept of the Regulation of Penal law against Poles applies to the defendant's offense, although it was committed before the regulation came into force for, according to article I of the Supplementary Regulation of 31 January 1942, the Regulation of Penal Law against Poles can be applied to offenses committed before the regulation was in force with the approval of the prosecutor. This approval has been given by the Reich Chief Prosecutor."

In another, the Kalicki case, the record of which is marked "Secret," three Poles were sentenced to death for preparation of high treason upon the same grounds as in the previous case. The court held that "the sentence to be pronounced has to be based on the ordinance concerning the administration of penal law against Poles, since this ordinance provides the heaviest penalty of all laws applicable to the case." The evidence does not disclose that the defendant Lautz personally signed the indictment, but it was certainly filed under his authority. The question of clemency in the Kalicki case was presented to the defendant Rothenberger. On 28 July 1943 he wrote:

"* * * I have decided upon authorization by the Fuehrer not to exercise my right of pardon but to let justice take its course."

The defendant Lautz filed an indictment against the Pole, Bratek. The specific charge was leaving his work in Germany and attempting to cross the border into Switzerland to join the Polish Legion. The general charge was the treasonable attempt to separate from the Reich an area belonging to the Reich and the violation of the law against Poles and Jews. The court said (*NG–595, Pros. Ex. 136*):

"At the same time he has made himself guilty of a crime according to Article I, paragraph 3, last half sentence, of the Ordinance on the Administration of Penal Law Against Poles, issued 4 December 1941. Because, being a Pole, he has inten-

tionally inflicted damage to the interests of the German people by malevolently leaving his important agricultural job, above all during harvest time, in September 1942, and by planning to rob the German people forever of his own labor by escaping abroad. * * *

"According to article 73, Penal Code, the penalty must be based on the ordinance concerning the administration of penal law against Poles which *loc. cit.* demands exclusively the death penalty as a rule, this being the most severe penal law applicable here."

A secret communication by the defendant Lautz to the Reich Minister of Justice is of especial interest. The proposal under consideration as for the prosecution of certain Poles upon the charge of high treason on account of acts done in Poland before the war. In his discussion Lautz quotes from Himmler, the Foreign Office, and the president of the People's Court. The facts on the basis of which opinions were expressed may be illustrated thus: Within Poland and before the war, a Pole institutes proceedings against a Polish citizen of German blood, charging the racial German with fifth column activities directed against Poland. During the war the Pole who instituted the prosecution against the racial German is captured. The question was: Can the Pole be prosecuted in a German court on a charge of high treason against the Reich, basing the charge on the fact that he had prosecuted the racial German in Poland? The German penal statute involved was section 91, paragraph 2, which provides that "whoever with the intention of causing a serious detriment to a national of the Reich, enters into relations as described in paragraph I shall be punished," in especially serious cases by death. Himmler, as quoted by Lautz, discusses the basis for punishment by German courts of "an offender who has caused racial Germans to be punished or otherwise prosecuted by Polish authorities." Himmler asserts that foreign police used methods against racial Germans which were contrary to international law and "the laws of minorities" and that such offenders deserve heavy punishment, but he also states that as far as racial Germans are concerned, section 91, paragraph 2, of the German Penal Code "is not directly applicable, as racial Germans, according to formal national laws were not German, but Polish, citizens. I can only express my opinion in the form of a suggestion, that in case of the betrayal of a racial German by the foreign Poles * * * section 91, paragraph 2, of the German Penal Code is to be applied * * *." (Citing decisions of the People's Court.) Himmler directly states that the provisions of section 91, paragraph 2, are "nonapplicable". We emphasize the fact that the question under discussion related to the proposed prosecution of

a Pole for acts committed before the war while Poland was in the exercise of its sovereign powers throughout its territory. The question could not well have related to acts done after Poland had been overrun and part of it purportedly annexed, for, at that time Polish authorities would have been in no position to prosecute racial Germans. Furthermore, in discussing the problem, Lautz mentions a case against the Pole Golek which had recently come into his hands on preliminary proceedings. He states that Golek in the years 1938 and 1939 in Poland had turned over to the police authorities a racial German of Polish nationality and had accused him of high treason committed in favor of the Reich.

Himmler, as quoted by Lautz, expressed the view that considerations of foreign policy would be opposed to the enactment of any German statute under which a Pole could be prosecuted by German authorities on account of acts of the kind indicated, but he added:

> "I see here a task for the courts, an opportunity to fill a gap in the law, a gap caused by political reasons of state by creating a law in the appropriate cases."

Himmler quoted from an opinion by the People's Court in which it was said that the National Socialist State "feels it incumbent on itself, even in case of a conspiracy by a foreign government against one single Reich citizen, to give the threatened person its protection in accordance with penal law as far as this is possible from the home country." It will be observed that this quotation relates to the protection of Reich citizens, not Polish citizens, who are only racial Germans. Himmler continued, however:

> "The Reich made no secret of the fact that with regard to the protection of Germans, it does not only claim the right to protect Reich Germans but also racial Germans living on its borders."

The defendant Lautz frankly expressed the view that the German statute defining treason did not cover the case under discussion. In this he was clearly correct. The German statute on treason had been extended to provide that "whoever with the intention of causing * * * any other serious detriment to the Reich, establishes relations with a foreign government, shall be punished by death." This section was not applicable to the case under discussion because the charge to be preferred against the Pole was one of treason against an individual and not against the Reich. By the law of 24 April 1934 the concept of treason was also expanded to cover certain cases of causing serious detriment to a German national, but that law also was inapplicable to the case under discussion because the serious detriment had not been

caused to a German national but only to a racial German. Insofar as the German statutes required punishment of acts done with the intention of causing serious detriment to a national of the Reich, they extended the concept of treason in a manner unknown to the criminal law of any civilized state, and this law was made applicable in occupied and purportedly annexed territory. Notwithstanding the extremes to which the German laws of treason were extended, the defendant Lautz stated that he agreed with the Reich Leader SS and the president of the People's Court that a direct application of the German law of treason protects only German nationals and does not apply to racial Germans. He then stated:

> "Furthermore, I concur with the conception that the general political development which has meanwhile come about, particularly during the last years, which has enabled the Reich largely to protect its racial members of foreign nationality to a greater extent than it has been possible hitherto, must be borne in mind in this particular instance. Therefore, I find it necessary, on principle, to protect by means of the German penal code those racial Germans who have seriously suffered through action such as mentioned in paragraph 92, subparagraph 2, of the Penal Code, provided that action deserves punishment in accordance with sound German sentiment, but where such punishment, considering the elements of wrongdoing of that particular case, cannot be brought home on the strength of any other directly applicable penal regulation."

In conclusion the defendant Lautz stated that in the majority of cases which have been committed by foreign nationals abroad against racial Germans he would "have to report in each individual case."

Stated in plain language, Lautz proposed that the courts should try and convict Poles for acts which violated no statute of any kind, if they deserved punishment according to sound German sentiment. This proposal violates every concept of justice and fair play wherever enforced, but when applied against a Pole for an act done in his own country in time of peace, the proposition becomes a monument to Nazi arrogance and criminality. Such a Pole owed no duty of loyalty to any state except Poland and was subject to the criminal jurisdiction of no state but Poland. The prosecution of the Pole Golek would constitute a palpable violation of the laws of war (see: citations to the Hague Convention, *supra*), and any official participating in such a proceeding would be guilty of a war crime under C. C. Law 10. The document discloses that cases similar to that of Golek had been tried by the People's Court and that more prosecutions were expected in the future. As a

witness, the defendant Lautz testified that "in several individual cases a decision had to be obtained from the minister." We are justified in believing that Lautz' expectations were fulfilled and that he participated in the prosecution of Golek and in similar cases.

We have cited a few cases which are typical of the activities of the prosecution before the People's Court in innumerable cases. The captured documents which are in evidence establish that the defendant Lautz was criminally implicated in enforcing the law against Poles and Jews which we deem to be a part of the established governmental plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide.

He is likewise guilty of a violation of the laws and customs of war in connection with prosecutions under the Nacht und Nebel decree, and he participated in the perversion of the laws relating to treason and high treason under which Poles guilty of petty offenses were executed. The proof of his guilt is not, however, dependent solely on captured documents or the testimony of prosecution witnesses. He is convicted on the basis of his own sworn statements. Defendant is entitled to respect for his honesty, but we cannot disregard his incriminating admissions merely because we respect him for making them.

There is much to be said in mitigation of punishment. Lautz was not active in Party matters. He resisted all efforts of Party officials to influence his conduct but yielded to influence and guidance from Hitler through the Reich Ministry of Justice, believing that to be required under German law. He was a stern man and a relentless prosecutor, but it may be said in his favor that if German law were a defense, which it is not, many of his acts would be excusable.

We find the defendant Lautz guilty as charged upon counts two and three of the indictment.

THE DEFENDANT METTGENBERG

By his own sworn statement the defendant Wolfgang Mettgenberg frankly and fully admits his connection with the Hitler Night and Fog decree. His statements show that he exercised wide discretion and had extensive authority over the entire plan from the time the Night and Fog prisoner was arrested in occupied territory and continuously after his transfer to Germany, his trial, and execution or imprisonment.

We will not reiterate the statements made by him in his sworn statement and hereinabove quoted. Suffice it to say that Mettgenberg held the position of Ministerialdirigent in Departments III

and IV of the Reich Ministry of Justice. In Department III, for penal legislation, he dealt with international law, formulating secret, general, and circular directives. He was regarded as an eminent authority on international law. He handled Night and Fog cases and knew the purpose and procedure in such cases. He knew that the decree was based upon the Fuehrer's order of 7 December 1941 to the OKW. He knew that an agreement existed between the Gestapo, the Reich Ministry of Justice, the Party Chancellery, and the OKW with respect to the purposes of the Night and Fog decree and the manner in which such matters were to be handled.

The defendant von Ammon was Ministerial Councillor in Mettgenberg's subdivision and was in charge of the Night and Fog section as shown in this judgment. The two acted together on doubtful matters and referred difficult questions to competent officials in the Reich Ministry of Justice and the Party Chancellery, since both of these offices had to give their "agreement" in cases of malicious attacks upon the Reich or Nazi Party or in the Night and Fog cases. The NN cases came from the Wehrmacht but in some cases directly from the Gestapo. These cases were assigned to Special Courts at several places in Germany and to the People's Court at Berlin by defendant von Ammon. Mettgenberg and von Ammon were sent to the Netherlands occupied territory because some German courts set up there were receiving Night and Fog cases in violation of the decree that they should be transferred to Germany. They held a conference at The Hague with the highest military justice authority and the heads of the German courts in the Netherlands, which resulted in a reference of the matter to the OKW at Berlin which agreed with Mettgenberg and von Ammon that "the same procedure should be used in the Netherlands as in other occupied territories, that is, that all Night and Fog matters should be transferred to Germany."

In Department IV for penal administration, Mettgenberg's work consisted of inspecting execution equipment. He witnessed one execution in 1944. He was entrusted with speeding up clemency applications because prisoners were escaping during air raids. Reich Minister Thierack called the defendant, Rothenberger, Under State Secretary, by telephone at Berlin and instructed him to make decisions concerning the clemency in death sentence cases presented by defendant Mettgenberg who made "reports lasting hours," and then Rothenberger made the decisions.

The evidence does not positively show that clemency cases presented by Mettgenberg and passed upon by Rothenberger were NN cases. We think, however, that the only conclusion that can be reached from Mettgenberg's testimony during the trial is that Rothenberger passed upon all clemency matters presented to him

by Mettgenberg which included NN cases. Mettgenberg stated that he was appointed to speed up clemency matters due to air raids and that he took the matter up with the Reich Minister of Justice, Thierack, who at the time called Rothenberger on the telephone and told him to receive and pass upon the clemency matters submitted. Mettgenberg testified that he did present clemency matters to Rothenberger by telephone conversations which lasted for several hours and that Rothenberger then made the decisions.

The defendant Mettgenberg assumed the burden of defending the illegality of the Night and Fog proceedings under the Ministry of Justice not only for himself but for all defendants connected therewith. He prefaced this defense with the following statement:

> "Today I am still of the view which I expressed in my affidavit. My view is that it was regrettable because the courts, in these matters, could not completely do justice to their foremost task, the finding of the truth. Now that I believe I have heard everything and believe myself to be able to survey the whole matter, I have to say that as concerns the various evils between which one had to choose, a transfer of the NN cases to the administration of justice was, after all, the lesser evil, so that this emergency solution which was made was probably the only possible solution." (*Tr. pp. 6269–6270.*)

With respect to the legal foundation for the NN cases, three laws or decrees are presented as justifying the proceedings. The first is article 161 of the Military Penal Code which dates back to the 1870's and which, as amended, provides:

> "A foreigner or a German who, in a foreign territory occupied by German troops, acts against German troops or their members or against an authority established by order of the Fuehrer and thereby commits an act which is punishable according to the laws of the Reich, is to be punished, just as if that act would have been committed by him within the territory of the Reich."

Whether this law violates international law of war need not be determined here because the defendants did not act under it in the execution and enforcement of the Hitler Night and Fog decree. Nor does this law authorize the execution and enforcement of any such decree.

The second legal ground presented is article 3, section 2 of the Code of Penal Procedure of 17 August 1938 which provides for the punishment of criminal acts committed in the areas of military operations in occupied territory by foreigners or Germans and further provides that:

"If a requirement of warfare demands it, * * * they may turn over the prosecution to the ordinary courts in the rear army area."

There can be no criticism of this law. It was not applied in any respect in the Night and Fog cases; hence, it constitutes no defense for the manner in which the Night and Fog decree was carried out.

The third legal foundation for the proceeding is based upon the claim that the Hitler decree of 7 December 1941 was a legal regulation for the handling of offenses against the Reich or against the occupation forces of the German Army in occupied areas. With respect to this decree we are convinced that it has no legal basis either under the international law of warfare or under the international common law as recognized by all civilized nations as heretofore set out in this judgment.

The defendant Mettgenberg referred to and approved the testimony of the defendant Schlegelberger which states "that the NN prisoners were expected to be, and were, tried materially according to the same regulations which would have been applied to them by the courts martial in the occupied territories" and that, accordingly, "the rules of procedure had been curtailed to the utmost extent." This court martial procedure was shown to have been used in the prosecution of NN persons who had been charged with high treason or preparation of treason against the Reich.

Mettgenberg testified as to the troubles the department had with the Gestapo because the Gestapo insisted that they had already investigated the facts as to each NN prisoner and that these facts should be accepted without further trial. This practice was not acceptable to the Ministry of Justice. As to other difficulties in securing proper evidence, Mettgenberg testified:

"Even though investigations were first of all carried out in the occupied territories before the NN prisoners were transferred to Germany, yet it was a matter of course that that evidence was not always without gaps."

These "gaps" in the evidence were shown by [NG–261 and NG–264] Prosecution Exhibits 334 and 335 in which the public prosecutor at Katowice complained of the difficulty of securing sufficient proof due to the utter secrecy of the proceedings. The Gestapo alone presented the evidence by "rather dubious police transcripts" and "such police records occasionally had been obtained by inadmissible means." Mettgenberg testified that defendant von Ammon made an official trip to Upper Silesia to discuss these matters with the chief judge in Belgium and northern France "to remedy that state of affairs." This action did not take place

until 30 June 1944, which was only a few months before the Night and Fog matters were taken out of the hands of the Ministry of Justice, and all prisoners then held by the Ministry of Justice were transferred to the Gestapo to be placed in concentration camps.

Mettgenberg also testified to the difficulties experienced with the Gestapo arising out of the fact that the Gestapo transferred many of these prisoners directly to concentration camps and thereby retained control over them. Nothing was done about the fact that the police took the NN prisoners into police custody and retained them in police custody.

We find defendant Mettgenberg to be guilty under counts two and three of the indictment. The evidence shows beyond a reasonable doubt that he acted as a principal, aided, abetted, and was connected with the execution and carrying out of the Hitler Night and Fog decree in violation of numerous principles of international law, as has been heretofore pointed out in this judgment.

THE DEFENDANT VON AMMON

From his own sworn statements we gain the following information concerning the defendant von Ammon. He joined the SA in December 1933, in which organization he held the rank of Scharfuehrer. He joined the NSDAP in May 1937. He was called to the Reich Ministry of Justice as of 1 January 1935, became a Landgerichtsrat on 1 February 1935, and Landgerichtsdirektor on 1 July 1937. His main activity in the Ministry during that period concerned "questions of international legal usage in penal matters."

After the Austrian Anschluss he was employed as liaison officer of Department III (penal matters) in connection with Department VIII (Austria), in the Reich Ministry of Justice. He was consultant in the department for the administration of penal law under Ministerialdirektor Crohne. He was transferred to the Munich Court of Appeals as Oberlandesgerichtsrat where he served until June 1940, at which time he was recalled to the Reich Ministry of Justice. As of 1 March 1943 he was appointed Ministerial Counsellor in the Ministry of Justice. He states (*NG–852, Pros. Ex. 55*) :

> "From 1942 onward I dealt mainly with Nacht und Nebel cases in the occupied territories. In my capacity as consultant for Nacht und Nebel cases I made several duty trips to the occupied territories and took part in discussions in Paris and Holland which dealt with questions of Nacht und Nebel proceedings."

The broad scope and the variety of the official activities of von Ammon may be illustrated by reference to reports which he made to officials of the Ministry of Justice during the year 1944. On 14 January 1944 he reported at the Ministry upon "jurisdiction of Denmark". On 10 February he reported to the minister on "Competence for Prosecution of NN Cases." On 31 May, under the heading "Submissions to the State Secretary" (Klemm), he reported on "Action Against Stateless Jews, Admission of Legal Procedure." Under the heading "Reports to the State Secretary" for 21 June 1944, he reported on "Pastoral Service for NN Prisoners", after which in handwriting appears the word "rejection". Under the heading "Submissions to the Minister" for 26 July, he reported on "Proceedings of State Police in Lower Styria." Under the heading "Reports to the Ministers" of 5 October, he reported on "Taking Over of Criminal Proceedings from the Eastern Districts." Under the heading "Formal Verbal Reports to the Minister" of 3 November 1944, he reported on "Liquidation of Offenses from the Eastern Territories." On 10 January 1945 it appears that he made a verbal report on the "Taking Over Administration of Penal Justice of the Minister for the East."

The prosecution introduced in evidence a captured document of 142 pages in length, containing lists of many hundreds of death sentences which were submitted to the Minister of Justice and at times to State Secretary Klemm for final disposition. The cases were classified as "clear" or as "doubtful." The former, "clear," outnumbered the latter. An examination of the document discloses that between 14 January 1944 and 16 November of the same year the defendant von Ammon made twenty-four reports on cases in which persons from the occupied territories had been sentenced to death under the Nacht und Nebel procedure. The death sentences averaged more than one for every 3 days of the entire period.

In a notice addressed to Under Secretary Rothenberger, and to Minister Thierack, von Ammon reported that on 1 September 1942, in Kiel, Essen, and Cologne cases were pending against 1,456 persons charged under the Night and Fog decree.

In view of the fact that von Ammon was in charge of Nacht und Nebel procedure from 1942 until the end of the war, it is clear that we have in evidence only incomplete records of the activities of this defendant in connection with the Night and Fog decree. The fragmentary character of the captured documents which have been submitted renders it impossible to give a complete picture of this criminal activity. The illustrations which we have given and which cover only a portion of the time involved will, however, serve as an indication of the scope of the activities which were

under the direction of the defendants Mettgenberg and von Ammon. Von Ammon also participated in a lengthy secret correspondence concerning the transfer of NN cases to the Special Court at Oppeln and the necessity of allocating additional judges and public prosecutors to that court in view of the resultant increase in the volume of work.

The defendant von Ammon held an executive position of responsibility involving the exercise of personal discretion. Within the ministry he was in charge of the section which handled Night and Fog cases. The defendant Mettgenberg stated that the Night and Fog section within his subdivision was headed by von Ammon and that whenever von Ammon had doubts concerning the handling of individual cases joint discussions were held. We quote:

"When he had no doubts he could decide on matters himself."

We have already set forth at length the statement of von Ammon concerning his knowledge and activities and his misgivings concerning the entire procedure. The defendants von Ammon and Mettgenberg were the representatives of the Reich Ministry of Justice at a conference at The Hague on 2 November 1943 concerning "New Regulations for Dealing with Night and Fog Cases from the Netherlands". Von Ammon states that assurance was given by Mettgenberg and himself that close connection would be maintained between the judicial authorities at Essen and the German authorities in the Netherlands in the handling of NN cases. We have already quoted a note signed by von Ammon wherein he remarked that it was "rather awkward" that the defendants should learn the details of their charges only during the trial and commented on the insufficiency of the translation facilities in the trial of French NN prisoners. Von Ammon is chargeable with actual knowledge concerning the systematic abuse of the judicial process in these cases.

In respect to his other activities we refer to our general discussion under the heading "Night and Fog." We find the defendant von Ammon guilty of war crimes and crimes against humanity under counts two and three of the indictment.

THE DEFENDANT JOEL

The professional career of the defendant Guenther Joel in the Third Reich proceeded at the same pace as his career as a Party man; in fact, even before the war years his professional career merged with his career in Nazi organizations, and to be more precise, in the SS and the SD—the organization which the IMT judgment has declared to be criminal.

He became a member of the NSDAP on 1 May 1933 and entered the Ministry of Justice as a junior public prosecutor (Gerichts-

assessor) on 7 August 1933. In quick succession he became assistant public prosecutor (1 September 1933), public prosecutor (1 January 1934), senior public prosecutor (1 February 1935), and chief public prosecutor (1 November 1936).

Between August 1933 and October 1937, Joel was the chief of a newly created subdepartment of the Reich Ministry of Justice, the Central Public Prosecution (Zentralstaatsanwaltschaft). In October 1937 this subdepartment was dissolved, but the Reich Minister of Justice, Guertner, reserved the right to assign Joel as "Referent" for special cases and subsequently made use of this right. After the dissolution of the Central Public Prosecution, Joel worked as "Referent" in the Ministry's Penal Department III (later renumbered IV).

By a formal letter of appointment, dated 19 December 1937 and signed by Minister Guertner, Joel was, in addition to his other duties, appointed liaison officer between the Reich Ministry of Justice and the SS, including the SD, as well as the Gestapo. A few months later, namely, in a letter of 2 May 1938, signed by Heydrich, Joel was, effective 30 January 1938, admitted to the SS and, effective the same day, promoted to the rank of SS Untersturmfuehrer and given the position of leader (Fuehrer) in the SD Main Office (Security Service Main Office).

His SS personnel record shows how quickly he climbed to high positions in the SS and the SD: on 11 September 1938 he became SS Obersturmfuehrer; on 30 January 1939, SS Hauptsturmfuehrer; on 26 September 1940, SS Sturmbannfuehrer—holding all these ranks as leader in the SD Main Office.

The record shows that in his capacity as SS officer Joel was, between 2 and 8 May 1939, sent on an official mission for the Security Office (SD). An official letter from the Reich Leader of SS, Chief of the Security Service Main Office, dated 28 April 1939, so notified the Reich Minister of Justice. Again, on 4 July 1940, the Chief of the Security Police and the Security Service informed the Reich Ministry of Justice that Joel had been "put on the list of indispensable persons on behalf of the Reich Leader SS and Chief of the German Police," thereby reserving to the Security Police and the Security Service the indispensable service of Joel and freeing him from military service.

But in his answer, dated 11 July 1940, to this request, Freisler, Under Secretary of the Ministry of Justice, asked:

> "To refrain from calling upon SS Captain Joel, senior public prosecutor, for taking over duties for the Reich Leader SS and Chief of the German Police. Dr. Joel, as you know, is entrusted with extremely important reports at my ministry."

The nature of these reports will be later discussed.

On 1 May 1941 Joel was promoted to ministerial counsellor. He remained with the Reich Ministry of Justice until 12 May 1943.

The reason for his leaving the Ministry was that on 7 May 1943 he was appointed attorney general to supreme provincial court of appeals in Hamm (Westphalia). By letter dated Fuehrer Headquarters, 12 May 1943, Bormann, Chief of the Party Chancellery (sentenced to death in absentia by the IMT) personally confirmed his appointment. It should be added that a few weeks earlier, by letter of 13 March 1943 to Reich Minister of Justice, Thierack, the Gauleiter of Westphalia, Alfred Meyer, also formally endorsed Joel's appointment for attorney general at Hamm, in his own name and in the name of deputy Gauleiter Hoffmann, in charge of the administration of the Gau Westphalia-South.

Shortly after this new appointment, namely, as of 9 November 1943, Joel was promoted to the high rank of SS Obersturmbannfuehrer, which appointment was approved by Himmler. His political and Party career went hand in hand with his professional career, and his promotions were made by or approved by such high ranking Nazi officials as Himmler, Bormann, Heydrich, Thierack, and Freisler—whose desperate and despicable characters are known to the world; the record in this case is replete with many atrocities and crimes committed by these leaders and members of organizations which have been declared criminal by the IMT. Thus, Joel continued to the end as the confidant and trusted protegé of these most outstanding and notorious criminals of all time.

It will be remembered that ever since December 1937, Joel in his several capacities at the Ministry of Justice had, in addition to his other duties, acted as liaison officer between the ministry and the SS, the SD, and the Gestapo. To this position a successor, Chief Public Prosecutor Franke, was appointed on 1 August 1943. Joel claims that in fact he had ceased to act as such liaison officer when Thierack assumed office as Reich Minister of Justice in August 1942. However, the record shows that even after that time Joel made numerous reports, some of which are mentioned below, relating to the execution of death penalties imposed under the law against Poles and Jews, and relating to the transfer of Poles who had received mild sentences, or had been acquitted, or had served their term, to the Gestapo. These were the very duties which he had to perform in the Reich Ministry as liaison officer. Even after Thierack's appointment as minister, Joel was connected with the interests of the Reich Security Office, and his work was productive and satisfactory in the carrying out of the plan or scheme of racial persecution and extermination of Poles

and Jews. On 17 August 1943, defendant Rothenberger inducted defendant Joel into his office as general public prosecutor at Hamm, praised him in the highest terms, and referred to him as an SS member and also to his rank of SS Obersturmbannfuehrer. As late as 1945, when the question of military service for Joel again arose, Gauleiter Hoffmann of South Westphalia intervened in a letter to the Reich Ministry of Justice, referring to the fact that Joel was known to be a member of the Waffen SS, and that if he were to go into military service he would undoubtedly be assigned to the SS activities.

Under our discussion of the Night and Fog decree, reference is made to several documents which show Joel as having aided, abetted, participated in, and having been connected with, the Night and Fog scheme or plan.

Rudolf Lehmann, lieutenant general of the legal department of the armed forces, stated under oath:

> "These cases were, as I seem to remember, handled by von Ammon, also of that same division of the Reich Ministry of Justice. General Public Prosecutor Joel, who was in the Ministry of Justice until sometime in 1943, would be able to supply further details on this 'Nacht und Nebel' matter. Joel was general public prosecutor in Hamm, and a court handling 'Nacht und Nebel' cases was located at Hamm. Other courts handling 'Nacht und Nebel' cases were located at Cologne, Breslau, and at one or two other places unknown to me but which can be named by Joel."

Joel became chief prosecutor of the court of appeals in Hamm, covering all of Westphalia and the district of Essen, on 17 August 1943, which office he continued to hold until the end of the war. In this position he was in charge of the Night and Fog program for the Special Courts in Hamm and Essen until 15 March 1944 when these courts were transferred farther east to Oppeln in the Katowice district. Reports of Joel show that he attended conferences both in Hamm and in Belgium on Night and Fog matters. The record also shows that the district of which he was the highest, and therefore the most responsible, prosecuting authority was, in area and population, one of the largest in Germany. He had under his supervision the senior public prosecutors and their staffs at the Special Courts at Hamm and in Essen. It was his task to supervise the work of all prosecutors assigned to his office. The Special Courts in Hamm and Essen tried more Night and Fog cases than the combined total of all other Special Courts and the People's Court. In law, Joel must be held to have had the responsibility of these cases. The record further shows that Joel assumed this responsibility.

A letter addressed to Joel, dated 20 January 1944, stated that in the future all Night and Fog persons who were upon trial acquitted or who had served their sentences, must be turned over for custody to the Gestapo.

A letter dated 26 January 1944 from Joel to the Reich Minister of Justice complained about the delay which the defendant Lautz, chief prosecutor at the People's Court, caused by his failure to return files in NN cases. Joel pointed out that 84 Night and Fog prisoners who had been held near Hamm since 1941 were still there.

In November 1943 defendants von Ammon and Mettgenberg came to Hamm enroute back to Berlin from the conferences they had attended in Holland. The purpose of their visit to Joel was to determine whether there was any available space in prison for the keeping of additional Night and Fog prisoners to be transported from the Netherlands. Joel assured them that more prisoners could be accommodated and even opposed the view of his Oberlandesgericht who stated they should not be sent to the Hamm area. They were sent to that area. In December 1943 Joel attended a conference in Brussels which he reported upon after his return to Hamm, pertaining to Night and Fog prisoners who were sent from Belgium.

The categorical denial of Joel of ever having transferred an NN prisoner or of ever having tried an NN prisoner or of ever having issued an order to transfer an NN prisoner who had been acquitted or who had served his sentence, to Gestapo custody is no defense of his activities in connection with the custody, trial, execution, or transfer of NN prisoners after they had served their sentences or had been acquitted to the Gestapo.

The high office which he held required him to supervise and properly handle Night and Fog cases filed in the courts where he was chief prosecutor. He had numerous assistants whom he necessarily had to entrust with the prosecution and carrying out of the Night and Fog program and cases arising thereunder. The fact that Joel did not actually try the Night and Fog cases himself has no significance. He did supervise the men who tried and had executed some of them and imprisoned others and transferred others who were not guilty of any crime or who had served their sentence, to the Gestapo and concentration camps.

The defendant Joel is chargeable with knowledge that the Night and Fog program from its inception to its final conclusion constituted a violation of the laws and customs of war.

We turn now to the other activities here under indictment of the defendant Joel.

We direct attention to a document from the Reich Ministry of Justice which contains the program for conferences among the officials of the Ministry. In each instance the name of the official who is to report is set opposite the subject for discussion. From this we gain some information as to the scope of the work assigned to Joel.

According to this program Joel was scheduled to report upon the following subjects. We quote:

"Nullification plea, Maslanka.

"Nullification plea, Beyer Bosich (Italian) article 4, VVO.

"Matter of clemency Pongratz (70 year old farmer, non-delivery).

"Handing-over of Poles to the State Police (cases Bartosinski and Marcziniak).

"Lenzinger Zoowoll AG (Lenzinger Artificial Wool, Ltd.).

"Treatment of Jews and Poles, as well as Russians. Internal order of the Reich Leader SS.

"Bartosinski, Pole, shall be transferred from criminal custody (3 years' penal camp on account of sexual intercourse) to State Police.

"Marasyak, Pole, wanted to marry German maid in France. Detention pending investigation. State Police demands him turned in.

"Should there be any reports during the war on the question of mercy for Poles who have been sentenced to death on account of the possession of weapons and other offenses and who have been pardoned to 5 years' penal servitude with the reserve of an investigation after 2 to 3 years?

"Extortion of food ration cards, Mrs. Ritter. Chorlow, Russian from the district of Kursk, article 2, VVO. State Police wants to punish with police measures.

"Jakubowski, Pole, has raped German woman. He has been executed by hanging. The criminal police asks for a burial certificate.

"Uschako, workman, from the East, from old Soviet Russian territory, has stolen a jacket. The Secret State Police sent him to a labor education camp and requests cancelation of the order to inflict 1-month imprisonment."

Another significant incident relates to the case of two "deserving National Socialists." Our source of knowledge is a brief document signed by the defendant Joel. The facts stated are that a policeman and a temporary mayor "shot two Polish priests for no reason other than hatred for the Catholic clergy." On 11 June 1940, the two murderers were sentenced to 15 years' penal servitude for manslaughter. Joel states that more than 2 years of the

sentence had been served and that the Reich Leader SS asked for pardon. The document concludes as follows:

"Penal servitude changed to 5 years' imprisonment each. Postponement of the serving of the sentence and of the defamatory consequences for the duration of stay in a Waffen SS probation unit. Further pardon in the case of the probation. (Signed) Dr. Joel"

As early as 1937 it is clear that Joel had knowledge of conditions in concentration camps. A document marked "For the time of circulation: Secret! to III–a: After circulation in sealed envelope to the Gestapo general files", contains the following:

"2. As far as reports concerning executions when escaping from concentration camps, etc., suicides in K.Z.'s (concentration camps) arrive, they shall continue to be dealt with by the specialist competent for the respective subject. The general consultant for political criminal matters, however, is to be informed of the reports. They are to be submitted to him [at] once."

This order was circulated to all specialists for political criminal matters. Joel was listed as a political specialist.

An official report on a meeting of the presidential board of 1 February 1939 shows that a report was given by the Chief Public Prosecutor on developments in connection with the events of 9 to 11 November 1938 (the Jewish pogrom). We quote:

"The Reich Minister of Justice and Senior Public Prosecutor Joel pointed out that it was impossible, of course, to handle this matter in the usual judicial manner; if the top men disregarded legal principles, it was impossible to prosecute people concerned with the execution. For instance, the viewpoint of violation of the public peace should be dropped. This is legally justified *inter alia* by the fact that the culprits were not conscious of any violation, since they were acting under orders. As far as the criminal offenses committed on that occasion are concerned, trifles should be dropped. Otherwise, however, proceedings can only be quashed by the Fuehrer, whereas serious criminal offenses such as rape and race defilement must be prosecuted. The order to prosecute is issued in any case by the minister after the culprits, if they are members of the Party or of any organization, have been excluded by a special department of the Supreme Party Tribunal in Berlin."

It is self-evident that if prosecution was to take place only after a Party tribunal had excluded them, they would live a long and happy life of freedom.

Defendant Joel became a Referent in the Reich Ministry of Justice with authority and duty to review penal cases from the

Incorporated Eastern Territories after the occupation of Poland. In this capacity he handled many of the cases tried pursuant to the decree against Poles and Jews. In defense of these acts, Joel testified that "he felt obligated by the existing laws and so complied with them." Joel did not have the same view as other officials that after the surrender of the Polish nation the nationals of the annexed part of Poland became German nationals. He testified that such a Polish citizen after 1 September 1939 remained a Polish national and that "a Polish national is never a German." Joel frankly admitted that he knew he was not dealing with Germans but with foreign nationals.

In his capacity as Referent for the Incorporated Eastern Territories Joel, as liaison officer between the Reich Ministry of Justice and the Gestapo, took part in conferences with others from Department IV concerning the disposition of such Jewish and Polish cases. In one instance he reported having discussed an order of Himmler's as to the treatment Poles and Jews should receive. In another instance he reported ordering the transfer of Poles who had been sentenced to a penal camp for 3 years to the Gestapo.

As a witness, Schlegelberger testified concerning transfers to the police, which he described as "a very sad chapter for anyone who has a sense of justice." Guertner protested against this procedure and made compilations of press reports concerning executions by the police.

> "Lammers actually submitted these compilations to Hitler but told Guertner later Hitler had said that he had not given a general directive to carry out these shootings, but in individual cases he could not do without these measures because the courts, that was military courts as well as civil courts, were not able to take care of the special conditions as created by the war. And, Lammers at the same time announced that Hitler in a further case had already ordered the execution by shooting."

Schlegelberger testified further that after an order had been made for the transfer of a prisoner to the police, there was a time limit of 24 hours, at the end of which the police were required to report that the order had been executed. Schlegelberger states that Guertner charged the defendant Joel with the mission of representing the Ministry of Justice with the police in connection with these transfers. It appears that the Ministry of Justice, through Joel, was able to intervene in some cases and to prevent the transfers. Schlegelberger testified:

> "* * * the attempts to intervene on the part of the Ministry of Justice were successful in some cases but, if all possibilities had been exhausted, and if in spite of that he had

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not succeeded in having the order issued by the police withdrawn, nothing was left but to issue the instructions to the executing authority not to offer any resistance but to hand the man over to the police when they requested him."

Notwithstanding the reluctance with which the officials of the Ministry of Justice acted, it appears from the foregoing that they did cooperate in the transfer of prisoners to the police.

From 10 September 1942 to March 1943, Joel reviewed 105 death sentences passed by courts in the Incorporated Eastern Territories and in most cases gave final authorization for their execution.

In his capacity as such Referent, Joel reviewed and passed upon 16 death sentences of Poles who had committed alleged crimes against the Reich or the German occupation forces. One of these Poles was born in Cleveland, Ohio, in the United States, and his death sentence was commuted to life imprisonment because Joel was fearful his execution would involve the Reich in international complications. The remaining 15 Poles were executed.

As Referent, Joel was shown by captured official documents to have had knowledge that many Jewish and Polish political prisoners were being executed under the law against Jews and Poles. This matter was called to his attention because of a dispute as to who should handle the corpses of the executed prisoners. One main difficulty was that, under Himmler's orders, these corpses were to be turned over to the Secret Police for disposition. The mayor and police of Posen [Poznan] refused to handle the corpses of Poles and Jews who were not executed as political prisoners. Joel was thereupon instructed to handle the matter temporarily and to work out a permanent plan for such burials, which he later assisted in doing.

As Referent in the department of justice and as liaison officer between the department and the SS, Joel obtained extensive information and exercised far-reaching power in the execution of the law against Jews and Poles. He therefore took an active part in the execution of the plan or scheme for the persecution and extermination of Jews and Poles.

Concerning Joel's membership in the SS and SD, a consideration of all of the evidence convinces us beyond a reasonable doubt that he retained such membership with full knowledge of the criminal character of those organizations. No man who had his intimate contacts with the Reich Security Main Office, the SS, the SD, and the Gestapo could possibly have been in ignorance of the general character of those organizations.

We find defendant Joel guilty under counts two, three, and four.

THE DEFENDANT ROTHAUG

Oswald Rothaug was born 17 May 1897. His education was interrupted from 1916 to 1918 while he was in the army. He passed the final law examination in 1922 and the State examination for the higher administration of justice in 1925.

He joined the NSDAP in the spring of 1938 and the membership was made effective from May 1937.

Rothaug was a member of the National Socialist Jurists' League and the National Socialist Public Welfare Association. In his affidavit he denies belonging to the SD. However, the testimony of Elkar and his own admission on the witness stand establishes that he was an "honorary collaborator" for the SD on legal matters.

In December 1925 he began his career as a jurist, first as an assistant to an attorney in Ansbach and later as assistant judge at various courts. In 1927 he became public prosecutor in Hof in charge of criminal cases. From 1929 to 1933 he officiated as counsellor at the local court in Nuernberg. In June 1933 he became senior public prosecutor in the public prosecution in Nuernberg. Here he was the official in charge of general criminal cases, assistant of the Chief Public Prosecutor handling examination of suspensions of proceedings and of petitions for pardon. From November to April 1937 he officiated as counsellor of the district court in Schweinfurt. He was legal advisor in the civil and penal chamber and at the Court of Assizes, as well as chairman of the lay assessors' court. From April 1937 to May 1943 he was director of the district court in Nuernberg, except for a period in August and September of 1939 when he was in the Wehrmacht. During this time he was chairman of the Court of Assizes, of a penal chamber, and of the Special Court.

From May 1943 to April 1945 he was public prosecutor of the public prosecution at the People's Court in Berlin. Here, as head of Department I he handled for a time cases of high treason in the southern Reich territory, and from January 1944 cases concerning the undermining of public morale in the Reich territory.

Crimes charged in the indictment, as heretofore stated in this opinion, have been established by the evidence in this case. The questions, therefore, to be determined as to the defendant Rothaug are: first, whether he had knowledge of any crime so established; and second, whether he was a participant in or took a consenting part in its commission.

Rothaug's sources of knowledge have, with those of all the defendants, already been pointed out. But Rothaug's knowledge was not limited to those general sources. Rothaug was an official of considerable importance in Nuernberg. He had many political and official contacts; among these—he was the friend of Haberkern,

Gau inspector of the Gau Franconia; he was the friend and associate of Oeschey, Gau legal advisor for the Gau Franconia; and was himself Gauwalter of the Lawyers' League. He was the "honorary collaborator" for the SD. According to the witness Elkar, [he was] the agent of the SD for Nuernberg and vicinity, this position was more important than that of a confidential agent, and an honorary collaborator was active in SD affairs. He testifies that Rothaug took the SS oath of secrecy.

Whether Rothaug knew of all the aspects of the crimes alleged, we need not determine. He knew of crimes as established by the evidence, and it is the function of this Tribunal to determine his connection, if any, therewith.

The defendant is charged under counts two, three, and four of the indictment. Under count four he is charged with being a member of the Party Leadership Corps. He is not charged with membership in the SD. The proof as to count four establishes that he was Gauwalter of the Lawyers' League. The Lawyers' League was a formation of the Party and not a part of the Leadership Corps as determined by the International Military Tribunal in the case against Goering, et al.

As to counts two and four of the indictment, from the evidence submitted, the Tribunal finds the defendant not guilty. The question of the defendant's guilt as to count three of the indictment remains to be determined.

The evidence as to the character and activities of the defendant is voluminous. We shall confine ourselves to the question as to whether or not he took a consenting part in the plan for the persecution, oppression, and extermination of Poles and Jews.

His attitude of virulent hostility toward these races is proved from many sources and is in no wise shaken by the affidavits he has submitted on his own behalf.

The evidence in this regard comes from his own associates—the judges, prosecutors, defense counsel, medical experts, and others with whom he dealt. Among, but not limited to these, we cite the evidence of Doebig, Ferber, Bauer, Dorfmueller, Elkar, Engert, Groben, and Markl. In particular the testimony of Father Schosser is important. He testified as to many statements made by the defendant Rothaug during the trial of his own case, showing the defendant's hostility to Poles and his general attitude toward them. He stated that concerning the Poles in general, Rothaug expressed himself in the following manner:

> "If he (Rothaug) had his way, then no Pole would be buried in a German cemetery, and then he went on to make the remark which everybody heard in that courtroom—that he would get up from his coffin if there was a Pole being buried near to

him. Rothaug himself had to laugh because of this mean joke, and he went on to say, 'You have to be able to hate, because according to the Bible, God is a hating God.' "

The testimony of Elkar is even more significant. He testifies that Rothaug believed in severe measures against foreigners and particularly against Poles and Jews, whom he felt should be treated differently from German transgressors. Rothaug felt there was a gap in the law in this respect. He states that Rothaug asserted that in his own court he achieved this discrimination by interpretation of existing laws but that other courts failed to do so. Such a gap, according to Rothaug, should be closed by singling out Poles and Jews for special treatment. Elkar testifies that recommendations were made by the defendant Rothaug, through the witness, to higher levels and that the subsequent decree of 1941 against Poles and Jews conformed to Rothaug's ideas as expressed and forwarded by the witness Elkar through SD channels to the RSHA.

This animosity of the defendant to these races is further established by documents in this case which show that his discrimination against these races encompassed others who he felt lacked the necessary harshness to carry out the policy of the Nazi State and Party toward these people.

In this connection the communication of Oeschey to Deputy Gauleiter Holz, concerning Doebig, is worthy of note. In this communication many charges were made against Doebig for his failure to take action against officials under him who had failed to carry out the Nazi programs against Jews and Poles. Oeschey testified that these charges were copied from a letter submitted to him by the defendant Rothaug and that the defendant assumed responsibility for these charges. Rothaug denies that he assumed responsibility or had anything to do with the charges made, except in one immaterial instance. However, in the light of the circumstances themselves, the Tribunal accepts Oeschey's testimony in this regard, particularly in view of the unimpeached affidavit of Oeschey's secretary to the effect that these charges were copied directly by her from a letter of Rothaug's.

Documentary proof of Rothaug's attitude in this respect is further found in the records of cases tried by him which hereafter will be considered.

Proof as to his animus is not shaken by his own testimony. It is confirmed by his testimony. He states:

"In my view, by introduction of the question of the so-called incredibility of Poles, the whole problem is shifted onto another plane. It is a matter of course that a nation, which has been

subjected by another nation, and which is in a state of stress—that a citizen of such a country which had been subjected to another *vis-à-vis* the victorious nation, finds himself in quite a different moral-ethical relationship. It is useless to shut your eyes against reality. Of course, he finds himself in a different moral relationship from the relationship in which a German citizen would find himself. It is so natural there is no point in ignoring it. There is no need to lie."

His explanations as to his feeling toward Poles, given in connection with the Schosser arrest and trial are also most enlightening but too extensive to quote here.

Concerning his participation in the Nazi policy of persecution and extermination of persons of these races, we shall confine our discussions to three cases which were tried by Rothaug as presiding judge.

The first case to be considered is that of Durka and Struss. Our knowledge of this case is based primarily upon the evidence of Hans Kern, the defense counsel of one of these defendants; Hermann Markl, the prosecutor in the case; and the testimony of the defendant Rothaug.

The essential facts are in substance as follows: Two Polish girls—one, according to the testimony of Kern, 17 years of age, the other somewhat older—were accused of starting a fire in an armament plant in Bayreuth. This alleged fire did not do any material damage to the plant, but they were in the vicinity when it started and were arrested and interrogated by the Gestapo. Both gave alleged confessions to the Gestapo. Almost immediately following this occurrence, they were brought to Nuernberg by the Gestapo for trial before the Special Court.

Upon their arrival the prosecutor in the case, Markl, was directed to draw up an indictment based upon the Gestapo interrogation. This was at 11 o'clock of the day they were tried.

The witness Kern was summoned by the defendant Rothaug to act as defense counsel in the case approximately 2 hours before the case came to trial. He informed Rothaug that he would not have time to prepare a defense. According to Kern, Rothaug stated that if he did not take over the defense, the trial would have to be conducted without a defense counsel. According to Rothaug, he told Kern that he would get another defense counsel. In either event the trial was to go on at once.

The trial itself, according to Kern, lasted about half an hour; according to the defendant, approximately an hour; according to Markl, it was conducted with the speed of a court martial.

The evidence consisted of the alleged confessions which one of the defendants repudiated before the court. Rothaug states that

he thereupon called the Gestapo official who had obtained these alleged confessions and questioned him under oath. According to Rothaug the Gestapo official stated that the interrogations were perfectly regular. There was also a letter in evidence which it was said the defendants had tried to destroy before their capture. The witness Kern stated on cross-examination that this letter had little materiality.

The defendant attempts to justify the speed of this trial upon the legal requirements in existence at this time. He states, in contradiction to the other witnesses, that a clear case of sabotage was established. This Tribunal is not inclined to accept the defendant Rothaug's version of the facts which were established. Under the circumstances and in the brief period of the trial, the Tribunal does not believe the defendant could have established those facts from evidence.

According to the witness Kern, one of the defendants was 17 years of age. This assertion as to age was not disputed. A German 18 years of age or thereunder would have come under the German Juvenile Act and would not have been subject to trial before a Special Court or to capital punishment. Whatever the age of the defendants in this case, they were tried under the procedure described in the ordinance against Poles and Jews which was in effect at this time, by a judge who did not believe the statements of Polish defendants, according to the testimony in this case. These two young Polish women were sentenced to death and executed 4 days after trial. In the view of this Tribunal, based upon the evidence, these two young women did not have what amounted to a trial at all but were executed because they were Polish nationals in conformity with the Nazi plan of persecution and extermination.

The second case to be considered is the Lopata case. This was a case in which a young Polish farmhand, approximately 25 years of age, is alleged to have made indecent advances to his employer's wife.

He first was tried in the district court at Neumarkt. That court sentenced him to a term of 2 years in the penitentiary. A nullity plea was filed in this case before the Reich Supreme Court, and the Reich Supreme Court returned the case to the Special Court at Nuernberg for a new trial and sentence. The Reich Supreme Court stated that the judgment of the lower court was defective, since it did not discuss in detail whether the ordinance against public enemies was applicable and stated that if such ordinance were applicable—a thing which seemed probable, a much more severe sentence was deemed necessary.

The case was therefore again tried in violation of the funda-

mental principles of justice that no man should be tried twice for the same offense.

In the second trial of the case, the defendant Rothaug obligingly found that the ordinance against public enemies had been violated.

In its reasons, the court states the facts on which the verdict was based as follows:

"The wife of farmer Schwenzl, together with the accused and a Polish girl, chopped straw in the barn. The accused was standing on the righthand side of the machine to carry out the work. Suddenly, in the middle of the work, the accused, without saying anything, touched with his hand the genitals of the wife of farmer Schwenzl, through her skirt. When she said, after this unexpected action of the defendant, 'You hog, do you think I am not disgusted about anything; you think you can do that because my husband is sick,' the accused laughed and in spite of this dissuasion touched again the genitals of the farmer's wife above her skirt. The wife of farmer Schwenzl slapped him after that. In spite of this, the accused continued with his impertinent behavior; for a third time he touched the genitals of the farmer's wife above the skirt.

* * * * * * *

"The accused did not make a complete confession. He states that he only once, for fun, touched the farmer's wife's genitals above the skirt.

"The court is convinced, on account of the testimony given by the witness Therese Schwenzl, who makes a trustworthy impression, that the affair occurred exactly as described by the witness. Therefore, its findings were arrived at according to the testimony given by her."

The Polish woman who was present at the time of this alleged assault is not listed as a witness. Rothaug has stated in his testimony before this Court that he never had a Polish witness.

As for the reasons for bringing the defendant under the public enemy ordinance, the following facts are stated in the reasons for the verdict: Lopata having had some minor difficulties with the farmer Schwenzl refused to eat his noon meal and induced the Polish servant maid to do likewise. Thereupon, farmer Schwenzl, his employer, called him to account in the stable. The defendant put up resistance to the farmer's "admonitions" by arming himself with a dung fork. It is further stated that the Pole, at the threshold of the farm hallway, again turned against his employer and let him go only when attacked by the sheep dog which the farmer kept.

As to the actual reasons for the sentence of this Polish farmhand to death, the following paragraphs are more significant:

"Thus, the defendant gives the impression of a thoroughly degenerate personality, which is marked by excitability and a definite trend to mendacity, or to lying. The whole inferiority of the defendant, I would say, lies in the sphere of character and is obviously based on his being a part of Polish subhumanity, or in his belonging to Polish subhumanity.

"The drafting of men into the armed forces effected a heavy labor shortage in all spheres of life at home, last but not least in agriculture. To compensate this, Polish laborers, among others, had to be used to a large extent, mainly as farmhands.

"These men cannot be supervised by the authorities to such an extent as would be necessary due to their insubordinate and criminal disposition.

* * * * * * *

"The action of the defendant constitutes a considerable disturbance of the peace of the persons immediately concerned by his mean actions. The rural population has the right to expect that the strongest measures will be taken against such terrorization by foreign elements. But beyond disregarding the honor of the wife of farmer Schwenzl, the attack of the defendant is directed against the purity of the German blood. Looking at it from this point of view, the defendant showed such insubordination within the German living space that his action has to be considered as especially significant. * * *

"Accordingly, as outlined in article III, paragraph 2, second sentence of the ordinance against Poles and Jews, the crime of the defendant, which in connection with his other behavior shows a climax of unheard-of impudence, has to be considered as especially serious so that the death sentence had to be passed as the only just expiation, which is also necessary in the interest of the Reich security to deter Poles of similar mentality."

The defendant was sentenced under the ordinance against Poles and Jews in the Incorporated Eastern Territories. The verdict was signed by the defendant Rothaug, and an application for clemency was disapproved by him.

When on the witness stand, the defendant Rothaug was asked the following question by the court:

"* * * if Lopata had been a racial German, all other facts being the same as they were in the Lopata case, is it your judgment that the nullity plea would have been invoked and that the Supreme Court would have ordered the case sent back to you for another trial? I should like your opinion on that."

Rothaug replied as follows to this question:

"Mr. President, this question is very interesting, but I cannot even imagine that possibility even theoretically, because the very elements which are of the greatest importance could not be the same in the case of a German."

Lopata was sentenced to death and subsequently executed.

The third case to be considered is that of Leo Katzenberger. The record in this case shows that Lehmann Israel Katzenberger, commonly called Leo Katzenberger, was a merchant and head of the Jewish community in Nuernberg; that he was "sentenced to death for an offense under paragraph 2, legally identical with an offense under paragraph 4 of the decree against public enemies in connection with the offense of racial pollution." The trial was held in the public session on 13 March 1942. Katzenberger's age at that time was over 68 years.

The offense of racial pollution with which he was charged comes under article 2 of the Law for the Protection of German Blood and Honor. This section reads as follows:

"Sexual intercourse (except in marriage) between Jews and German nationals of German or German-related blood is forbidden."

The applicable sections of the Decree Against Public Enemies reads as follows:

"Section 2

"Crimes During Air Raids

"Whoever commits a crime or offense against the body, life, or property, taking advantage of air raid protection measures, is punishable by hard labor of up to 15 years, or for life, and in particularly severe cases, punishable by death.

* * * * * * *

"Section 4

"Exploitation of the State of War a Reason for More Severe Punishment

"Whoever commits a criminal act exploiting the extraordinary conditions caused by war is punishable beyond the regular punishment limits with hard labor of up to 15 years, or for life, or is punishable by death if the sound common sense of the people requires it on account of the crime being particularly despicable."

The evidence in this case, aside from the record, is based primarily upon the testimony of Hans Groben, the investigating

judge who first investigated the case; Hermann Markl, the official who prosecuted the case; Karl Ferber, who was one of the associate judges in the trial; Heinz Hoffmann, who was the other associate judge in the trial; Armin Baur, who was medical expert in the trial; Georg Engert, who dealt with clemency proceedings; and Otto Ankenbrand, another investigating judge.

The salient facts established in connection with this case are in substance as follows: Sometime in the first half of the year 1941 the witness Groben issued a warrant of arrest against Katzenberger, who was accused of having had intimate relations with the photographer Seiler. According to the results of the police inquiry, actual intercourse had not been proved, and Katzenberger denied the charge. Upon Groben's advice, Katzenberger agreed that he would not move against the warrant of arrest at that time but would await the results of further investigation. These further investigations were very lengthy, although Groben pressed the public prosecutor for speed. The police, in spite of their efforts, were unable to get further material evidence, and it became apparent that the way to clarify the situation was to take the sworn statement of Seiler, and this was done.

In her sworn statement she said that Katzenberger had known both her and her family for many years before she had come to Nuernberg and that his relationship to her was a friendly and fatherly one and denied the charge of sexual intercourse. The evidence also showed that Katzenberger had given Seiler financial assistance on various occasions and that he was administrator of the property where Seiler lived, which was owned by a firm of which he was a partner. Upon Seiler's statement, Groben informed Dr. Herz, counsel for Katzenberger, of the result and suggested that it was the right time to move against the warrant of arrest.

When this was done, Rothaug learned of it and ordered that the Katzenberger case be transferred from the criminal divisional court to the Special Court. The first indictment was withdrawn, and another indictment was prepared for the Special Court.

The witness Markl states that Rothaug dominated the prosecution, especially through his close friendship with the senior public prosecutor, Dr. Schroeder, who was the superior of Markl.

The indictment before the Special Court was prepared according to the orders of Rothaug, and Katzenberger was not charged only with race defilement in this new indictment, but there was also an additional charge under the decree against public enemies, which made the death sentence permissible. The new indictment also joined the Seiler woman on a charge of perjury. The effect of joining Seiler in the charge against Katzenberger was to preclude her from being a witness for the defendant, and such a

combination was contrary to established practice. Rothaug at this time told Markl that there was sufficient proof of sexual intercourse between Seiler and Katzenberger to convince him, and that he was prepared to condemn Katzenberger to death. Markl informed the Ministry of Justice of Rothaug's intended procedure against Katzenberger and was told that if Rothaug so desired it, the procedure would be approved.

Prior to the trial, the defendant Rothaug called on Dr. Armin Baur, medical counsellor for the Nuernberg Court, as the medical expert for the Katzenberger case. He stated to Baur that he wanted to pronounce a death sentence and that it was, therefore, necessary for the defendant to be examined. This examination, Rothaug stated, was a mere formality since Katzenberger "would be beheaded anyhow." To the doctor's reproach that Katzenberger was old, and it seemed questionable whether he could be charged with race defilement, Rothaug stated:

"It is sufficient for me that the swine said that a German girl had sat upon his lap."

The trial itself, as testified to by many witnesses, was in the nature of a political demonstration. High Party officials attended, including Reich Inspector Oexle. Part of the group of Party officials appeared in uniform.

During the proceedings, Rothaug tried with all his power to encourage the witnesses to make incriminating statements against the defendants. Both defendants were hardly heard by the court. Their statements were passed over or disregarded. During the course of the trial, Rothaug took the opportunity to give the audience a National Socialist lecture on the subject of the Jewish question. The witnesses found great difficulty in giving testimony because of the way in which the trial was conducted, since Rothaug constantly anticipated the evaluation of the facts and gave expression to his own opinions.

Because of the way the trial was conducted, it was apparent that the sentence which would be imposed was the death sentence.

After the introduction of evidence was concluded, a recess was taken, during which time the prosecutor Markl appeared in the consultation room and Rothaug made it clear to him that he expected the prosecution to ask for a death sentence against Katzenberger and a term in the penitentiary for Seiler. Rothaug at this time also gave him suggestions as to what he should include in his arguments.

The reasons for the verdict were drawn up by Ferber. They were based upon the notes of Rothaug as to what should be included. Considerable space is given to Katzenberger's ancestry

and the fact that he was of the Mosaic faith, although that fact was admitted by Katzenberger. Such space is also given to the relationship between Katzenberger and Seiler. That there was no proof of actual sexual intercourse is clear from the opinion. The proof seems to have gone little farther than the fact that the defendant Seiler had at times sat upon Katzenberger's lap and that he had kissed her, which facts were also admitted. Many assumptions were made in the reasons stated which obviously are not borne out by the evidence. The court even goes back to the time prior to the passage of the law for the protection of German Blood and Honor, during which Katzenberger had known Seiler. It draws the conclusion apparently without evidence, that their relationship for a period of approximately 10 years, had always been of a sexual nature. The opinion undertakes to bring the case under the decision of the Reich Supreme Court that actual sexual intercourse need not be proved, provided the acts are sexual in nature.

Having wandered far afield from the proof to arrive at this conclusion as to the matter of racial pollution, the court then proceeds to go far afield in order to bring the case under the decree against public enemies. Here the essential facts proved were that the defendant Seiler's husband was at the front and that Katzenberger, on one or possibly two occasions, had visited her after dark. On both points the following paragraphs of the opinion are enlightening (*NG–154, Pros. Ex. 152*):

> "Looked at from this point of view, Katzenberger's conduct is particularly contemptible. Together with his offense of racial pollution he is also guilty of an offense under paragraph 4 of the ordinance against people's parasites.* It should be noted here that the national community is in need of increased legal protection from all crimes attempting to destroy or undermine its inner cohesion.
>
> "On several occasions since the outbreak of war the defendant Katzenberger crept into Seiler's flat after dark. In those cases the defendant exploited the measures taken for the protection in air raids. His chances were further improved by the absence of the bright street lighting which exists in the street along Spittlertorgraben in peacetime. He exploited this fact fully aware of its significance because thus he instinctively escaped during his excursions being observed by people in the street.
>
> "The visits paid by Katzenberger to Seiler under the protection of the black-out served at least the purpose of keeping relations going. It does not matter whether during these visits

* Popular name for the decree against public enemies.

extra-marital sexual relations took place or whether they only conversed as when the husband was present, as Katzenberger claims. The request to interrogate the husband was therefore overruled. The court holds the view the defendant's actions, done with a purpose within a definite plan, amount to a crime against the body according to paragraph 2 of the ordinance against people's parasites. The law of 15 September 1935 has been passed to protect German blood and German honor. The Jew's racial pollution amounts to a grave attack on the purity of German blood, the object of the attack being the body of a German woman. The general need for protection therefore makes appear as unimportant the behavior of the other partner in racial pollution who anyway is not liable to prosecution. The fact that racial pollution occurred up to at least 1939–1940 becomes clear from statements made by the witness Zeuschel to whom the defendant repeatedly and consistently admitted that up to the end of 1939 and the beginning of 1940 she was used to sitting on the Jew's lap and exchanging caresses as described above.

"Thus, the defendant committed an offense also under paragraph 2 of the ordinance against people's parasites.

"The personal character of the male defendant also stamps him as a people's parasite. The racial pollution practiced by him through many years grew, by exploiting wartime conditions, into an attitude inimical to the nation, into an attack on the security of the national community, during an emergency.

"This was why the defendant Katzenberger had to be sentenced both on a charge of racial pollution and of an offense under paragraphs 2 and 4 of the ordinance against people's parasites, the two charges being taken in conjunction according to paragraph 73 of the criminal code.

* * * * * * *

"In passing sentence the court was guided by these considerations: The political life of the German people under national socialism is based on the community. One fundamental factor of the life of the national community is race. If a Jew commits racial pollution with a German woman, this amounts to polluting the German race and, by polluting a German woman, to a grave attack on the purity of German blood. The need for protection is particularly strong.

"Katzenberger has been practicing pollution for years. He was well acquainted with the point of view taken by patriotic German men and women as regards racial questions, and he knew that by this conduct he insulted the patriotic feelings of

the German people. Nor did he mend his ways after the National Socialist revolution of 1933, after the passing of the law for the protection of German blood, in 1935, after the action against Jews in 1938, or the outbreak of war in 1939.

"The court therefore regards it as indicated, as the only feasible answer to the frivolous conduct of the defendant, to pass death sentence, as the heaviest punishment provided by paragraph 4 of the decree against public enemies. His case takes on the complexion of a particularly grave crime as he was to be sentenced in connection with the offense of committing racial pollution, under paragraph 2 of the Decree Against Public Enemies, especially if one takes into consideration the defendant's character and the accumulative nature of commission. This is why the defendant is liable to the death penalty which the law provides for only such cases. Dr. Baur, the medical expert, describes the defendants fully responsible."

We have gone to some extent into the evidence of this case to show the nature of the proceedings and the animus of the defendant Rothaug. One undisputed fact, however, is sufficient to establish this case as being an act in furtherance of the Nazi program to persecute and exterminate Jews. That fact is that nobody but a Jew could have been tried for racial pollution. To this offense was added the charge that it was committed by Katzenberger through exploiting war conditions and the black-out. This brought the offense under the ordinance against public enemies and made the offense capital. Katzenberger was tried and executed only because he was a Jew. As stated by Elkar in his testimony, Rothaug achieved the final result by interpretations of existing laws as he boasted to Elkar he was able to do.

This Tribunal is not concerned with the legal incontestability under German law of these cases above discussed. The evidence establishes beyond a reasonable doubt that Katzenberger was condemned and executed because he was a Jew; and Durka, Struss, and Lopata met the same fate because they were Poles. Their execution was in conformity with the policy of the Nazi State of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in that program of persecution and extermination.

From the evidence it is clear that these trials lacked the essential elements of legality. In these cases the defendant's court, in spite of the legal sophistries which he employed, was merely an instrument in the program of the leaders of the Nazi State of persecution and extermination. That the number the defendant could wipe out within his competency was smaller than the number involved in the mass persecutions and exterminations by the

leaders whom he served, does not mitigate his contribution to the program of those leaders. His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.

The individual cases in which Rothaug applied the cruel and discriminatory law against Poles and Jews cannot be considered in isolation. It is of the essence of the charges against him that he participated in the national program of racial persecution. It is of the essence of the proof that he identified himself with this national program and gave himself utterly to its accomplishment. He participated in the crime of genocide.

Again, in determining the degree of guilt the Tribunal has considered the entire record of his activities, not alone under the head of racial persecution but in other respects also. Despite protestations that his judgments were based solely upon evidence introduced in court, we are firmly convinced that in numberless cases Rothaug's opinions were formed and decisions made, and in many instances publicly or privately announced before the trial had even commenced and certainly before it was concluded. He was in constant contact with his confidential assistant Elkar, a member of the criminal SD, who sat with him in weekly conferences in the chambers of the court. He formed his opinions from dubious records submitted to him before trial. By his manner and methods he made his court an instrumentality of terror and won the fear and hatred of the population. From the evidence of his closest associates as well as his victims, we find that Oswald Rothaug represented in Germany the personification of the secret Nazi intrigue and cruelty. He was and is a sadistic and evil man. Under any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Rothaug is guilty under count three of the indictment. In his case we find no mitigating circumstances; no extenuation.

THE DEFENDANT BARNICKEL

The evidence has not convinced the Tribunal beyond a reasonable doubt of the guilt of the defendant Barnickel. He is therefore acquitted on all counts.

THE DEFENDANT PETERSEN

Upon the evidence submitted, it is the judgment of this Tribunal

that the defendant Hans Petersen is not guilty under any of the counts charged against him in the indictment.

THE DEFENDANT NEBELUNG

Upon the evidence submitted, it is the judgment of this Tribunal that the defendant Nebelung is not guilty under any of the counts charged against him in the indictment.

THE DEFENDANT CUHORST

The defendant Cuhorst is charged under counts two, three, and four of the indictment.

There is no evidence in this case to substantiate the charge under count two of the indictment.

As to count four, the proof establishes that Cuhorst was a Gaustellenleiter and so a member of the Gau staff and a "sponsoring" member of the SS. His function as Gaustellenleiter was that of a public propaganda speaker.

In its judgment the International Military Tribunal, in defining the members of the Party Leadership Corps who came under its decision as being members of a criminal organization, states the following:

> "The decision of the Tribunal on these staff organizations includes only the Amtsleiter who were heads of offices on the staffs of the Reichsleitung, Gauleitung, and Kreisleitung. With respect to other staff officers and Party organizations attached to the Leadership Corps other than the Amtsleiter referred to above, the Tribunal will follow the suggestion of the prosecution in excluding them from the declaration."

There is no evidence in this case which shows that the office of Gaustellenleiter was the head of any office on the staff of the Gauleitung.

With regard to the SS the judgment of the International Military Tribunal is as follows:

> "The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by Article 6 of the Charter * * *."*

Referring back to the membership enumerated, the judgment declares:

* Trial of the Major War Criminals, op. cit., volume I, page 273.

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"In dealing with the SS, the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf-Verbaende, and the members of any of the different police forces who were members of the SS." *

It is not believed by this Tribunal that a sponsoring membership is included in this definition.

The Tribunal therefore finds the defendant Cuhorst not guilty under counts two and four of the indictment.

As to count three the problem is considerably more complicated. There are many affidavits and much testimony in the record as to the defendant's character as a fanatical Nazi and a ruthless judge. There is also much evidence as to the arbitrary, unfair, and unjudicial manner in which he conducted his trials. Some of the evidence against him was weakened on cross-examination, but the general picture given of him as such a judge is one which the Tribunal accepts.

The cases to be considered as connecting him with crimes established in this case under count three involve the question as to whether the evidence establishes his connection with the persecution of Poles. In this connection we have given particular consideration to the Skowron and Pietra cases.

Unfortunately the records of the Special Court at Stuttgart were destroyed at the time that the Palace of Justice in Stuttgart was burned. There are therefore no records available as to the cases tried by Cuhorst.

From the evidence available, this Tribunal does not consider that it can say beyond a reasonable doubt that the defendant was guilty of inflicting the punishments which he imposed on racial grounds or that it can say beyond a reasonable doubt that he used the discriminatory provisions of the decree against Poles and Jews to the prejudice of the Poles whom he tried.

While the defendant Cuhorst followed a misguided fanaticism, certain things can be said in his favor. He was severely criticized for his leniency by the defendant Klemm in a number of cases which he tried. He was tried by a Party court for statements considered to reflect upon the Party, which he made in a trial involving Party officials. Subsequently he was relieved as a judge in Stuttgart because he apparently did not conform to what the State and Party demanded of a judge.

This Tribunal does not consider itself commissioned to try the conscience of a man or to condemn a man merely for a course of conduct foreign to its own conception of the law, it is limited to

* Ibid.

the evidence before it as to the commission of certain alleged offenses. Upon the evidence before it, it is the judgment of this Tribunal that the defendant Cuhorst has not been proved guilty beyond a reasonable doubt of the crimes alleged and that he be, therefore, acquitted on the charges against him.

THE DEFENDANT OESCHEY

The defendant Oeschey joined the NSDAP on 1 December 1931. He was war representative for the Gau Main Office for legal aid and legal advice. After filling other offices he was appointed on 1 January 1939 to the office of senior judge of the district court at Nuernberg, which office he held until 1 April 1941. He was then appointed district court director at the same court. He was a presiding judge of the Special Court in Nuernberg.

By decree of 30 July 1940 of the Reich legal office of the NSDAP, he was provisionally commissioned with the direction of the legal office of the NSDAP in the Franconia Gau, and the leadership of the Franconia Gau in the NSRB, the National Socialist Lawyers' League. He carried out his duties in the Leadership Corps of the Party at the same time that he was serving as a judge of the Special Court. His personnel file in the Reich Ministry of Justice shows that he was highly recommended for his Party reliability by at least five different public officials.

He was drafted into the army in February 1945, and remained in the army until the end of the war; however, he was released for the period from 4 April until 14 April 1945, during which time he functioned as chairman of the civilian court martial at Nuernberg. The record discloses that he and the defendant Rothaug were the guiding, if not controlling, spirits of the Special Court at Neurnberg, which was known as the most brutal of the special courts in Germany.

Among many cases which gave evidence of his arbitrary character we will give detailed attention to two:

In March 1943, Sofie Kaminska, a widowed Polish farm laborer, and Wasyl Wdowen, a Ukrainian, were indicted before the Special Court at Nuernberg for alleged crimes as follows:

Kaminska for a violation of the law against Poles and Jews in connection with the crime of assault and battery and threat and resistance to an officer; Wdowen for the alleged crime of being accessory to a crime according to the law against Poles and Jews, and for attempting to free a prisoner. The case was tried before the Special Court, the defendant Oeschey presiding.

The facts on which the sentence was based may, with complete fairness to the defendant Oeschey, be very briefly summarized. Shortly after the invasion of Poland, Kaminska "came to Ger-

many, being committed to work there." Kaminska and Wdowen were lovers. They were both working for a farmer, Gundel. They demanded pay from Gundel, which was refused, and they became more insistent. "The defendant Wdowen actually gave the farmer a push." "In his distress Gundel called for help of the Pfc. Anton Wanner who was in uniform and happened to be spending his leave there." A quarrel followed. Kaminska slapped the soldier's face, and the soldier slapped her face. During the dispute the soldier's combat infantryman's badge fell to the ground. There were various demonstrations; the soldier drew his bayonet, and Kaminska ran out of the room and took a hoe, but did not get a chance to attack the soldier because he closed the door. Shortly thereafter, the soldier was riding on his bicycle and the Pole, Kaminska, threw a stone at him without, however, hitting him. The next day a police official came out to the farm and arrested Kaminska who followed him "unwillingly." Wdowen, contrary to the instructions of the police officer, followed them. The policeman slapped Wdowen's face twice to force him to turn back. Nevertheless, Wdowen followed to the door of the cell and attempted to assist the Polish woman, Kaminska, in resisting imprisonment. The very most that can possibly be said of the evidence, as stated by the defendant Oeschey himself, is that there was a good squabble with mutual recriminations and threats. It is to be understood that many of the statements heretofore made, as quoted from the opinion, were denied by the defendants in that case but, as before stated, we do not retry the case upon the facts. The court argues at great length concerning the claim of the prosecution that the stone weighed a half a pound and should be considered equal to a cutting or thrusting weapon. The court said:

> "The defendant had the insolence to attack a German soldier; she took up an offensive position which would have led to a great blood bath if the soldier had not evaded the stone which was hurled at him."

The court said of Kaminska (*NG–457, Pros. Ex. 201*): "She thereby characterizes herself as a Polish violent criminal," and then stated:

> "As the defendant on 1 September 1939 was a resident in the territory of the former Polish state, she had to be found guilty, in application of paragraphs II, III, and XIV of the Penal Law against Poles, of a crime of assault and battery in coincidence with a crime of threat, a crime under paragraph 1, section 1, of the law against violent criminals, and of a crime of offering resistance to the authority of a state."

The fact that the discriminatory law against Poles was invoked in this case is established. The opinion signed by Oeschey states:

"Under paragraph III, section 2, of the Penal Law against Poles, the death sentence must be passed if the law threatens with it."

Concerning Wdowen, who was a Ukrainian and therefore could not be sentenced under the law against Poles, the court commented on the fact that he knew that the Germany economy, on account of wartime conditions, was dependent on foreign labor, "in particular, labor from the eastern territories." The court drew the conclusion that Wdowen, who had used at most only a little force in attempting to protect Kaminska, was guilty of having taken advantage of extraordinary wartime conditions and of violating the law against violent criminals. Both defendants were sentenced to death by the defendant Oeschey. The associated judges in the Kaminska and Wdowen case were Doctors Gros and Pfaff. They are guilty of having signed the judgment. Both submitted affidavits and both were cross-examined before this Tribunal. Dr. Gros stated that Oeschey demanded the severest countermeasures in similar cases. "We associate judges were powerless toward such an attitude. It must be mentioned that none of the defendants had criminal records, and that they were eliminated in a most objectionable way by Oeschey for racial and political reasons."

The other associate judge, Dr. Theodor Pfaff, spoke of the Kaminska case as "the most terrible of my entire career. * * * The sentence of death and the consequent execution of these Poles offended my sense of ethics and has continually preyed upon my conscience. I would like to state here that Oeschey forced his will upon us."

The two associate judges are to be condemned for their spineless attitude in submitting to the domination of the defendant Oeschey, but we cannot fail to give weight to their statements, which in effect amount to confessions of their own wrongdoing.

In this case Oeschey, with evil intent, participated in the government-organized system for the racial persecution of Poles. This is also a case of such a perversion of the judicial process as to shock the conscience of mankind.

The progressive degeneration in the administration of justice came to a climax in 1944 and 1945. A decree by Thierack on 13 December 1944 abrogated the rules concerning the obligatory representation of accused persons by defense counsel. It was left for the judge to decide whether defense counsel was required. On 15 February 1945 as a final measure of desperation and in the face of imminent defeat, the law was passed for the establishment of civilian courts martial. The statute provided that sentence should be either death, acquittal, or commitment to the regular court. Pursuant to this law Gauleiter Holz set up a drumhead

court martial in Nuernberg. It consisted of the defendant Oeschey as presiding judge, with Gau Inspector Haberkern and a major in the Wehrmacht as associate judges. On 2 April 1945 Karl Schroeder was appointed prosecutor. The judges and prosecutor then went to the office of the Gauleiter, where he delivered a speech in which he stated:

> "That the main point was to stop the American advance; one could count upon introduction of new weapons, and that he expected that the court martial would give the necessary support to the army at the front by applying the severest measures."

The officials were sworn in on 3 April. The affidavit of Schroeder, who later appeared for cross-examination, discloses that Holz intended that the first case be tried on the third day of April. Schroeder stated this would be impossible because he would need time to examine the case. The first case to be tried was that of Count Montgelas. Schroeder states that the case was the most difficult in his practice, but that it had to be tried "because the Gauleitung pressed for a quick decision of this matter". The defendant Oeschey testified concerning the court martial procedure as follows:

> "Proceedings were to follow the provisions laid down in the Code of Criminal Procedure which had been very strongly simplified. Nevertheless, the court martial had observed in its proceedings the most important principles of protecting the interest of the defendant. The defendant's right to be heard, oral trial, admission of defense counsel, thorough presentation of evidence, a freedom of the judge to go into the evidence, a vote among the judges, and so forth."

The procedure followed by Oeschey as presiding judge in the case Montgelas did not conform to the foregoing statement. Count Montgelas had for some time been represented by defense counsel Eichinger, who had an office in the courthouse adjacent to that of the prosecutor, and who had had dealings with the prosecutor concerning the Montgelas case. The defendant Oeschey testified that he had directed that Eichinger be notified concerning the trial, but in any event Eichinger was not notified and Oeschey informed the prosecutor that he would conduct the trial without defense counsel because the "legal prerequisites for trial without defense counsel did exist." He apparently had reference to Thierack's decree of 13 December 1944, *supra.** Eichinger, as attorney for Count Montgelas, received his first information concerning the trial after Montgelas had been convicted and shot.

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* 1944 RGBl. I, page 339.

The statute creating civilian courts martial specifically provided that they should consist of "a judge of a criminal court, as president * * *." At the time of his appointment, Oeschey was a soldier serving in the Wehrmacht and was not a judge of a criminal court. He testified that the statute meant only that it was necessary "that a man be appointed who has the qualifications to exercise the function of a judge."

The Nuernberg civilian court martial functioned for the first time on 5 April, held ten sessions, and disposed of twelve defendants, ten of whom were charged with political offenses. On 16 April the American Army was approaching Nuernberg, and on that date at noon the civilian court martial ceased to function.

An exhibit was offered in evidence containing the results of an official investigation of the defendant Oeschey and prosecutor Schroeder for perversion of justice, conducted in August 1946, before German judicial authorities. An objection to the receipt of the exhibit was first made by counsel for Oeschey but was later withdrawn. The exhibit was received and is before us for consideration. From this exhibit we learn that Dr. Wilhelm Eser was the investigating judge in the Montgelas case. He states that at the hearing of Montgelas a Gestapo official was present, and that if Montgelas had not been arrested the official would have taken him back to the Gestapo "as it was demanded in the record of the investigation * * *." Eichinger, who appeared as a witness before this Tribunal, had been employed in February by Countess Montgelas to defend her husband. He stated that he had conferred with Prosecutor Dr. Mueller and had been informed that the prosecutor recognized—

> "* * * the competence of the People's Court and therefore he had submitted the record of the case to the chief public prosecutor at the People's Court for a decision. I asked him to inform me immediately after the record was returned, respectively, after receiving the decision of the chief public prosecutor. He promised me this, and I was completely reassured."

At this time Montgelas was in the sick ward of the prison for solitary confinement. On 10 April Eichinger went to the prison office to examine the files in the Montgelas case, whereupon the director of Nuernberg prison informed me confidentially that Count Montgelas had been summoned before the court martial on 5 April at 2 p.m., sentenced to death, and shot the next day. The crime for which Count Montgelas had been shot consisted of remarks made by him in a private room in the Grand Hotel to a lady, Mrs. Pfleger, of Bamberg. The Count had made insulting remarks concerning Hitler, among others to the effect that his

true name was Schickelgruber. He also expressed approval of the attempt upon Hitler's life of 20 July 1944. We are convinced from the testimony of Eichinger before this Tribunal that if any serious effort had been made he could have been notified prior to the trial of his client. Eichinger expressed the opinion with which this Tribunal concurs, that a summons issued at 1400 hours to appear at 1500 hours before a court martial is an offense against justice. The only witness who appeared against Count Montgelas was an SS Fuehrer, who had been shadowing him for many days in an attempt to secure evidence against him. By concealing himself in an adjoining room and by the use of a mechanical device, he was able to overhear the conversation between Montgelas and the lady and to testify concerning it. Eichinger states that the statements of the SS Fuehrer who was the eavesdropper at the hotel were "in important points contradictory" to the statements Montgelas had made to his attorney and that the latter had already proposed to summon the lady with whom Montgelas had conversed as a rebuttal witness in behalf of the Count.

The wife of the martyr Montgelas stated in the official investigation that Chief Prosecutor Schroeder told her that "there had not been time to comply with my husband's urgent request to get a defense counsel." Schroeder also told the Countess that she was not to be given any information on the disposal of the body of her husband because he had died a dishonorable death. Thus, on the last days of the war, when the American Army was almost at the gates of Nuernberg, and within a month of the total collapse of German opposition, a sick man, after solitary confinement, is indicted on 3 April, tried on 5 April, and shot on 6 April without the knowledge of his counsel in secret proceedings, and without the benefit of witnesses who would have testified for him. Such a mock trial is not a judicial proceeding but a murder.

It is provided in C. C. Law 10 that persecutions on political as well as racial grounds are recognized as crimes. While the mere fact alone that Montgelas was prosecuted for remarks hostile to the Nazi regime may not constitute a violation of C. C. Law 10, the circumstances under which the defendant was brought to trial and the manner in which he was tried convince us that Montgelas was not convicted for undermining the already collapsed defensive strength of the defeated nation, but on the contrary, that the law was deliberately invoked by Gauleiter Holz and enforced by Oeschey as a last vengeful act of political persecution. If the provisions of C. C. Law 10 do not cover this case, we do not know what kind of political persecution it would cover.

We have already indicated that we will not convict any defendant merely because of the fact, without more, that he participated in the passing or enforcement of laws for the punishment of habitual criminals, looters, hoarders, or those guilty of undermining the defensive strength of the nation, but we also stated that these laws were in many instances applied in an arbitrary and brutal manner shocking to the conscience of mankind and punishable here. This was the situation in a number of cases tried by Rothaug and Oeschey, but concerning which we have no transcript of testimony and we must therefore of necessity rely upon statements of associates and close observers. In this connection we shall have reference to affidavits and to testimony of associates of the defendant Oeschey. We shall refer to statements of affiants only in those cases in which the affiant was also brought to court and verbally cross-examined concerning his statements.

Dr. Hermann Mueller was a prosecutor at the Special Court in Nuernberg. He said:

> "He (Oeschey) frequently insulted the defendants and presented the crimes to them as if these crimes were already a proven fact. His behavior was often so extreme that one might well believe he was a psychopathic case. The abusive insults that he inflicted upon the defendants were, to the highest degree, unworthy of a court trial. He wielded such influence over the form of the administration of justice through his close Party affiliations that the other officials of equal rank at the Nuernberg administration of criminal justice were almost always forced to yield."

Mueller mentions several cases in which Oeschey announced before trial that the defendant would be executed. In a case against Schnaus he states that Oeschey—

> "* * * told me that, as a result of a discussion with government officials, he was certain to obtain the death sentence. At that time I was still unaware of the changed situation at the Special Court occasioned by the war, and turned to my immediate superior for information. He then informed me of the very close relations existing between judges and the prosecutors."

Concerning the case Montgelas, Mueller stated:

> "Concerning the case of Montgelas it must be pointed out that this was a case of political extermination, which was handled in a most hideous fashion."

Again, he said:

> "Oeschey was the most brutal judge that I have ever known in my life and a most willing instrument of the Nazi terroristic justice."

Dr. Armin Baur was the medical officer at the Special Court. He said:

> "One always had the impression that the verdict was already previously decided upon and that Oeschey and Rothaug were just playing cat and mouse with the defendants for hours. No occasion was missed to insult the defendants in the filthiest way."

This medical expert dealt with cases which were tried both by Rothaug and by Oeschey. In the Katzenberger case the defendant Rothaug told the doctor that he wanted the defendant examined but that the examination was a matter of pure formality because the Jew "would be beheaded anyhow," and he added, "It is sufficient for me that the swine said that a German girl sat on his lap." Dr. Baur states that "foreigners were generally dealt with by Rothaug and Oeschey as inferior beings whose task it was only to serve the German master race."

Hans Kern, defense counsel, stated "that foreigners were told at the beginning and throughout the trial that they were to be annihilated." Again he said:

> "Rothaug and Oeschey declined, as a matter of principle, to believe Polish citizens who were under accusation. They were branded as liars. It was assumed that their innate tendency made liars of them."

He described Oeschey as a "notorious Pole baiter."

Dr. Gustav Kunz, leading court doctor at Nuernberg, was an excellent and reliable witness. He stated:

> "Insult, humiliation, and mental torture of the defendants were routine and the two judges, especially Oeschey, did not even renounce them in cases in which—according to the legal situation—the verdict had to be and actually was acquittal or an insignificant sentence."

Kurt Hoffmann, prosecutor at Nuernberg, states that Oeschey was severe as to the German defendants and was—

> "* * * even more severe with regard to sentences against foreigners and much more furious in his conduct of their trials, especially in the case of Poles."

Adolf Paulus, former public prosecutor, speaks of the "brutality of which only Oeschey was capable."

Friedrich Doebig, who was president of the district court of appeals at Nuernberg, later senate president of the Reich Supreme Court, stated that "Oeschey like Rothaug was a fanatical Nazi,

who consistently interpreted and enforced the law in accord with Nazi ideologies."

Dr. Herbert Lipps served with defendant Oeschey on the Special Court, Nuernberg. He states that Oeschey was autocratic and would not tolerate contradiction.

"Defendants were insulted by Oeschey in the most abusive manner and death candidates were told by Oeschey right at the beginning of the session that they had forfeited their lives.

"Toward foreigners, particularly Poles, Oeschey was especially rigorous and here upheld the National Socialist theory of liquidating where nationals of the occupied territories were concerned. I remember a case in which a Polish farmhand was ill-treated by his employer and defended himself. Oeschey told the defendant that a Pole was not allowed to oppose a German."

Dr. Franz Gros was an associate judge at Nuernberg. He states that Oeschey followed the harsh procedural methods of Rothaug and was a "fanatic National Socialist who pursued his dishonorable motives with conviction and who willingly lent his hand to blood-thirsty National Socialist jurisdiction."

Dr. Pfaff was an associate judge at Nuernberg and corroborates the statements of Dr. Gros.

Dr. Joseph Mayer was a Referent in the prosecutor's office at Nuernberg. Concerning Oeschey, he said:

"Oeschey * * * was obviously of Rothaug's school. Outwardly he gave the impression of being morose and unrelenting. I cannot remember ever having had a personal conversation with him. As a rule he began the proceedings with a preconceived opinion to which he adhered. Anyone who tried to oppose this opinion was overridden by him in the most brutal way. He insulted the defendants all the time in a most offensive manner, informing them repeatedly all the way through, what he intended to do with them. He had an extensive vocabulary of invectives for that purpose, the use of which he developed to a fine art. * * * It was literally tormenting if one had to listen to this tirade often for hours at a time. When his face became distorted into a repulsive mask by his continual scolding and abusive language, Faust's words to Mephistopheles would often quite involuntarily come to my mind: 'Thou freak of filth and fire.'"

Joseph Eichinger, defense attorney at Nuernberg, stated:

"His prejudice was so strong that he did not consider, seriously, the statements of the defense and dismissed them rudely or ironically. Even during the trial he repeatedly addressed the

defendant thus: 'People such as you deserve to be exterminated,' 'You will be convicted;' or he called the defendant insulting and humiliating names such as 'criminal,' or 'scoundrel,' 'enemy of the people.' "

Again, he said:

"As leader of the Gau legal office (Gaurechtsamt) and, after the latter's disbanding, as member in the Gau staff (Gaustab), he enjoyed a special position of power which enabled him to hold the defense strongly in check; it was well known that a sign from the Gau authorities, instigated by Oeschey, was sufficient to have a lawyer turned over to the Gestapo.

"I had the impression that he supported, knowingly and willingly, the policy of Hitler to 'decimate' (Dezimierung) aliens, especially Poles, by increasing the number of death sentences against them * * *."

On cross-examination Eichinger admitted that he did not know of any lawyer who had been turned over to the Gestapo by Oeschey. It is clear that in his statements Eichinger was relying only upon general information as the basis of his opinion. We think, however, that his opinion merits consideration.

Dr. Karl Mayer, defense counsel, said that Rothaug was judge of the worst Special Court in Germany and used to tell defendants even during the trial that they would be exterminated. He adds that after Rothaug was transferred to Berlin, Oeschey even surpassed him in the spitefulness of his manner. Space does not permit the discussion of the other cases which illustrate Oeschey's ruthless exercise of arbitrary power. Mention should, however, be made of the trial of a group of foreign boys who had some fights with boys in the Nuernberg Hitler Youth Home. Dr. Mueller characterizes the action of the boys as harmless pranks. At worst they were indulging in street fights with the Hitler Youth. Oeschey held that they constituted a resistance movement and several of the boys were sentenced to death.

The defendant Oeschey is charged under count four of the indictment with being a member of the Party Leadership Corps at Gau level within the definition of the membership declared criminal according to the judgment of the first International Military Tribunal in the case against Goering, et al.

We have previously quoted the findings of the first International Military Tribunal which define the organizations and groups within the Leadership Corps which are declared to be criminal. Oeschey was provisionally commissioned with the direction of the legal office of the NSDAP in the Franconia Gau and served in that official capacity for a long time. In his testimony he states that

from 1940 to 1942 he was solely in charge of the Gau legal office as section chief. The evidence clearly establishes the defendant's voluntary membership as the chief of a Gau staff office subsequent to 1 September 1939. The judgment of the first International Military Tribunal lists among the criminal activities of the Party Leadership Corps the following:

"The Leadership Corps played its part in the persecution of the Jews. It was involved in the economic and political discrimination against the Jews which was put into effect shortly after the Nazis came into power. The Gestapo and SD were instructed to coordinate with the Gauleiter and Kreisleiter the measures taken in the pogroms of 9 and 10 November 1938. The Leadership Corps was also used to prevent German public opinion from reacting against the measures taken against the Jews in the East. On 9 October 1942, a confidential information bulletin was sent to all Gauleiter and Kreisleiter entitled 'Preparatory measures for the final solution of the Jewish question in Europe —rumors concerning the conditions of the Jews in the East.' This bulletin stated that rumors were being started by returning soldiers concerning the conditions of Jews in the East which some Germans might not understand, and outlined in detail the official explanation to be given. This bulletin contained no explicit statement that the Jews were being exterminated, but it did indicate they were going to labor camps, and spoke of their complete segregation and elimination and the necessity of ruthless severity. * * *

"The Leadership Corps played an important part in the administration of the slave labor program. A Sauckel decree dated 6 April 1942 appointed the Gauleiter as plenipotentiary for labor mobilization for their Gaue with authority to coordinate all agencies dealing with labor questions in their Gaue, with specific authority over the employment of foreign workers, including their conditions of work, feeding, and housing. Under this authority the Gauleiter assumed control over the allocation of labor in their Gaue, including the forced laborers from foreign countries. In carrying out this task the Gauleiter used many Party offices within their Gaue, including subordinate political leaders. For example, Sauckel's decree of 8 September 1942, relating to the allocation for household labor of 400,000 women laborers brought in from the East, established a procedure under which applications filed for such workers should be passed on by the Kreisleiter, whose judgment was final.

"Under Sauckel's directive the Leadership Corps was directly concerned with the treatment given foreign workers, and the Gauleiter were specifically instructed to prevent 'politically

inept factory heads' from giving 'too much consideration to the care of eastern workers'. * * *

"The Leadership Corps was directly concerned with the treatment of prisoners of war. On 5 November 1941 Bormann transmitted a directive down to the level of Kreisleiter instructing them to insure compliance by the army with the recent directives of the department of the interior ordering that dead Russian prisoners of war should be buried wrapped in tar paper in a remote place without any ceremony or any decorations of their graves. On 25 November 1943 Bormann sent a circular instructing the Gauleiter to report any lenient treatment of prisoners of war. On 13 September 1944 Bormann sent a directive down to the level of Kreisleiter ordering that liaison be established between the Kreisleiter and the guards of the prisoners of war in order 'better to assimilate the commitment of the prisoners of war to the political and economic demands'. * * *

"The machinery of the Leadership Corps was also utilized in attempts made to deprive Allied airmen of the protection to which they were entitled under the Geneva Convention. On 13 March 1940 a directive of Hess, transmitted instructions through the Leadership Corps down to the Blockleiter for the guidance of the civilian population in case of the landing of enemy planes or parachutists, which stated that enemy parachutists were to be immediately arrested or 'made harmless.'" *

As to his knowledge, the defendant Oeschey joined the NSDAP on 1 December 1931. He was head of the Lawyers' League for the Gau Franconia and a judicial officer of considerable importance within the Gau. These offices would provide additional sources of information as to the crimes outlined. Furthermore, these crimes were of such wide scope and so intimately connected with the activities of the Gauleitung that it would be impossible for a man of the defendant's intelligence not to have known of the commission of these crimes, at least in part if not entirely.

We find the defendant Oeschey guilty under counts three and four of the indictment. In view of the sadistic attitude and conduct of the defendant, we know of no just reason for any mitigation of punishment.

THE DEFENDANT ALTSTOETTER

Joseph Altstoetter was born 4 January 1892. He was educated for the bar and passed the State examination in jurisprudence in Munich. He subsequently served in the Bavarian and in the Reich Ministries of Justice.

* Trials of the Major War Criminals, op. cit., volume I, pages 259–261.

In 1932 he was promoted and sent to the Reich Supreme Court in Leipzig. In 1933 he was a member of the appeals criminal senate. In 1936 he was a member of the Reich Labor Court. From 1939 to 1943 he served with the Wehrmacht. In 1943 he was assigned to the Reich Ministry of Justice where he was made chief of the civil law and procedure division in the Ministry of Justice with the title of Ministerialdirektor and served in that capacity until the surrender. He had been a member of the Stahlhelm prior to the Nazi rise to power. When the Stahlhelm was absorbed into the Nazi organization, he automatically became a member of the SA. Prior to May 1937 he resigned from the SA to become a member of the general SS. His membership in the SS, from his personnel files, dates from 15 May 1937. He applied for membership in the NSDAP in 1938 and his membership was dated back to 1 May 1937. He was awarded the Golden Party Badge for service to the Party.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Altstoetter is not guilty under counts two and three of the indictment.

The question which remains to be determined as to the defendant Altstoetter is whether, knowing of its criminal activities as defined by the London Charter, he joined or retained membership in the SS, an organization defined as criminal by the International Military Tribunal in the case of Goering, et al.

The evidence in this case as to his connection with the SS is found primarily in his personnel record which covers a great many pages, in his correspondence with SS leaders, and his own testimony. From this evidence it appears that the defendant, upon the request of Himmler, joined the SS in May 1937. He stated that Himmler told him he would receive a rank commensurate with his civil status. The record does not indicate what rank in the SS was commensurate with his civil status as a member of the Reich Supreme Court, but on 20 April 1938 he was promoted to Untersturmfuehrer, which corresponds to a second lieutenant in the army. He was subsequently promoted on 20 April 1939 to Obersturmfuehrer; on 20 April 1940 to Hauptsturmfuehrer. On 12 March 1943, according to a letter to the SS Main Personnel Office, signed by Himmler, he was promoted to Sturmbannfuehrer, effective 25 January 1943 and, by the same letter, to Obersturmbannfuehrer as of 20 April 1943, and it was directed that he be issued a skull and crossbones ring. In June 1943 he wrote to the Chief of the SS Main Office, SS Gruppenfuehrer Berger, thanking him for this ring bestowed by the Reich Leader SS. In this letter he wrote:

"Both this promotion and the honoring of this decoration with the skull and crossbone ring I will take not only as a token of the Reich Leader's most distinct proof of trust in me, but also as an incentive for further active proof of my loyalty and for strictest adherence to my duties in my career as an SS man."

On 11 February 1944 he wrote SS Gruppenfuehrer and Lieutenant General of the Waffen SS, Professor Dr. Karl Gebhardt, a letter containing the following paragraph:

"One more personal remark—You kindly promoted me SS Oberfuehrer. It is not that far yet. At least, I did not get to know it until now. I merely tell you this because I do not want to claim anything for me which does not correspond to facts."

By letter dated 16 June 1944 he was notified that the Reich Leader SS had promoted him to the rank of Oberfuehrer, effective 21 June 1944.

The defendant stated that he was assigned to the legal staff of the 48th Standarte and later to the legal staff of the SS Main Office. He stated that he had no actual duties. However, part of his service credentials, dated 14 March 1939, under the heading of qualifications, signed by Dalski, SS Obersturmbannfuehrer, the following is stated:

"SS Untersturmfuehrer Altstoetter is frank, honest, and helpful. His ideology is firmly established on a National Socialist basis. A. was a leader of the staff of the 48th Standarte and there at all times performed his duties in a satisfactory manner."

In a report from Leipzig, dated 10 June 1939, it is stated that he was awarded the "badge of honor for legal service, in silver", effective 19 April 1938, signed Sachse, SS Untersturmfuehrer and Adjutant.

The defendant was evidently highly regarded by Himmler who, on 18 September 1942, at a meeting with Thierack and Rothenberger, referred to him as a reliable SS Obersturmfuehrer.

It also appears that his appointment to the Ministry of Justice was at the suggestion of Himmler and that the defendant's relationship with Himmler was one which Thierack fostered for purposes of his own.

At the instance of Thierack, he visited Himmler at his headquarters and was present at a speech given by Himmler at Kochem, where he attended a dinner for twelve people, including SS Standartenfuehrer Rudolf Brandt and SS Obergruppenfuehrer Pohl.

He visited Berger, a high SS official, at Berger's request. He carried on considerable correspondence with high officials in the

SS, including Himmler, SS Gruppenfuehrer Professor Dr. Gebhardt, SS Gruppenfuehrer Berger, and Kaltenbrunner, Chief of the Security Police and SD.

On 25 May 1940 Altstoetter wrote to the Reich Leader SS as follows:

> "If I can contribute my small part towards helping our Fuehrer to accomplish his great task for the benefit of our nation, this causes me particular joy and satisfaction, especially in my capacity as SS officer."

According to a letter to Gebhardt, Himmler had instructed the SS leaders to request Altstoetter's advice in certain matters.

On 6 June 1944 he wrote Gebhardt, congratulating him upon a recent award. In this letter he states:

> "I am especially glad about your distinction, especially because I do not see only in it a recognition of your great war service as a physician and surgeon but also as a research scientist and organizer and which is attributed to our old and trusty friend."

The evidence in this case clearly establishes that the defendant joined and retained his membership in the SS on a voluntary basis. In fact it appears that he took considerable interest in his SS rank and honors. The remaining fact to be determined is whether he had knowledge of the criminal activities of the SS as defined in the London Charter. In this connection we quote certain extracts from the judgment of the International Military Tribunal in the case of Goering, et al., as to the SS—

> "Criminal activities: SS units were active participants in the steps leading up to aggressive war. The Verfuegungstruppe was used in the occupation of the Sudetenland, of Bohemia and Moravia, and in Memel. The Henlein Free Corps was under the jurisdiction of the Reich Leader SS for operations in the Sudetenland in 1938, and the Volksdeutsche Mittelstelle financed fifth column activities there.
>
> "The SS was even a more general participant in the commission of war crimes and crimes against humanity. Through its control over the organization of the police, particularly the Security Police and SD, the SS was involved in all the crimes which have been outlined in the section of this judgment dealing with the Gestapo and SD. * * * The Race and Settlement Office of the SS, together with the Volksdeutsche Mittelstelle were active in carrying out schemes for Germanization of occupied territories according to the racial principles of the Nazi Party and were involved in the deportation of Jews and other foreign nationals. Units of the Waffen SS and Einsatzgruppen

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operating directly under the SS Main Office were used to carry out these plans. These units were also involved in the widespread murder and ill-treatment of the civilian population of occupied territories. * * *

"From 1934 onward the SS was responsible for the guarding and administration of concentration camps. The evidence leaves no doubt that the consistently brutal treatment of the inmates of concentration camps was carried out as a result of the general policy of the SS, which was that the inmates were racial inferiors to be treated only with contempt. There is evidence that where manpower considerations permitted, Himmler wanted to rotate guard battalions so that all members of the SS would be instructed as to the proper attitude to take to inferior races. After 1942 when the concentration camps were placed under the control of the WVHA they were used as a source of slave labor. An agreement made with the Ministry of Justice on 18 September 1942 provided that antisocial elements who had finished prison sentences were to be delivered to the SS to be worked to death. * * *

"The SS played a particularly significant role in the persecution of the Jews. The SS was directly involved in the demonstrations of 10 November 1938. The evacuation of the Jews from occupied territories was carried out under the directions of the SS with the assistance of SS police units. The extermination of the Jews was carried out under the direction of the SS central organizations. It was actually put into effect by SS formations. * * *

"It is impossible to single out any one portion of the SS which was not involved in these criminal activities. The Allgemeine SS was an active participant in the persecution of the Jews and was used as a source of concentration camp guards. * * *

"The Tribunal finds that knowledge of these criminal activities was sufficiently general to justify declaring that the SS was a criminal organization to the extent hereinafter described. It does appear that an attempt was made to keep secret some phases of its activities, but its criminal programs were so widespread, and involved slaughter on such a gigantic scale, that its criminal activities must have been widely known. It must be recognized, moreover, that the criminal activities of the SS followed quite logically from the principles on which it was organized. Every effort had been made to make the SS a highly disciplined organization composed of the elite of national socialism. Himmler had stated that there were people in Germany 'who become sick when they see these black coats', and that he did not expect that 'they should be loved by too many'. * * *

Himmler in a series of speeches made in 1943, indicated his pride in the ability of the SS to carry out these criminal acts. He encouraged his men to be 'tough and ruthless'; he spoke of shooting 'thousands of leading Poles', and thanked them for their cooperation and lack of squeamishness at the sight of hundreds and thousands of corpses of their victims. He extolled ruthlessness in exterminating the Jewish race and later described this process as 'delousing'. These speeches show that the general attitude prevailing in the SS was consistent with these criminal acts. * * *

"In dealing with the SS the Tribunal includes all persons who had been officially accepted as members of the SS, including the members of the Allgemeine SS, members of the Waffen SS, members of the SS Totenkopf Verbaende, and the members of any of the different police forces who were members of the SS. * * *

"The Tribunal declares to be criminal within the meaning of the Charter the group composed of those persons who had been officially accepted as members of the SS as enumerated in the preceding paragraph who became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by article 6 of the Charter * * *."*

In this regard the Tribunal is of the opinion that the activities of the SS and the crimes which it committed as pointed out by the judgment of the International Military Tribunal above quoted are of so wide a scope that no person of the defendant's intelligence, and one who had achieved the rank of Oberfuehrer in the SS, could have been unaware of its illegal activities, particularly a member of the organization from 1937 until the surrender. According to his own statement, he joined the SS with misgivings, not only on religious grounds but also because of practices of the police as to protective custody in concentration camps.

Altstoetter not only had contacts with the high ranking officials of the SS, as above stated, but was himself a high official in the Ministry of Justice stationed in Berlin from June 1943 until the surrender. He attended conferences of the department chiefs in the Ministry of Justice and was necessarily associated with the officials of the Ministry, including those in charge of penal matters.

The record in this case shows as part of the defense of many of those on trial here that they claim to have constantly resisted the encroachment of the police under Himmler and the illegal acts of the police.

* Ibid., pp. 270–273.

Documentary evidence shows that the defendant knew of the evacuation of Jews in Austria and had correspondence with the Chief of the Security Police and Security Service regarding witnesses for the hereditary biological courts. This correspondence states:

> "If the Residents' Registration Office or another police office gives the information that a Jew has been deported, all other inquiries as to his place of abode as well as applications for his admission of hearing or examination are superfluous. On the contrary, it has to be assumed that the Jew is not attainable for the taking of evidence."

It also quotes this significant paragraph:

> "If in an individual case it is to the interest of the public to make an exception and to render possible the taking of evidence by special provision of persons to accompany and means of transportation for the Jew, a report has to be submitted to me in which the importance of the case is explained. In all cases offices must refrain from direct application to the offices of the police, especially also to the Central Office for the Regulation of the Jewish Problem in Bohemia and Moravia at Prague, for information on the place of abode of deported Jews and their admission, hearing, or examination."

He was a member of the SS at the time of the pogroms in November 1938, "Crystal Week," in which the IMT found the SS to have had an important part. Surely whether or not he took a part in such activities or approved of them, he must have known of that part which was played by an organization of which he was an officer. As a lawyer he knew that in October of 1940 the SS was placed beyond reach of the law. As a lawyer he certainly knew that by the thirteenth amendment to the citizenship law the Jews were turned over to the police and so finally deprived of the scanty legal protection they had theretofore had. He also knew, for it was part of the same law, of the sinister provisions for the confiscation of property upon death of the Jewish owners, by the police.

Notwithstanding these facts, he maintained his friendly relations with the leaders of the SS, including Himmler, Kaltenbrunner, Gebhardt, and Berger. He refers to Himmler, one of the most sinister figures in the Third Reich, as his "old and trusty friend." He accepted and retained his membership in the SS, perhaps the major instrument of Himmler's power. Conceding that the defendant did not know of the ultimate mass murders in the concentration camps and by the Einsatzgruppen, he knew the policies of the SS and, in part, its crimes. Nevertheless he accepted

its insignia, its rank, its honors, and its contacts with the high figures of the Nazi regime. These were of no small significance in Nazi Germany. For that price he gave his name as a soldier and a jurist of note and so helped to cloak the shameful deeds of that organization from the eyes of the German people.

Upon the evidence in this case it is the judgment of this Tribunal that the defendant Altstoetter is guilty under count four of the indictment.

This Tribunal has held that it has no jurisdiction to try any defendant for the crime of conspiracy as a separate substantive offense, but we recognize that there are allegations in count one of the indictment which constitute charges of direct commission of war crimes and crimes against humanity. However, after eliminating the conspiracy charge from count one, we find that all other alleged criminal acts therein set forth and committed after 1 September 1939 are also charged as crimes in the subsequent counts of the indictment. We therefore find it unnecessary to pass formally upon the remaining charges in count one. Our pronouncements of guilt or innocence under counts two, three, and four dispose of all issues which have been submitted to us.

Concerning those defendants who have been found guilty, our conclusions are not based solely upon the facts which we have set forth in the separate discussions of the individual defendants. In the course of 9 months devoted to the trial and consideration of this case, we have reached conclusions based upon evidence and observation of the defendants which cannot fully be documented within the limitations of time and space allotted to us. As we have said, the defendants are not charged with specific overt acts against named victims. They are charged with criminal participation in government-organized atrocities and persecutions unmatched in the annals of history. Our judgments are based upon a consideration of all of the evidence which tends to throw light upon the part which these defendants played in the entire tragic drama. We shall, in pronouncing sentence, give due consideration to circumstances of mitigation and to the proven character and motives of the respective defendants.

[Signed] JAMES T. BRAND
Presiding Judge

MALLORY B. BLAIR
Judge

JUSTIN W. HARDING
Judge

VIII. SEPARATE OPINION BY JUDGE BLAIR

OPINION OF MALLORY B. BLAIR, JUDGE OF MILITARY TRIBUNAL III

I concur in the final judgment and verdict filed herein, which I have signed. A difference of view has arisen, however, with respect to certain findings and conclusions made in the judgment under the title "Source of Authority of Control Council Law No. 10". Under this title a lengthy and able discussion is made in the judgment concerning the effect and meaning of the term "unconditional surrender" of Germany to the Allied Powers. From the meaning given to the term of "unconditional surrender" of the armed forces of the Hitler regime and the collapse of his totalitarian government in Germany, the view is expressed that a distinction arises between measures taken by the Allied Powers prior to the destruction of the German Government and those taken afterwards; and that only the former may be tested by the Hague Regulations because they relate only to a belligerent occupation. To support this view, quotations are made from articles expressing views of certain text writers, which articles are published in the American Journal of International Law. The judgment then adopts the view expressed in the quoted texts, which is admittedly contrary to the views of the equally scholarly writers whose articles are also cited.

The foregoing decision is made to depend upon a determination of the present character or status of the occupation of Germany by the Allied Powers; that is, whether or not it is a belligerent occupation. This interesting but academic discussion of the question has no possible relation to or connection with the "source of authority of Control Council Law No. 10," which is the question posed in the judgment. No authority or jurisdiction to determine the question of the present status of belligerency of the occupation of Germany has been given this Tribunal. This question of present belligerency of occupation rests solely within the jurisdiction of the military occupants and the executives of the nations which the members of the Allied Control Council represent. The determination by this Tribunal that the present occupation of Germany by the Allied Powers is not belligerent may possibly involve serious complications with respect to matters solely within the jurisdiction of the military and executive departments of the governments of the Allied Powers.

If, however, any possible questions are here present for determination with respect to (1) the character of the present status of occupation of Germany; and (2) the present status of belligerency, such questions can only relate to the rights of the victorious belligerent to exercise control over Germany. Such matters as regard the American Zone are controlled by both the written and unwritten laws, rules, and customs of warfare and by the rights and obligations of a victorious occupant under international law. The determination of these matters has not been entrusted to this Tribunal. This Tribunal has not been given any jurisdiction to exercise any sovereign power of Germany; nor has it been given any jurisdiction to determine that because of the unconditional surrender Germany's sovereignty was thereby transferred to the victorious Allied Powers. These matters are controlled in the American Zone by the Basic Field Manual [27–10] on Rules of Land Warfare issued (1940) by The Judge Advocate General of the United States Army.

As concerns questions of transfer of sovereignty of a defeated belligerent to the victorious belligerent, the foregoing rules of land warfare provide—

"*273. Does not transfer sovereignty.*—Being an incident of war, military occupation confers upon the invading force the right to exercise control for the period of occupation. It does not transfer the sovereignty to the occupant, but simply the authority or power to exercise some of the rights of sovereignty. The exercise of these rights results from the established power of the occupant and from the necessity for maintaining law and order, indispensable to both the inhabitants and to the occupying force.

"*274. Distinguished from invasion.*—The state of invasion corresponds with the period of resistance. Invasion is not necessarily occupation, although it precedes it and may frequently coincide with it. An invader may push rapidly through a large portion of enemy country without establishing that effective control which is essential to the status of occupation. He may send small raiding parties or flying columns, reconnoitering detachments, etc., into or through a district where they may be temporarily located and exercise control, yet when they pass on it cannot be said that such district is under his military occupation.

"*275. Distinguished from subjugation or conquest.*—Military occupation in a foreign war, being based upon the fact of possession of *enemy* territory, necessarily implies that the sovereignty of the occupied territory is not vested in the occupying power. The occupation is essentially provisional.

"On the other hand, subjugation or conquest implies a transfer of sovereignty. Ordinarily, however, such transfer is effected by a treaty of peace. When sovereignty passes, military occupation, as such, must of course cease; although the territory may, and usually does for a period at least, continue to be governed through military agencies which have such powers as the President or Congress may prescribe."

And as concerns the administration of occupied territory, the same rules of land warfare require—

"*285. The laws in force.*—The principal object of the occupant is to provide for the security of the invading army and to contribute to its support and efficiency and the success of its operations. In restoring public order and safety he will continue in force the ordinary civil and criminal laws of the occupied territory which do not conflict with this object. These laws will be administered by the local officials as far as practicable. All crimes not of a military nature and which do not affect the safety of the invading army are left to the jurisdiction of the local courts.

"*286. Power to suspend and promulgate laws.*—The military occupant may suspend existing laws and promulgate new ones when the exigencies of the military service demand such action."

Manifestly this Tribunal, created for the sole purpose of trying and punishing war criminals in the broadest sense of that term as used in Control Council Law No. 10, has not by such law been given any jurisdiction to determine matters relating to the far reaching power or authority which the foregoing rules authorize a military occupant to exercise provisionally. In consequence, the lengthy discussion of the far reaching power or authority which the Allied Powers are now exercising in Germany has no material relation to any question before us for determination, and particularly the question of the "source of the authority of Control Council Law No. 10". Certainly this Tribunal has no jurisdiction to determine whether or not the military or executive authorities have exceeded their authority or whether or not they are exercising in fact the sovereign authority of Germany, or whether by her unconditional surrender Germany has lost all sovereignty. The exercise of such powers has to do with provisional matters of occupation and operates presently and in future. Our jurisdiction extends to the trial of war criminals for crimes committed during the war and before the unconditional surrender of Germany. This jurisdiction is determined by entirely different laws.

Under the foregoing rules of military operation there is no rule which would, because of the unconditional surrender of the German armed forces, transfer the sovereignty of Germany to the

Allied occupants, or to either of them, in their respective zones of occupation. It may here be pointed out that the report of 1919 by the Commission on Responsibility of the Authors of War and Enforcement of Penalties lists among other war crimes in violation of international law or of the laws and customs of land warfare, "(10) the usurpation of sovereignty during military occupation." This rule is incident to military occupation and was clearly intended to protect the inhabitants of any occupied territory against the unnecessary exercise of sovereignty by a military occupant. As concerns this Military Tribunal in the American Zone of Occupation, the problem is dealt with and concluded by the above-quoted rules (285–286), relating to administration of occupied territory.

No attempt has been made by the Allied Powers, or either of them, to exercise the sovereign authority of Germany, except in the limited sense provided for by the foregoing rules of land warfare. On 30 January 1946 the Allied Control Council enacted Law No. 11 which repealed most of the enactments of the Nazi regime and continued in force in all of Germany the great body of criminal law contained in the German Criminal Code of 1871 with amendments thereto. This is in accord with the provisions of the above-quoted rule 285. Thus in the American Zone there has been continued in force the ordinary civil and criminal laws of the German states, each of which has been recognized as a sovereign power. These laws are being administered by German local and state officials as far as can practicably be done, with the avowed intention of the Allied Powers, and each of them, to surrender all powers now exercised as a military occupant, particularly when the all-Nazi militaristic influence in public, private, and cultured life of Germany has been destroyed, and when Nazi war criminals have been punished as they justly deserve to be punished.

Furthermore, as concerns the American Zone of Occupation, the punishment of war leaders or criminals is being and will be carried out by four separate procedures—

(1) Major German war leaders or criminals are tried by this and similar military tribunals set up under Control Council Law No. 10 and Military Government Ordinance No. 7, limited to the crimes or offenses therein defined or recognized.

(2) The trials of Germans for the commission of war crimes against American military personnel and for atrocities or crimes committed in concentration camps in the area captured or occupied by the American armed forces, are tried by special military courts set up at the direction of the zone commander, with the theater judge advocate in charge of the prosecution of the cases.

(3) Germans who are charged with committing crimes against humanity upon other Germans, in violation of German law, are tried by the ordinary German criminal courts.

(4) Other Germans who were actively responsible for the crimes of the Hitler or Nazi regime, or who actively participated in the Nazi plans or schemes, are tried by German tribunals under the Law for Liberation from National Socialism and Militarism of 5 March 1946.

The purpose of the foregoing program is to carry out the objectives of the Potsdam Agreement that "war criminals and those participating in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes, shall be arrested and brought to judgment."

The Potsdam Agreement related to punishment of all Axis war criminals. Control Council Law No. 10 sets up the machinery to apply the Potsdam Agreement to European Axis war criminals and particularly to German war criminals.

The judgment further declares, however, that "in the case of Germany, subjugation has occurred by virtue of military conquest." This holding is based upon the previous declarations that at the time of the unconditional surrender of the German armed forces the Nazi government had completely disintegrated, requiring the victorious belligerent to take over the complete exercise and control of governmental affairs of Germany, and thereby resulting in the transfer of her sovereignty to the victorious Allied Powers. In this holding, the judgment simply attempts to apply the provisions of rule 275 that "subjugation or conquest implies a transfer of sovereignty." Obviously this rule implies that the question of subjugation is one of fact or intention to be determined by the successful belligerent. There has been no act or declaration of the Allied Powers, either before or since their occupation of Germany under the terms of the unconditional surrender, which could possibly be construed as showing that they intend by the subjugation and occupation of Germany to transfer her sovereignty to themselves. To the contrary every declaration that has been made by the Allied Powers with respect to their occupancy of Germany and the enactment of laws for her control during the occupation has emphasized the fact that the ultimate purpose of such occupancy is to destroy the Nazi form of government and militarism in Germany so that as thus extirpated from these influences she may take her place in the comity of the nations of the world.

The declaration made in the judgment that Germany has been subjugated by military conquest and that therefore her sover-

eignty has been transferred to the successful belligerent Allied Powers cannot be sustained either as a matter of fact or under any construction of the foregoing rules of land warfare. The control and operation of Germany under the Allied Powers' occupation is provisional. It does not transfer any sovereign power of Germany other than for the limited purpose of keeping the peace during occupancy, and for the ultimate rectification of the evils brought about by the Nazi regime and militarism, and in order to destroy such influences and to aid in the establishment of a government in and for Germany under which she may in the future earn her place in the comity of nations. In any event this Tribunal has no power or jurisdiction to determine such questions.

The judgment further declares that Control Council Law No. 10 has a dual aspect. The judgment states:

> "In its first aspect and on its face it purports to be a statute defining crimes and providing for the punishment of persons who violate its provisions. It is the legislative product of the only body in existence having and exercising general lawmaking power throughout the Reich."

Obviously this aspect or theory of reasoning is predicated upon the previous declarations that since at the time of the unconditional surrender the Nazi government had completely collapsed, and that, since the Allied Powers assumed the entire control of the governmental function of Germany, her sovereignty was thereby transferred to the Allied Powers. It is then declared that Control Council Law No. 10 was enacted by the Allied Control Council in and for Germany in the exercise of this transferred German sovereignty. Under this reasoning Control Council Law No. 10 merely became a local law in and for Germany because Germany, in the exercise of her national governmental sovereignty, could not enact the law as international law. Nor can the Allied Control Council in the exercise of the transferred sovereignty of Germany enact international law.

The judgment further declares that the same and only supreme legislative authority in and for Germany, the Allied Control Council, gave this Tribunal jurisdiction and authority to enforce the local German law so enacted by it and to punish crimes in violation of it, including crimes by German nationals against German nationals as authorized by Control Council Law No. 10. From the foregoing premise the conclusion is inescapable that the Allied Control Council in the exercise of the sovereign power of Germany has enacted the law in and for Germany and has authorized this Tribunal to punish criminals who violated the law in the manner of a German police court.

The foregoing conclusion is based upon the articles by Freeman and Fried, from which quotations are made in the judgment. This same theory by Fried has been expressed in a subsequent statement wherein he states, after reviewing the foregoing facts with respect to the unconditional surrender of the armed forces and the disintegration of the Nazi government, that—

> "This Tribunal (III) has the double quality of being an international court and, owing to the special situation of Germany at the present time, also a German court."

This is the only possible conclusion that can be reached in the premises stated.

The second aspect of Control Council Law No. 10 is declared by the judgment to be as follows:

> "We have discussed C. C. Law 10 in its first aspect as substantive legislation. We now consider its other aspect. Entirely aside from its character as substantive legislation, C. C. Law 10, together with Ordinance No. 7, provides procedural means previously lacking for the enforcement within Germany of certain rules of international law which exist throughout the civilized world independently of any new substantive legislation."

There can be no serious disagreement as regards this aspect or theory of Control Council Law No. 10, but it is contrary to the first aspect or theory of the law. The two aspects are diametrically opposed to each other as to the "source of authority for Control Council No. 10." They are so conflicting with respect to the claims that the law is both local law and international law that either one or the other aspect cannot exist. The legislature of a national state cannot by a legislative act make international law binding upon other nations. Only an international legislative body may so legislate and no such body has ever existed.

With regard to the premises supporting the view that Control Council Law No. 10 has two aspects, the judgment apparently contains other conflicting statements with respect to the "source of authority for Control Council Law No. 10" and also with respect to the basis of the authority of the legislative body to enact the law. The judgment states at one place—

> "International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law, it has grown to meet the exigencies of changing conditions."

The judgment recites at another point—

"Since the Charter IMT and C. C. Law 10 are the product of legislative action by an international authority, it follows of necessity that there is no national constitution of any one state which could be invoked to invalidate the substantive provisions of such international legislation."

At still another place the judgment recites—

"In its aspect as a statute defining crime and providing punishment the limited purpose of C. C. Law 10 is clearly set forth. It is an exercise of supreme legislative power in and for Germany. It does not purport to establish by legislative act any new crimes of international applicability."

Still at another place in the judgment it is declared that—

"Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonized with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of the common international law, a power which no international authority without consent could assume or exercise within a state having a national government presently in the exercise of its sovereign powers."

Thus, in the first quotation, the judgment states that there has never been an international legislature and that, therefore, international law is not the product of statute; whereas, in the second quotation, it is contended that Control Council Law No. 10 is "the product of legislative action by an international authority." The third recitation is that Control Council Law No. 10 "is an exercise of supreme legislative power in and for Germany."

The fourth quotation doubts the legality of our procedure unless the international body in Germany (the Allied Control Council) has assumed and exercised the power to establish judicial machinery for punishment of crimes in violation of international law. The source of the authority to set up courts and machinery for punishment of German war criminals does not depend in any manner upon the exercise of any sovereign power of Germany. This matter will be later discussed.

With these conflicting conclusions as to the source of authority of Control Council Law No. 10, I must respectfully disagree. But the judgment saves itself from them by finally waiving them aside and holding as follows:

"For our purposes, however, it is unnecessary to determine the present situs of 'residual sovereignty'. It is sufficient to hold

that, by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty. We hold that the legal right of the Four Powers to enact C. C. Law 10 is established and that the jurisdiction of this Tribunal to try persons charged as major war criminals of the European Axis must be conceded."

The judgment makes the further and additional declaration that—

"The fact that the Four Powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative, or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the victor states. The power and right exerted is that of victors, not of the vanquished."

With these declarations there is no disagreement. They waive and completely nullify the foregoing conflicting declarations of the judgment with regard to the "source of authority of Control Council Law No. 10" and that its enactment was the exercise of German sovereignty by the four Allied Powers.

It is my view that the jurisdiction of this Tribunal is limited to the area or field of international law which relates to the punishment of war criminals in the fullest sense of that term. The source of its Charter and jurisdiction to try and punish European Axis war criminals is as follows:

Charter and Jurisdiction of this Tribunal

The charter and jurisdiction of this Military Tribunal are found within the framework of four instruments or documents: (1) Allied Control Council Law No. 10; (2) Military Government Ordinance No. 7; (3) the Charter of the International Military Tribunal; and (4) the judgment of the International Military Tribunal. These instruments and documents confer power or jurisdiction upon this Tribunal to try and punish certain European Axis war criminals. The source of Control Council Law No. 10 and Ordinance 7 and the authority to enact or issue them are found in certain unilateral agreements, instruments, and documents of the Allied Powers to which brief reference will be here made.

By the Moscow Declaration of 30 October 1943 on German war atrocities and crimes, the three Allied Powers (the United Kingdom, the United States, and the Soviet Union) declared that at

the time of granting any armistice to Germany, "those German officers and men and the members of the Nazi Party who have been responsible for or have taken a consenting part in" committing such atrocities or crimes will be adjudged and punished for their abominable deeds. By the Yalta Conference of 11 February 1945 the same three Powers declared that only "the unconditional surrender" of the Axis powers will be accepted. The plan for enforcing the unconditional surrender terms was agreed upon and provides that the Allied Powers will each occupy a separate zone of Germany with coordinated administration and control through a Central Control Council composed of the supreme commanders at Berlin. France was to be invited to take over a zone of occupation and to participate as a fourth member of the Control Council for Germany. Among other things, the Allied Powers declared that they intended to "bring all war criminals to just and swift punishment." They further declared that they intended "to destroy German militarism and nazism and to insure that Germany will never again be able to disturb the peace of the world." With these provisional matters we are not concerned here.

The German armed forces unconditionally surrendered on 8 May 1945. France accepted the invitation to become a fourth member of the Allied Control Council and later took over a zone of occupation.

By the Potsdam Agreement of 5 June 1945 and the declaration of the Joint Chiefs of Staff of 2 August 1945 at Berlin, the then Four Allied Powers expressly declared and provided that the punishment of European Axis war criminals "was made a primary task of the military occupation of Germany." They further declared that certain far reaching provisional measures would be undertaken in Germany to rid her people of nazism and of militarism and to insure the peace and safety of the world, and so that the German people thus extirpated will in the future take their place in the comity of nations. With these latter provisions we are not here concerned. The Allied Control Council for Germany is composed of the Joint Chiefs of Staff of the Four Allied Powers.

By the London Agreement of 8 August 1945, the Four Allied Powers referred to the Moscow Declaration and authorized, after consultation with the Allied Control Council for Germany, the establishment of an International Military Tribunal to try certain of the European Axis war criminals. The Charter of the Tribunal was attached to and made a part of the London Agreement. This Charter described the power and jurisdiction of the Tribunal and defined or recognized the crimes for which the European Axis war criminals were to be tried.`

The foregoing avowed policy of the Allied Powers for the punishment of European war criminals or enemy persons was thereafter approved and sanctioned by 19 of the United Nations in accordance with the provisions of article V of the London Agreement.

The International Military Tribunal was duly created and held its first session on 18 October 1945. The actual trial began on 20 November 1945 of 22 alleged major war criminals; and by the judgment of 1 October 1946 some of them were given death sentences; some of them were given life imprisonment; some were given lesser prison terms; and others of them were acquitted.

After the foregoing trial began, the Allied Control Council for Occupied Germany met and on 20 December 1945 enacted Control Council Law No. 10, which defined the jurisdiction of this and similar military tribunals and recognized as crimes to be tried by them—

1. Crimes against peace;
2. War crimes;
3. Crimes against humanity; and
4. Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

Control Council Law No. 10 recognizes as a crime, membership in any organization declared to be criminal by the International Military Tribunal.

Article 9 of the London Charter provides that the IMT may declare any group or organization of which an individual was a member to be a criminal organization. Article 10 provides that the IMT may also declare membership in an organization found by it to be criminal to be a crime. This the IMT did and further declared that its Charter makes the declaration of criminality against an accused organization final. The IMT then fixed the character of membership which would be regarded as criminal, and expressly limited its declaration of group criminality to persons who became or remained members of the organization with knowledge that it was being used for criminal acts or who were personally implicated as members of the organization in the commission of such crimes. These findings and conclusions of the IMT are binding upon this Tribunal.

The Control Council declared that this law or procedure was intended to reach the German war criminals to be tried by the occupying powers of Germany in their respective zones of occupation. The preamble stated that the law was enacted by the authority of and to give effect to the Moscow Declaration, the London

Agreement, and the Charter of the International Military Tribunal. Thus, the avowed purpose of the Allied Powers to punish German war criminals was given quadripartite agreement and application under Control Council Law No. 10.

Military Government Ordinance No. 7 was issued on 26 October 1946 "pursuant to the powers of the Military Governor of the United States Zone of Occupation within Germany, and further pursuant to the power conferred upon the Zone Commander by Control Council Law No. 10, and articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945," authorizing the establishment of certain "tribunals to be known as Military Tribunals". Accordingly, Military Tribunal III was established on 13 February 1947, by virtue of the provisions of said Military Government Ordinance No. 7, "with powers to try and punish persons charged with offenses recognized as crimes in article II of Control Council Law No. 10, including conspiracies to commit such crimes." And article X of Ordinance No. 7 provides that—

> "The determinations of the International Military Tribunal in the judgments in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof of any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 shall constitute proof of the facts stated, in the absence of substantial new evidence to the contrary."

As so created and established this and other similar military tribunals are international in character and jurisdiction. They are authorized and empowered to try and punish the "major war criminals of the European Axis"; to try and punish "those German officers and men and members of the Nazi Party who have been responsible for, and have taken a consenting part in," and have aided, abetted, ordered, or have been connected with plans or enterprises involving the commission of any offense recognized in Control Council Law No. 10 as a crime.

The jurisdiction and power of this and similar tribunals to try and punish war criminals find full support in established international law relating to warfare. This law is that during hostilities and before their formal termination belligerents have concurrent jurisdiction over war crimes committed by the captured enemy persons in their territory or against their nationals in time of war. Accordingly, it has been generally recognized that belliger-

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ents during the war may legitimately try and punish enemy persons charged with infractions of the rules of war, if the accused is a prisoner of war and if the act charged has been made a penal offense by the generally accepted laws and customs of war. In such cases the accused usually is tried before the court, commission, or tribunal set up by and adjudged in accordance with the laws and procedure of the victor. After armistice or peace agreement the matter of punishment of war crimes is determined by the terms thereof.

The foregoing law was applied by the judgment of the International Military Tribunal, which after referring to the Charter creating it, declared that—

> "The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.
>
> "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."*

Even prior to the foregoing IMT judgment, Lord Chief Justice Wright had so construed the London Charter in an article appearing in volume 62 of the Law Quarterly Review, January 1946, page 41. He limits the discussion to the punishment of war criminals. He there states that—

> "All I am here concerned with is a limited area of international law, that relating to the trial and punishment of war criminals in the full sense of that term, as adopted in the Agreement of 8 August 1945, made in London between the Governments of the United Kingdom, of the United States, of the French Republic, and of the Union of Soviet Socialist Republics, which established a Tribunal for the trial and punishment of the major war criminals of the European Axis countries. The Agreement includes as falling within the jurisdiction of the Tribunal persons who committed the following crimes: (a) crimes against peace, which means in effect planning, preparation, initiation, or waging of a war of aggression; (b) war crimes, by which term is meant mainly violation of the laws

*Ibid., p. 218.

and customs of war; (c) crimes against humanity, in particular murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

"The Tribunal so established is described in the Agreement as an International Military Tribunal. Such an International Tribunal is intended to act under international law. It is clearly to be a judicial tribunal constituted to apply and enforce the appropriate rules of international law. I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in classes (a), (b), and (c) are crimes for which there is properly individual responsibility; that they are not crimes because of the agreement of the four governments, but that the governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the court would not be a court of law but a manifestation of power. The principles which are declared in the Agreement are not laid down as an arbitrary direction to the court but are intended to define and do, in my opinion, accurately define what is the existing international law on these matters."

Similar holdings may be made with respect to Control Council Law No. 10 which recognizes the same basic crimes to be tried by this Tribunal as were recognized by the London Charter. Each such law is an expression of the treaties, rules, and customs of international law on crimes against peace, war crimes, and crimes against humanity; each is in effect and purpose a listing of crimes in violation of preexisting international law and each "to that extent is itself a contribution to international law." (IMT judgment, *supra.*) But IMT did not rest its declaration of authority and its procedure upon the Charter which created it, but on the contrary, discussed at length the matters before it from the standpoint of preexisting international law. No defendant was convicted by the International Military Tribunal except for crimes in violation of preexisting international law which they held to exist even as to crimes against peace. It supported its judgment that each crime was based upon preexisting international law or custom of war, discussing at length the matter of violation of international treaties and agreements, particularly the Hague Conventions of 1899 and 1907, the Peace Conference of 1919, the violation of the Versailles Treaty, the various treaties of mutual guarantee, arbitration, and nonaggression, and the Kellog-Briand Pact.*

Under American law (National Defense Act of 4 June 1920) a military court or commission may be set up to try persons in the

* Ibid., pp. 216–218.

custody of the United States Government or its armed forces for crimes in violation of international law. The right to punish such war criminals is not dependent upon any question of unconditional surrender or of whether hostilities have ceased. As regards these matters, in the recent case of Yamashita, the United States Supreme Court makes several pronouncements applicable here, as follows:

> "The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violation, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by law of war, that sanction is without qualification as to the exercise of this authority so long as a state of war exists, from its declaration until peace is proclaimed. Articles of War, articles 2, 15.
>
> * * * * * * *
>
> "The mere fact that hostilities have ceased does not preclude the trial of offenders against the law of war before a military commission, at least until peace has been officially recognized by treaty or proclamation of the political branch of the government. Articles of War, article 15.
>
> "The extent to which power to prosecute violations of the laws of war shall be exercised before peace is declared rests, not with courts, but with the political branch of the government, and may itself be governed by terms of an armistice or a treaty of peace." *

The importance of the Yamashita decision is apparent. The International Military Tribunal was established by the London Agreement, 8 August 1945, with its Charter annexed thereto. On entirely similar principles the Charter of the International Military Tribunal, or other tribunals or commissions, for the trial of major war criminals in the Far East was proclaimed on 19 January 1946. These tribunals or commissions of similar principles were all established in accordance with the Berlin Agreement of 2 August 1945, which defined the meaning of the unconditional surrender of the armed forces of the Axis Powers, and declared that the Allied Powers intended to punish captured war criminals of the European Axis Powers. All such commissions or tribunals are deemed to exercise military powers and therefore are described as "Military Tribunals." This includes the tribunals created under the provisions of Control Council Law No. 10 and Ordinance 7.

* Supreme Court decision re Yamashita; 66 S. Ct. 340.

The judges of these Tribunals set up under Law No. 10 and Ordinance 7 are appointed by the War Department, by the acts of the Secretary of War, by the President of the United States as Commander-in-Chief of the Armed Forces, and by the Commanding General of the American Zone of Occupation in Germany. These judges take an oath to faithfully perform the task thus assigned to them to the best of their ability.

The Supreme Court of the United States had previously applied the rule announced in the Yamashita case in the case of Quirin and six others (*317 U. S. 1*). The court declared that:

> "The 'law of war' includes that part of the law of nations which prescribes for the conduct of war the status, rights, and duties of enemy nations as well as of enemy individuals.
>
> "Under the 'law of war' lawful combatants are subject to capture and detention as prisoners of war by opposing military forces and unlawful combatants are likewise subject to capture and detention but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."

This authority is expressly conferred by article 15 of the Articles of War enacted by Congress on 4 June 1920.

It may be here again observed that international law is an unwritten law. There has never been an international legislative authority. The law of nations is founded upon various international rules and customs, which gradually obtain universal recognition and thus become international law. Likewise the law of war is built upon treaties and upon the usages, customs, and practices of warfare by civilized nations, which gradually obtain universal recognition, and also become established by the general principles of justice as applied by jurists and military courts, tribunals, or commissions. And as held by the IMT:

> "The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law."*

After the unconditional surrender, the Allied Powers have obtained the actual custody of many of the leaders of the German Government, and the German armies, and many of those who were active participants in nameless atrocities against prisoners of

* Trial of the Major War Criminals, op. cit., volume I, page 218.

war, other persons alleged in the indictment, and civilians of invaded countries, and the power to try such Axis war criminals must be conceded. This power to try these crimes could have been exercised as an entirely military one, but such a method would not accord with Anglo-Saxon or United States ideology. It has been planned to conduct orderly trials, and fair trials, in accordance with the American concepts of due process, giving the accused the benefit of indictment, notice, counsel of their own choosing, witnesses in their behalf, proof beyond a reasonable doubt, and judgment by experienced jurists who are under the obligations of a solemn oath to render even and exact justice. Surely this is giving to the accused rights which they denied to their helpless victims.

It may be here observed that each of the defendants in this case has been captured or arrested and is now in the custody and jurisdiction of this Tribunal. Each of them has been charged by the indictment in this case with having committed two or more of the offenses recognized as crimes by the foregoing instruments which define and limit the Charter and jurisdiction of this Tribunal and which authorize this Tribunal to try and punish any individual found guilty of having committed such crimes or offenses. There has been no formal declaration of peace and officially a state of war still exists between the Allied Powers and Germany.

Under the doctrine of the Quirin and Yamashita cases, the Allied Powers, or either of them, have the right to try and punish individual defendants in this case. These cases hold that where individual offenders are charged with offenses against the laws of nations, and particularly the laws of war, they may be tried by military tribunals or courts set up by the offended government or belligerent power. In such cases no question as to the character of military occupation nor as to the character of belligerency is involved, or whether or not hostilities have ceased. These cases recognize the right to try and punish individuals who are in the custody and jurisdiction of such military court or commission so long as peace has not been officially declared by the authorities competent to conclude such matters.

After armistice or peace agreement, the matter of punishing war criminals is a question for the parties making the peace agreement to determine. In consequence, the question of whether hostilities have ceased is not material. And as is so ably said in the Yamashita case (*66 S. Ct. 340*)—

> "The extent to which power to prosecute violations of the laws of war shall be exercised before peace is declared rests, not with courts, but with the political branch of the Government

and may itself be governed by terms of an armistice or a treaty of peace."

Conspiracy

Count one of the indictment charged the defendants with having, pursuant to a common design, conspired and agreed together and with each other and with divers other persons to commit war crimes and crimes against humanity, as defined in article II of Control Council Law No. 10, in that each of the defendants participated either as a principal, or an accessory, or ordered and abetted, or took a consenting part in, or was connected with plans or enterprises involving the commission of the war crimes and crimes against humanity as set forth in the indictment; and that each defendant so participating was therefore responsible for his own acts and for the acts of all other defendants in the commission of the crimes.

This Tribunal has ruled that under no provision of Law No. 10 was conspiracy made a separate substantive and punishable crime. But the defendants may be punished for having committed war crimes or crimes against humanity by acts constituting a conspiracy to commit them.

Under the foregoing allegations of count one, the defendants are charged with having committed war crimes and crimes against humanity by acts constituting a conspiracy to commit them. This Tribunal has not applied or convicted any defendant under the conspiracy charge of the indictment. All defendants convicted, save one, have been convicted under a plan or scheme to commit the alleged war crimes or crimes against humanity. The same facts are alleged and proved as constituting a conspiracy to commit the same war crimes and crimes against humanity. The same facts under which certain defendants were convicted of having committed war crimes and crimes against humanity by carrying out the Night and Fog decree were alleged and, by the same evidence, proved to be a common design or conspiracy to commit such crimes. The same is true of the plan or scheme to persecute and exterminate Poles and Jews upon racial grounds.

There is no material difference between a plan or scheme to commit a particular crime and a common design or conspiracy to commit the same crime. In legal concept there can be no material difference to plan, scheme, or conspire to commit a crime. But of them all, the conspiracy to commit the crimes charged in the indictment is the most realistic because the Nazi crimes are in reality indivisible and each plan, scheme, or conspiracy proved in the instant case was in reality an interlocking part of the whole criminal undertaking or enterprise.

That Control Council Law No. 10 and Ordinance 7 authorize a conviction for committing war crimes and crimes against humanity by conspiracy to commit certain acts, which are defined or recognized as war crimes or crimes against humanity by international law and by Control Council Law No. 10, is clear.

In paragraph I (*a*) of article II of Control Council Law No. 10, as in article 6 (*a*) of the London Charter, it is provided that a conspiracy to initiate or wage an aggressive war is a crime against peace. The defendants are not charged with having committed or conspired to commit a crime against the peace but were so charged in the first international trial.

In discussing the issue of conspiracy the International Military Tribunal limited the scope of its inquiry to consideration of conspiracy to initiate or wage an aggressive war. It did not determine whether a conspiracy could be recognized as a crime under international law relating to war, or whether a conspiracy to commit such a crime had in fact been proved. It merely held that the concept of conspiracy under its Charter was more restricted than that set forth in the indictment which the prosecution sought to prove. That Tribunal did not construe article II of Control Council Law No. 10 to determine whether it authorized the punishment of a separate crime of conspiracy. Neither did it determine whether the offenses of war crimes or crimes against humanity could be committed by the acts which in fact constitute a conspiracy to commit such crimes.

The Charter of the International Tribunal provided in article 6 (*c*) that:

* * * * * * *

"Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

This provision of the International Charter is not found in Control Council Law No. 10. In lieu thereof the following pertinent and significant language was used [Article II]:

"2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this article, if he was (*a*) a principal or (*b*) was an accessory to the commission of any such crime or ordered or abetted the same or (*c*) took a consenting part therein or (*d*) was connected with plans or enterprises involving its commission or (*e*) was a member of any organization or group connected with the commission of any such crime or (*f*) with

reference to paragraph 1 (*a*), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites, or held high position in the financial, industrial or economic life of any such country."

This language in detail defines the acts which constitute aiding and abetting and is so specific and so comprehensive that it has defined conspiracy without employing the word. The language omits no element of the crime of conspiracy. As a rule there can be no such thing as aiding and abetting without some previous agreement or understanding or common design in the execution of which the aider and abetter promoting that common design has made himself guilty as a principal.

The foregoing provisions of paragraph 2 were intended to serve some useful purpose. War crimes and crimes against humanity had been defined or recognized and illustrated in paragraph 1 of Law No. 10 and did not need further explanation. Obviously, the provisions of paragraph 2 were intended to provide that if the act of one person did not complete the crime charged, but the acts of two or more persons did, then each person "connected with the plans or enterprises involving its commission" is guilty of the crime. This is the gravamen of the law of conspiracy. Conspiracy is universally known as a plan, scheme, or combination of two or more persons to commit a certain unlawful act or crime.

The conspiracies charged in the indictment and defined by Law No. 10 are conspiracies or plans to commit war crimes or crimes against humanity, which are established crimes under international laws or customs of war. In the very nature of such crimes their commission is usually by more than one person. Therefore the purpose of showing the conspiracy to commit such crimes was to establish the participation of each defendant and the degree of his connection with such crimes.

Since the language of paragraph 2 of Law No. 10 expressly provides that any person connected with plans involving the commission of a war crime or crime against humanity is deemed to have committed such crimes, it is equivalent to providing that the crime is committed by acts constituting a conspiracy under the ordinary meaning of the term. Manifestly it was not necessary to place the label "conspiracy" upon acts which themselves define and constitute in fact and in law a conspiracy. Paragraph 2 was so interpreted by the Zone Commander when he issued Military Government Ordinance No. 7, which authorized the creation of this and similar military tribunals, and which provides in article I that—

"The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in article II of Control Council Law No. 10, including conspiracies to commit any such crimes. * * *."

The prosecution also placed the same interpretation upon paragraph 2, because paragraph 2 of count one of the indictment charges that the "defendants herein * * * were principals in, accessories to, ordered, abetted, took a consenting part in, and were connected with plans and enterprises involving the commission of war crimes and crimes against humanity." Evidently the drawer of the indictment had before him paragraph 2 of Control Council Law No. 10 and made its language the basis of the charging of a conspiracy to commit war crimes or crimes against humanity.

Furthermore, it is apparent that the declared purpose of Ordinance No. 7, as set forth in article I thereof, is part and parcel of the entire ordinance as much as any other article thereof and the other articles of the ordinance, as well as Law No. 10, must be construed and applied in the light of article I. In fact article I is distinctly that portion of Ordinance No. 7 which defines the jurisdiction of the military tribunals authorized by it.

The Tribunal should therefore declare that military tribunals as created by Ordinance No. 7 have jurisdiction over "conspiracy to commit" any and all crimes defined in article II of Law No. 10. After all, from a practical standpoint, it can make little difference to any defendant whether the Tribunal finds that such defendant is a member of a conspiracy to commit crimes on the one hand, this being the language of article I of Ordinance No. 7, or on the other hand whether the Tribunal should find he was (a) a principal or (b) an accessory or that he abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving commission of crimes, these latter descriptions being the language of paragraph 2 of article II of Law No. 10.

In most modern English and American jurisprudence, conspiracy pure and simple is not recognized as a separate crime. The only legal importance of finding that any accused person is a party to a conspiracy is to hold the conspirator responsible as an aider and abetter of criminal acts committed by other parties to the conspiracy. If the party knowingly aided and abetted in the execution of the plan and became connected with plans or enterprises involving the commission of war crimes and crimes against humanity, he thereby became a co-conspirator with those who conceived the plan. It makes no difference whether the plan or

enterprise was that of only one of the conspirators. Upon this point we quote from the judgment of the International Tribunal—

> "The argument that such common planning cannot exist where there is complete dictatorship is unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it." [1]

This holding answers the further contention that one connected with execution of such a plan of Hitler could not be guilty of conspiracy, or punishable for helping carry out the plan or scheme as a co-conspirator. It is undoubtedly true that not all of the defendants had any part in the formulation of the plan, scheme, or conspiracy of the Nazi regime's Ministry of Justice to carry out the NN decree, but they did know of its illegality and inhumane purpose and helped to carry it out. The facts show beyond a reasonable doubt that they did knowingly aid, abet, and become connected with the plan, scheme, or conspiracy in aid of waging the war and committed those war crimes [and crimes] against humanity as charged in the indictment. A more perfect plan or scheme to show a conspiracy to commit crimes could hardly be written than was the agreement entered into by the OKW, Ministry of Justice, and the Gestapo to execute and carry out the Hitler Night and Fog decree. All the defendants who took a part in the execution and carrying out of the NN Decree knew of its illegality and of its cruel and inhumane purposes.

[Signed] MALLORY B. BLAIR
Judge of Military Tribunal III

SENTENCES[2]

THE MARSHAL: The Tribunal is again in session.

PRESIDING JUDGE BRAND: The Tribunal is informed that the defendant Schlegelberger is in a condition of illness rendering it impossible for his attendance and that his counsel desires that sentence be pronounced in his absence; in other words, that he waive the presence of the defendant Schlegelberger at the time of sentence.

Is our understanding correct, Dr. Kubuschok?

DR. KUBUSCHOK: Yes, Your Honor.

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[1] Trial of the Major War Criminals, op. cit., volume I, page 226.
[2] Session of the Tribunal on 4 December 1947, Transcript pages 10934–10936.

PRESIDING JUDGE BRAND: The Tribunal will now impose sentence upon those defendants who have been adjudged guilty in these proceedings.

This Tribunal has adjudged the defendant FRANZ SCHLEGELBERGER guilty on counts two and three of the indictment filed in this case. For the crimes of which he has been convicted, this Tribunal sentences him to imprisonment for life.

The Marshal will produce before the Tribunal the defendant Klemm.

HERBERT KLEMM, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to imprisonment for life.

The Marshal will produce before the Tribunal the defendant Rothenberger.

CURT ROTHENBERGER, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to seven years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will bring before the Tribunal the defendant Ernst Lautz.

ERNST LAUTZ, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will produce the defendant Wolfgang Mettgenberg.

WOLFGANG METTGENBERG, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove this defendant from the court and produce the defendant Wilhelm von Ammon.

Defendant WILHELM VON AMMON, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove this defendant from the court and will produce the defendant Guenther Joel.

GUENTHER JOEL, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to ten years'

imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove this defendant from the court and will produce the defendant Oswald Rothaug.

Defendant OSWALD ROTHAUG, on the count of the indictment on which you have been convicted, this Tribunal sentences you to imprisonment for life.

The Marshal will remove this defendant from the court and will produce the defendant Rudolf Oeschey.

RUDOLF OESCHEY, on the counts of the indictment on which you have been convicted, this Tribunal sentences you to imprisonment for life.

The Marshal will remove this defendant from the court and will produce the defendant Josef Altstoetter.

JOSEF ALTSTOETTER, on the count of the indictment on which you have been convicted, this Tribunal sentences you to five years' imprisonment. You will receive credit upon your sentence for the time already spent in confinement awaiting and pending trial.

The Marshal will remove the defendant from the courtroom.

The Tribunal now stands adjourned without day.

THE MARSHAL: This Tribunal now adjourns without day.

(At 1745 hours, 4 December 1947, the Tribunal was adjourned.)

X. CONFIRMATION OF SENTENCES BY THE MILITARY GOVERNOR OF THE UNITED STATES ZONE OF OCCUPATION*

A. Introduction

Under articles XV and XVII of Ordinance No. 7, the sentences imposed by a tribunal are subject to review by the Military Governor. On 18 January 1949, General Lucius D. Clay, Military Governor of the U.S. Zone of Occupation, confirmed by separate orders the life sentences imposed upon the defendants Klemm, Oeschey, Rothaug, and Schlegelberger and the sentences for a term of years imposed upon the defendants Altstoetter, von Ammon, Joel, Lautz, Mettgenberg, and Rothenberger. The order confirming the life sentence upon the defendant Schlegelberger is reproduced below.

B. Order of the Military Governor confirming the life sentence imposed upon the defendant Schlegelberger

HEADQUARTERS, EUROPEAN COMMAND
Office of the Commander-in-Chief
APO 742

Berlin, Germany
18 January 1949

In the Case of The
United States of America
vs.
Josef Altstoetter, et al.

Military Tribunal III
Case No. 3

Order with respect to Sentence of Franz Schlegelberger

In the case of the United States of America against Josef Altstoetter, et al., tried by United States Military Tribunal III, Case No. 3, Nuremberg, Germany, the defendant Franz Schlegelberger, on 4 December 1947, was sentenced by the Tribunal to life imprisonment. A petition to modify the sentence, filed on behalf of the defendant by Dr. Egon Kubuschok, his defense counsel, has been referred to me pursuant to the provisions of Military Government Ordinance No. 7. I have duly considered the petition and the record of the trial and in accordance with article XVII of said Ordinance, it is hereby ordered that:

* At the time this volume was nearing completion, further action on these sentences was taken by the United States High Commissioner for Germany. His decision upon review of these sentences will be included in section XXV, volume XV, this series.

a. The sentence imposed by Military Tribunal III on Franz Schlegelberger be, and hereby is, in all respects confirmed.

b. The defendant be confined in War Criminal Prison No. 1, Landsberg, Bavaria, Germany.

[Signed] LUCIUS D. CLAY
LUCIUS D. CLAY
General, U. S. Army
Military Governor and
Commander-in-Chief European Command

X. ORDER OF THE UNITED STATES SUPREME COURT DENYING WRITS OF HABEAS CORPUS

SUPREME COURT OF THE UNITED STATES
October Term, 1948

EXTRACT

* * * * * * *

No. 463 Misc. In the Matter of Wilhelm von Ammon.
No. 464 Misc. In the Matter of Dr. Guenther Joel.
No. 465 Misc. In the Matter of Herbert Klemm.
No. 466 Misc. In the Matter of Ernst Lautz.
No. 467 Misc. In the Matter of Dr. Wolfgang Mettgenberg.
No. 468 Misc. In the Matter of Rudolf Oeschey.
No. 469 Misc. In the Matter of Dr. Oswald Rothaug.
No. 470 Misc. In the Matter of Kurt Rothenberger.
No. 471 Misc. In the Matter of Dr. Franz. Schlegelberger.

* * * * * * *

ORDER

"Treating the application in each of these cases as a motion for leave to file a petition for an original writ of habeas corpus, leave to file is denied. The Chief Justice, Mr. Justice Reed, Mr. Justice Frankfurter, and Mr. Justice Burton are of the opinion that there is want of jurisdiction. U. S. Constitution, article III, section 2, clause 2; see *Ex parte Betz* and companion cases, all 329 U.S. 672 (1946); Milch *v.* United States, 332 U.S. 789 (1947); Brandt *v.* United States, 333 U.S. 836 (1948); *In re* Eichel, 333 U.S. 865 (1948); Everett *v.* Truman, 334 U.S. 824 (1948). Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge are of the opinion that argument should be heard on the motions for leave to file the petitions in order to settle what remedy, if any, the petitioners have. Mr. Justice Jackson took no part in the consideration or decision of these applications."

2 May 1949

APPENDIX

Titles of Judges and Prosecutors at Regular German Courts

1. Reichsgericht (Reich Supreme Court)

Judges	*Prosecutors*
Reichsgerichtspraesident (Presiding)	Oberreichsanwalt (Att. Gen.)
	Reichsanwalt (Asst. Att. Gen.)
Senatspraesident (Head of Division)	Oberstaatsanwalt, Staatsanwalt (Assts.)
Reichsgerichtsrat	

2. Oberlandesgericht (District Court of Appeal)

Judges	*Prosecutors*
Oberlandesgerichtpraesident* (Presiding)	Generalstaatsanwalt
	Oberstaatsanwalt, Staatsanwalt (Assts.)
Senatspraesident (Head of Division)	
Oberlandesgerichtsrat	

3. Landgericht (District Court)

Judges	*Prosecutors*
Landgerichtspraesident (Presiding)	Oberstaatsanwalt (Chief)
	Erster Staatsanwalt, Staatsanwalt (Assts.)
Landgerichtsdirektor (Head of Division)	
Landgerichtsrat	

4. Amtsgericht (Local Court)

Judges	*Prosecutors*
Amtsgerichtsdirektor (Presiding)	Amtsanwalt
Amtsgerichtsrat	

* In Berlin—Kammergerichtspraesident.

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German Civil Service Ranks[1]

I. *Lower Level*[2]

II. *Intermediate Level*

1. Assistent[3]
2. Sekretaer[3]
3. Obersekretaer[3]

III. *Upper Level*

1. Inspektor[3]
2. Oberinspektor[3]
3. Amtmann[3]
4. Amtsrat

IV. *Higher Level*

1. Regierungsrat
2. Oberregierungsrat
3. Ministerialrat
4. Ministerialdirigent
5. Ministerialdirektor
6. Staatssekretaer

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[1] The German Civil Service is divided into two main groups: Beamte (officials) and Angestellte (employees). Beamte are classified according to four levels: Beamte of "unteren Dienstes" (lower level), "einfachen mittleren Dienstes" (intermediate level), "gehobenen mittleren Dienstes" (upper level), and "hoeheren Dienstes" (higher level). Angestellte are mainly custodial employees, workers, and minor clerks, but also include some specialists who do not have Beamten-status.

[2] Officials of the "lower level" are usually clerical employees and are usually addressed with the title of their position (such as "Buerovorsteher"—chief clerk).

[3] Usually carries a prefix such as "Justiz," "Regierung," "Verwaltung," "Ministerial," etc.

Table of Comparative Ranks

U.S. Army	German Army	SS	SA
2d Lieutenant	Leutnant	Untersturmfuehrer	Sturmfuehrer
1st Lieutenant	Oberleutnant	Obersturmfuehrer	Obersturmfuehrer
Captain	Hauptmann	Hauptsturmfuehrer	Hauptsturmfuehrer
Major	Major	Sturmbannfuehrer	Sturmbannfuehrer
Lieutenant Colonel	Oberstleutnant	Obersturmbannfuehrer	Obersturmbannfuehrer
Colonel	Oberst	Standartenfuehrer	Standartenfuehrer
		Oberfuehrer*	Oberfuehrer*
Brigadier General	Generalmajor	Brigadefuehrer	Brigadefuehrer
Major General	Generalleutnant	Gruppenfuehrer	Gruppenfuehrer
Lieutenant General	General der Infanterie, der Artillerie, etc.	Obergruppenfuehrer	Obergruppenfuehrer
General	Generaloberst	Oberstgruppenfuehrer	
General of the Army	Generalfeldmarschall	Reichsfuehrer	Stabschef

* Equivalent to a senior colonel.

Glossary of Terms and Abbreviations

TERMS

Akademie fuer Deutsches Recht	Academy of German Law; organized as a corporation of public law to build up a new system of German law in all branches, supervised by Reich Ministry of Justice.
Amtsanwalt	Public Prosecutor at local court.
Amtsgericht	Local court.[1]
Amtsgerichtsdirektor	Presiding Judge of local court.
Amtsgerichtsrat	Judge of local court.
Arbeitshaus	Workhouse.
Armenrecht	Right granted by court to a litigant to file papers without payment of court fees, equivalent in United States to filing of papers *in forma pauperis.*
Assessor	Judge on probational appointment.[2]
Ausserordentlicher Einspruch	"Extraordinary Objection;" extraordinary remedy introduced by Act of 16 September 1939, enabling the Attorney general of Germany (Oberreichsanwalt) to secure the review of final criminal judgments.
Beisitzer	Associate judge.
Blitzvollstreckung	Expedited execution of a death sentence.
"Das Schwarze Korps"	"The Black Corps," official SS newspaper.
"Deutsche Justiz"	"German Justice," a legal publication; semi-official; mouthpiece of Reich Ministry of Justice.
Entmannung	Castration.
Entrechtung	Deprivation of civil rights.
Erbgesundheitsgericht	Hereditary Health Court.
Erbhofrecht	Hereditary Farm Law.
Ermaechtigungsgesetz	Enabling Act; law dated 24 March 1933, giving the Reich cabinet legislative power.
Erster Staatsanwalt	Public prosecutor at district court.
Gau	Regional division (usually of size of a province) of Nazi Party.
Gauleiter	Leader of a Gau.
Generalstaatsanwalt	Public prosecutor at district court of appeals; supervises all public prosecutors at subordinate courts within his jurisdiction. (Also translated as "attorney general," "general public prosecutor," and "public prosecutor general.")

[1] For detailed information on German court system see "A Brief Summary of the Court System," in section IV C 2.

[2] Term "Assessor" is also used in connection with probational appointments in the administrative career service and the teaching career in university-level institutions.

Hauptverhandlung	Trial.
Heimtueckegesetz	Law on Insidious Acts (also translated as "Law against Malicious Acts").
Justiz	Administration of justice; judiciary; term usually denotes the judicial system including Ministry of Justice, the courts, and members of the judiciary.
Kammergericht	District court of appeals in Berlin.
Kanzelmissbrauch	Misuse of pulpit; term denotes imprudent discussion of state affairs by clergymen.
Kreisleiter	Leader of a district of the Nazi Party.
Kriegstaeter	Perpetrator of a crime during wartime.
Land (Laender)	State (s).
Landgericht	District court.
Landgerichtsdirektor	Presiding judge of a division of a district court.
Landgerichtspraesident	Presiding judge of a district court.
Landgerichtsrat	Judge of district court.
Landrat (Landraete)	Highest administrative official (s) of a county.
Lynchjustiz	Lynch justice: lynch law; act or practice by private persons of inflicting punishment for crimes or offenses, without due process of law.
Ministerialblatt	Ministerial Gazette; official publication of a Ministry containing administrative ordinances, regulations, etc.
Mischling	Person of mixed race.
Mitarbeiter	Co-worker immediately subordinated to a Referent.
Nationalsozialistischer Rechtswahrerbund*	National Socialist Legal Workers' Association; (also translated National Socialist Jurists' League, and National Socialist Lawyers' League) organization included members of all professions and workgroups connected with legal work; it contained eight divisions (Fachgruppen): (1) Richter und Staatsanwaelte (Judges and Public Prosecutors); (2) Rechtsanwaelte (lawyer); (3) Notare (notaries public); (4) Rechtspfleger (court registrars with authority of issuing court orders); (5) Hochschullehrer, jur. (professors of law); (6) Rechtswahrer der Verwaltung (counsels in administrative agencies); (7) Wirtschaftsrechtswahrer (auditors, political economists, etc.); (8) Junge Rechtswahrer (junior legal workers).
Nichtigkeitsbeschwerde	Nullity plea.

* Literal translation of "Rechtswahrer" is "one who guards the observation of law."

Notzucht	Rape.
Obererbgesundheitsgericht	Higher (Appellate) Hereditary Health Court.
Oberlandesgericht	District court of appeals.
Oberlandesgerichtspraesident	Presiding judge of a district court of appeals; administrative head of all courts in his district.
Oberpraesident	Chief of administration of a Prussian province, corresponds to position of Reich governor in other German states.
Oberreichsanwalt	Attorney general of the Reich (also translated as chief Reich prosecutor); there were two attorneys general, one at the People's Court, the other at the Reich Supreme Court.
Oberstaatsanwalt	Public prosecutor at district court.
Oberster Gerichtsherr	Holder of supreme judicial power (Hitler).
Ortsgruppenleiter	Leader of a subdistrict of the Nazi Party.
Parteikanzlei	Nazi Party Chancellery.
Polenstrafrechtsverordnung	Criminal Code for Poles.
Rassenschande	Race defilement (also translated as race pollution).
Referat (e)	Office (s) or section (s) concerned with a specialized subject matter.
Referendar	Young jurist who has passed a preliminary state legal examination and works as a law clerk in a court.
Referent	Supervisor of several professional officials; section chief; expert in a particular field.
Reichsanwalt (-waelte)	Assistant attorney (s) general of the Reich (also translated as Reich prosecutor).
Reichsgericht	Reich Supreme Court.
Reichsgesetzblatt	Reich Law Gazette.
Reichsjustizministerium	Reich Ministry of Justice.
Reichsstatthalter	Reich Governor.
Reichsstrafprozessordnung	Code of Criminal Procedure.
Regierungspraesident	Highest Administrative official of a state district. (Each German state is subdivided into several administrative districts [Regierungsbezirke].)
Richterbrief (e)	Judge's Letter (s); confidential circular letter to German judges and public prosecutors issued by the Reich Ministry of Justice.
Senat	Division of the Reich Supreme Court, or a district court of appeals, or the People's Court, or of a Special Court.
Sondergericht	Special Court.
Staatsanwalt	Public prosecutor at district court.
Staatsanwaltschaft	Office of the public prosecutor.
Stahlhelm	German veterans organization of World War I, incorporated into the SA in 1933.

Standgericht	Civilian court martial.
Volksgerichtshof	People's Court.
Volksschaedlingsverordnung	Law against public enemies; (also translated as "law against public parasites.")
Wehrkraftzersetzung	Undermining of military efficiency.*
Wehrmacht	Armed Forces.
Zuchthaus	Penitentiary.

ABBREVIATIONS

BNSDJ	Bund Nationalsozialistischer Deutscher Juristen	Association for National Socialist Jurists; became part of NSRB in 1936.
DBG	Deutsches Beamtengesetz	German Civil Service Law.
Gestapo	Geheime Staatspolizei	Secret State Police.
NN	Nacht- und Nebel Erlass	Night and Fog Decree.
NSDAP	Nationalsozialistische Deutsche Arbeiterpartei	National Socialist Workers' Party (Nazi Party).
NSRB	Nationalsozialistischer Rechtswahrerbund	National Socialist Legal Workers' Association.
OKW	Oberkommando der Wehrmacht	German Armed Forces High Command.
RGBl	Reichsgesetzblatt	Reich Law Gazette.
RJM	Reichsjustizministerium	Reich Ministry of Justice.
RK	Reichskanzlei	Reich Chancellery.
RKabR	Reichskabinettsrat	Reich Cabinet Counselor (title).
RSHA	Reichssicherheitshauptamt	Reich Security Main Office of the SS.
SA	Sturmabteilung	"Storm Troop Force" of the Nazi Party.
SD	Sicherheitsdienst	Security and Intelligence Service of the SS.
SS	Schutzstaffel	Elite Guard and "Protective Force" of the Nazi Party.
UStS	Unterstaatssekretaer	Assistant Under Secretary.
VGH	Volksgerichtshof	People's Court.

* For offenses included in "Wehrkraftzersetzung" see NG–715, Prosecution Exhibit 112, in section IV B, pages 192 and 193.

List of Witnesses in Case 3

Note.—All witnesses in this case appeared before the Tribunal, except for 13 witnesses whose testimony was taken by commissioners of the Tribunal concerning affidavits they had signed and which had been offered in evidence by the prosecution. In the table below, prosecution witnesses are designated by the letter P and defense witnesses by the letter D. If the witness was a prosecution affiant called for cross-examination by the defense, the letter designation PA (prosecution affiant) is used. If the witness was a defense affiant called for cross-examination by the prosecution, the letter designation DA (defense affiant) is used. As the first column below indicates, the same witness was sometimes called by both the prosecution and the defense at different stages of the trial. The names not preceded by any designation represent defendants.

	Name	Date of Testimony	Pages (mimeographed transcript)
D	ALTMEYER, Hans Josef	15, 16 Jul 47	5244–5308
	ALTSTOETTER, Josef	15, 16 Sep 47	8841–8962
	AMMON, Dr. Wilhelm von	1, 4 Aug 47	6377–6473
P	ANCKER, Edinger	29 Apr 47	2743–2761
D	AZESDORFER, Dr. Hermann	9 Sep 47	8437–8469
PA	BAEUMLER, Dr. Josef	3 Jun 47	3818–3833
	BARNICKEL, Paul	26, 27, 28 Aug 47	7649–7752; 7780–7901
PA	BAUR, Armin	23 May 47	3598–3606
D	BECHER, Dr. Werner H.	17, 25 Sep 47	8969–8998; 9514–9517
P	BEHL, Dr. Ferdinand C. W.	18, 19, 20, 21 Mar 47	562–826
D	BLECKSCHMIDT, Annemarie	29 Jul 47	6112–6114
D	BODEN, Helmuth	31 Jul 47	6208–6235
PA	BREM, Walter	22 May 47	3517–3564
PA	BUCHHOLZ, Peter	27, 28 May 47	3718–3735
P	BUCHTHAL, Arnold	21 Aug 47	7471–7474
P	BUHL, Walter	18 Sep 47	9075–9107
	CUHORST, Hermann	29 Aug; 2, 3, Sep 47	7958–8175
D	DECHANT, George	10 Sep 47	8549–8558
D	DENZLER, Leonhard	15 Aug 47	7095–7133
P	DIESSEM, Dr. Julius	17, 18 Apr 47	2312–2346
P	DOEBIG, Dr. Friedrich	9, 10 Apr 47	1750–1872
P	DORFMUELLER, Dr. Martin	12 May 47	3154–3220
P	DRESCHER, Dr. Erich	22 Jul 47	5646–5671
P	DUERRBECK, Dr. Otto	29 Jul 47	6095–6096
P/D	EGGENSPERGER, Eugen	9 May; 16 Jul 47	3083–3096; 5309–5323
D	EHRHARDT, Dr. Otto	1 Aug 47	6363–6376
PA	EICHINGER, Josef	22 May 47	3471–3487
D	EIFFE, Peter E.	22, 23 Jul 47	5671–5692
P	EINSTEIN, Henry	1 May 47	2970–2976
P	EITNER, Lorenz	25 Mar; 22 Apr 47	943–949; 2521–2525
P	ELKAR, Friedrich	30 Apr; 1 May 47	2884–2938

	Name	Date of Testimony	Pages (mimeographed transcript)
PA	ENGERT, Georg	27 May 47	3694–3705
D	ERNST, Johanna	30 Jul 47	6169–6173
PA	ESCHER, Dr. Ernst	23 May 47	3628–3641
P	FERBER, Dr. Karl	31 Mar; 1, 3, 8 Apr 47	1312–1315; 1319–1466; 1576–1630; 1665–1746
P	FILBIG, Karl Kaspar	19 May 47	3351–3363
DA	FOETSCH, Maria	23 Sep 47	9363–9367
PA	FRANKE, Dr. Horst Guenther	22 Sep 47	9265–9280
D	FRITZSCHE, Hans	15 Jul 47	5200–5242
PA	FROBOESE, Katharina	27 May 47	3705–3718
P	GERSTAECKER, Dr. Wilhelm	29 Jul 47	6064–6084
P	GOERINGER, Dr. Hugo	28 Mar 47	1263–1280
D/P	GRAMM, Dr. Hans	3 Jul; 17 Sep 47	4700–4764; 9070–9073
PA	GROBEN, Hans	23 May 47	3614–3627
PA	GROS, Dr. Franz	30 Apr 47	2826–2882
PA	GRUEB, Dr. Josef	22 May 47	3502–3517
PA	GRUENWALD, Bruno	3 Jun 47	3879–3910
P	HACH, Josef	24 Apr 47	2643–2651
D	HAGEMANN, Hans	22 Sep 47	9302–9315
D	HARTMANN, Hans	17 Sep 47	8999–9068
P	HAVEMANN, Prof. Robert	10, 11 Apr 47	1873–1925
P	HECKER, Robert	18 Apr; 9, 12 May; 7 Jul 47	2363–2386; 3047–3083; 3111–3114; 4823–4870
D	HEGELE, Max	8 Sep 47	8366–8389
P	HELM, Arthur	22 Sep 47	9335–9337
P	HERGET, Franz	22 Sep 47	9337–9343
P	HLAVAC, Josef	30 Apr 47	2802–2825
P	HODGES, Thomas K.	19 May 47	3363–3371
D	HOFFMANN, Dr. Heinz	15 Sep 47	8816–8825
PA	HOFMANN, Kurt	27 May 47	3650–3653
PA	HOFFMANN, Wilhelm	4 Jun 47	3940–3947
PA	HUEMMER, Gottfried	4 Jun 47	3976–3992
D	HUPPERTZ, Karin	30 Jul 47	6141–6169
D	JAHRREISS, Prof. Hermann	25, 26 Jun 47	4253–4364
	JOEL, Guenther	4, 5, 6 Aug 47	6474–6611; 6617–6643
PA	KASSING, Bernhard	4 Jun 47	3997–4000
PA	KERN, Dr. Hans	28 May; 4 June 47	3806–3811; 3934–3940
	KLEMM, Herbert	3, 7, 8, 10, 11, 14, 15, Jul; 23 Sep 47	4784–4822; 4891–5024; 5027–5090; 5094–5199; 9383–9396

	Name	Date of Testimony	Pages (mimeographed transcript)
P	KLEES, Rudolf	12 May 47	3115–3140
D	KLETT, Dr. Arnulf	8 Sep 47	8432–8435
PA	KROHER, Dr. Hermann	22 May 47	3488–3496
D	KUESTNER, Dr. Otto	3, 4 Sep 47	8175–8234
PA	KUNZ, Dr. Gustav	23 May 47	3577–3598
D	LAMMERS, Dr. Hans Heinrich	22 Jul 47	5582–5620
	LAUTZ, Dr. Ernst	23, 24, 25, 28 Jul 47	5761–5775; 5781–6054
P	LEHMANN, Rudolf	23, 24 Apr 47	2586–2643
D	LENZ, Dr. Otto	6 Aug 47	6643–6652
D	LINK, Dr. Heinrich	29 Jul 47	6104–6111
PA	LIPPS, Herbert	28 May 47	3735–3755
P	LODUCHOWSKI, Dr. Hans Willi	4 Sep 47	8254–8282
D	LUDWIG, Fritz	22 Sep 47	9329–9332
P/D	MARKL, Hermann	27 May; 15 Sep 47	3653–3662; 3675–3683; 3687–3692; 8805–8815
P	MARTIN, Capt. Roy A.	20, 26 Aug 47	7399–7402; 7637–7639
D	MARX, Dr. Hanns	29, 30 Jul 47	6114–6140
PA	MAYER, Dr. Karl	23 May 47	3565–3577
PA	MAYER, Dr. Josef	5 Jun 47	4033–4039
P	MCLENDON, Lt. Col. John	13 May 47	3230–3234
D	MEISSNER, Dr. Otto	2 Jul 47	4606–4642
	METTGENBERG, Dr. Wolfgang	31 Jul; 1 Aug 47	6235–6271; 6274–6362
PA/D	MIETHSAM, Dr. Wilhelm	3, 4 Jun; 7, 8 Jul 47	3911–3932; 4870–4876; 4880–4891
D	MITZSCHKE, Dr. Gustav	22 Sep 47	9316–9328
PA	MUELLER, Dr. Hermann	28 May 47	3755–3781
P	MUENCH, Anni	19 May 47	3406–3419
P	OEHLCKERS, Dr. Wilhelm	18 Sep 47	9108–9133
	OESCHEY, Rudolf	9–12, 15 Sep 47	8510–8548; 8559–8805
D	OHLER, Paul	15 Aug 47	7149–7152
PA	OSTERMEIER, Robert	22 May 47	3497–3499
PA	PAULUS, Adolf	28 May 47	3781–3806
PA	PFAFF, Dr. Theodor	27 May 47	3642–3650
PA	PREY, Josef	4 Jun 47	3960–3975; 3992–3993
D	PRIESS, Dr. Friedrich	25 Sep 47	9494–9514
PA	RAUH, Robert	22 May 47	3499–3502
P	RIMELIN, Dr. Renatus	14 Apr 47	2049–2092; 2137–2142
P	RICE, Lowell O., Captain	29 Jul 47	6060–6064
PA	ROEDER, Dr. Manfred	4, 5 Jun 47	3993–3997; 4000–4033

	Name	Date of Testimony	Pages (mimeographed transcript)
P	ROEMER, Walter	24 Apr 47	2652–2672
D	ROSENAU, Dr. Wilhelm	1 Jul 47	4568–4587
P	ROSKA, Charles J., Captain	26, 31 Mar 47	1023–1024; 1316–1318
	ROTHAUG, Oswald	11–14, 18–22, 25, 26 Aug 47	6754–6917; 6928–7016; 7179–7395; 7406–7470; 7474–7636; 7640–7648
	ROTHENBERGER, Dr. Curt	16–18, 21, 22 Jul; 24 Sep 47	5324–5381; 5400–5484; 5495–5581; 9438–9478; 9512–9515
P	ROTTNER, Wolfgang	23, 24 Sep 47	9403–9411; 9413–9437
P	SCHAEFER, Robert, Major	29 Jul 47	6057–6060
P	SCHAEFER, Mark	15 Apr 47	2125–2142
PA	SCHIRMER, Ludwig	4 Jun 47	3947–3959
	SCHLEGELBERGER, Franz	26, 27, 30 June 47; 1 Jul 47	4367–4568
P	SCHOSSER, Luitpold	9 May 47	3021–3046
P	SCHMITT, Horst	14 May 47	3321–3335
D	SCHOECK, Dr. Willi	4 Sep 47	8235–8253
P/D	SCHROEDER, Dr. Karl	23 May; 14, 15 Aug 47	3607–3613; 7017–7095
D	SCHULZ, Hans Heinrich	25 Sep 47	9530–9552
P	SCHWARZ, Berthold	11, 14 Apr 47	1925–2048
P	SCHWARZ, Dr. Eberhard	17 Apr 47	2258–2312
P	SEILER, Irene	26 Mar 47	1025–1057
P	SKOK, Dr. Herbert	19 Sep 47	9178–9204
P	SOLF, Mrs. Hanna	15, 16 Apr 47	2143–2208
D	STEINAECKER, Dr. Walter Freiherr von	22 Jul 47	5621–5646
P	STERN, Dr. Peter	29 Jul; 20 Aug 47	6085–6094; 7396–7398
D	STUBER, Dr. Max	8 Sep 47	8390–8424
PA/D	SUCHOMEL, Dr. Hugo	3 Jun; 27 Aug 47	3833–3841; 3870–3879; 7753–7779
P	TIMMERMAN, Hans	19 Sep 47	9204–9214
D	WALLENTIN, Fritz	19 Sep 47	9215–9224
P	WAHLER, Isaac E.	19 Sep 47	9246–9262
P	WALDOW, Erich Christian	18, 19 Sep 47	9153–9164
P	WEIN, Benedict	28 Apr 47	2675–2692; 2716–2729

List of Witnesses in Case 3 (Contd.)

	Name	Date of Testimony	Pages (mimeographed transcript)
P	WEISS, Wilhelm	19 Sep 47	9227–9233
P	WENTZENSEN, Edmund	18, 19 Sep 47	9135–9153; 9166–9177
PA	WERGIN, Dr. Kurt	3 June 47	3847–3868
P	WIEBER, Mrs. Ruth	29, 30 Jul 47	6097–6103; 6174–6175
D	WILLERS, Hans	19 Sep 47	9233–9245
P	WISKOTT, Wolfgang	4 Sep 47	8282–8288
PA	WIZIGMANN, Eugen	27 May 47	3670–3674
D	ZIMMERMANN, Hans	15 Aug 47	7135–7149

INDEX OF DOCUMENTS AND TESTIMONIES IN CASE 3

(This is not a complete index of the evidence submitted in Case 3. Only those documents and testimonies which are reproduced herein are listed.)

Document No.	Exhibit No.	Description	Page
NG–059	Pros. Ex. 38	File note concerning a conference of 18 September 1942 at Himmler's field headquarters between Himmler, Reich Minister of Justice Thierack, and defendant Rothenberger.	503
NG–071	Pros. Ex. 98	Secret report of the Chief of the Security Police and SD, 3 September 1942, concerning "the control of penal jurisdiction" and the reactions of judges thereto.	454
NG–075	Pros. Ex. 27	Correspondence between the Reich Chancellery and Hitler's adjutant, May and June 1942, mentioning that Hitler had considered "noteworthy" the Rothenberger memorandum on judicial reform.	467
NG–077	Pros. Ex. 306	Letter from Under Secretary Freisler to General Lehmann, 16 December 1941, transmitting a draft of a proposed implementation order to the "Night and Fog" Decree, together with an interoffice note of 25 December 1941.	782
NG–102	Pros. Ex. 75	Four communications, May–June 1942, concerning the authority for the confirmation of sentences.	438
NG–126	Pros. Ex. 356	Letter from defendant Schlegelberger to Lammers, 26 May 1942, transmitting a copy of Schlegelberger's decree delegating the right to pardon Poles and Jews to Reich governors and provincial presidents.	666
NG–128	Pros. Ex. 354	Letter from the Provincial President of Upper Silesia to Lammers, 26 January 1942, requesting the power of amnesty for Poles and Jews sentenced to death.	665

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NG–129	Pros. Ex. 355	Letter from defendant Schlegelberger and Greiser, Reich Governor of the Warthegau (Poland) to Lammers, 15 December 1941, stating that Greiser's authority concerning the execution of death sentences and pardoning of Poles and Jews is no longer restricted.	665
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☆ U. S. GOVERNMENT PRINTING OFFICE: 1951—907802